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ARTICLES

IMPLICATIONS OF THE U.S. CAPITAL EXPENDITURE PROVISIONS FOR INTERPRETATION OF KOREAN TAX LAW

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Abstracts

Generally, a capital expenditure is a cost that will yield benefit in future years in a taxpayer's business. However, Korean tax law does not include a clear provision to guide or regulate capital expenditures and relies on administrative rulings on ad hoc basis. The United States has many provisions and case law to deal with capital expenditures. This article reviews and analyzes the tax law in the United States and in Korea to gain a new perspective for interpretative guidelines for Korean tax law for capital expenditures. American tax law has statutory provisions, such as Internal Revenue Code §§ 263 and 263A, which do define a capital expenditure and acquisition costs clearly as capital expenditures. In contrast, Korea does not have a clear statutory provision that defines a capital expenditure even though Article 31(2) of the Presidential Decree of the Corporation Tax Law does offer a definition of a capital expenditure and provides examples. Accordingly I.R.C. § 263, which is the general provision for a capital expenditure, and I.R.C. § 263A, which provides cost allocation standards, can both be good models for Korean tax reform and thus avoid vagueness when dealing with a capital expenditure and its tax ramifications in Korea. In practice, despite the absence of any definite statutory basis, it is not difficult in Korea to capitalize tangible property such as building or machine or intangible property like a copyright or a patent. Korea needs to have a clearer basis. Indirect costs in association with the acquisition of a property also must be capitalized. In this regard, American tax courts have developed many interpretative rules. However, in Korea, the issue is mainly solved by administrative rulings on an ad hoc basis, and Korean courts have not yet provided a clear interpretative ruling on the issue. Thus, the interpretation of indirect acquisition costs practiced in American courts and their rationale can be useful to resolve problems in Korea regarding deductions of capital expenditures. The U.S. Supreme Court in Commissioner v. Lincoln Savings & Loan Association ruled that when an expense enhances or creates a separate and distinct asset, that expense must be capitalized. That interpretation may be applicable to Korean tax law. The U.S. Supreme Court ruling in INDOPCO, Inc. v. Commissioner stated that even if an expense does not create a separate and distinct asset, that expense must be capitalized if the expense produces a long-term benefit to the firm beyond mere incidental future benefit. This ruling also may be applicable to Korean tax law.

In Korea, there is currently no clear standard for deciding whether a certain expense for repair is incidental and thus currently deductible or is a non-deductible improvement or replacement. Korean tax law needs to adopt clearer provisions such as U.S. Treasury Regulations § 1.162-4 and § 1.263(a)-1(b).

I. INTRODUCTION

If a given outlay is a capital expenditure, it is not currently deductible in most countries, including the United States and Korea. Instead, that outlay is deductible via depreciation over a period of years related to the asset's useful life or at its final disposal if the asset acquired is of infinite useful life, such as land. An expense that would otherwise be deductible cannot be deducted immediately if it is a capital expenditure. Generally, a capital expenditure is a cost that will yield benefits in future years in the taxpayer's business or via the taxpayer's income-producing activities.[1] Accordingly, determining whether a certain expense is a capital expenditure is very important.

However, Korean tax law does not contain clear provisions to guide or regulate capital expenditures and the issues on capital expenditures have been mainly solved by administrative rulings on ad hoc basis. In contrast, the United States has many provisions and associated case law that deals with capital expenditures. Thus, the provisions and interpretation regarding capital expenses in the U.S. may be a useful guideline in determining the best interpretation of similar capital expenditures in Korea as well as suggestions for how to proceed with Korean tax reform as it relates to capital expenditures. Accordingly, this article reviews and analyzes the provisions and the interpretation of capital expenditures in the U.S. and Korea and suggests new guidelines for the interpretation of Korean tax law on capital expenditures. In terms of research and analysis of Korean tax law, this article addresses only the Corporation Tax Law.

II. REVIEW AND ANALYSIS OF THE RELEVANT PROVISIONS AND THEIR INTERPRETATION IN THE UNITED STATES

Internal Revenue Code (I.R.C.) §§ 263(a)(1) and 263(a)(2) disallow deductions of any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended to restore property or to make good the exhaustion thereof for which an allowance is or has been made. Generally, these capital expenditures include amounts paid or incurred (i) to add to the value, or substantially prolong the useful life, of property owned by the taxpayer, such as a plant or

[1] BORIS I. BITTKER & LAWRENCE LOKKE, FEDERAL TAXATION OF INCOME, ESTATES, AND GIFTS ¶ 20.4 (3d ed. 2010).

equipment, or (ii) to adapt property to a new or different use.[2] However, amounts paid or incurred for incidental repairs and maintenance of property are not capital expenditures.[3] For instance, the following expenditures are not deductible: (i) the cost of acquiring, constructing, or erecting buildings, machinery and equipment, furniture and fixtures, and similar property having a useful life substantially beyond the taxable year; (ii) amounts expended for securing a copyright and plates, which remain the property of the person making the payments; (iii) the cost of defending or perfecting title to property; (iv) amounts expended for architect services; (v) commissions paid in purchasing securities; (vi) amounts assessed and paid under an agreement between bondholders or shareholders of a corporation to be used in a reorganization of the corporation or voluntary contributions by shareholders to the capital of the corporation for any corporate purpose; (vii) a holding company's guaranteed dividends at a specified rate on the stock of a subsidiary corporation for the purpose of securing new capital for the subsidiary and increasing the value of its stockholdings in the subsidiary; and (viii) the cost of good will in connection with the acquisition of the assets of a going concern.[4]

An accompanying provision with I.R.C. § 263 is I.R.C. § 263A, which was enacted in 1986. § 263A requires capitalization of both direct and indirect costs attributable to (i) producing real or tangible personal property to be used by a taxpayer in his trade or business or in an activity conducted for profit and (ii) producing or holding such property for sale to customers in the ordinary course of business. This subject will be further discussed below.

A. COST OF ACQUISITION

Acquisition costs of a property having a useful life beyond the taxable year constitute capital expenditures and must be capitalized.[5] When the taxpayer purchases tangible property, like a building or a machine, or intangible property, like a copyright or a patent, the application of this rule is straightforward. For example, if a taxpayer pays $500,000 for a building to be used in the taxpayer's business, the building cost must be capitalized with an initial basis of $500,000,[6] since costs directly incurred in the acquisition of a property are to be treated as capital expenditures. Indirectly incurred acquisition costs are also treated as

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[2] Treas. Reg. § 1.263(a)-1(b).
[3] Treas. Reg. § 1.263(a)-1(b), 1.162-4.
[4] Treas. Reg. § 1.263(a)-2(a).
[5] *Id.*
[6] J. MARTIN BURKE & MICHAEL K. FRIEL, TAXATION OF INDIVIDUAL INCOME 284 (8th ed. 2007).

capital expenditures, that is, acquisition costs. The most familiar example of such treatment is the capitalization of brokerage fees incurred in the purchase of securities.[7] But, sometimes it is unclear what costs are incurred in the acquisition of a property. The following are some cases dealing with this matter.

Commissioner v. Idaho Power Co., 418 U.S. 1 (1974)

This case addresses the question of how a taxpayer should treat indirect costs, that is, depreciation of the construction equipment used in constructing an asset.[8] The taxpayer, Idaho Power Co., was a public utility engaged in the production, transmission, distribution, and sale of electricity. During 1962 and 1963, the taxpayer used certain transportation equipment that it owned to construct capital facilities. On its books, the taxpayer capitalized the portion of the depreciation on its equipment that related to such construction, as required by the Federal Power Commission and the Idaho Public Utilities Commission. For federal income tax purposes, however, the taxpayer deducted depreciation on the construction-related equipment over the depreciable life of the equipment in reliance upon § 167(a) of the Internal Revenue Code of 1954.

The Commissioner disallowed the deduction, maintaining that, pursuant to I.R.C. § 263(a), depreciation on such equipment is a nondeductible capital expenditure. The Tax Court upheld the Commissioner's determination. However, the Ninth Circuit Court of Appeals reversed, reasoning that depreciation is specifically deductible under I.R.C. § 167(a) and is not "an amount paid out" within the meaning of I.R.C. § 263(a). The Supreme Court reversed the decision of the Ninth Circuit, holding that equipment depreciation allocable to the capital facilities must be capitalized and deducted over the depreciable lives of the capital facilities. In so holding, the Court announced that depreciation is within the scope of I.R.C. § 263(a).[9]

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[7] Treas. Reg. § 1.263(a)-2(e).

[8] Other construction-related expense items, such as tools, materials, and wages paid construction workers, are to be treated as part of the cost of acquisition of a capital asset. The taxpayer did not dispute this. Commissioner v. Idaho Power Co., 418 U.S. 1, 16-17 (1974).

[9] Following the *Idaho Power Co.* case, Congress enacted § 263A to incorporate the principles set out by the Court in that decision, requiring capitalizing direct and indirect costs incurred in construction or manufacture.

Encyclopedia Britannica, Inc. v. Commissioner, 685 F.2d 212 (7th Cir. 1982)

The taxpayer, Encyclopedia Britannica, hired a third party to write a book and then treated its payments to the third party as ordinary and necessary business expenses deductible in the current year under I.R.C. § 162(a). The Commissioner of the Internal Revenue assessed deficiencies on the ground that the payments were capital expenditures. The Tax Court found for the taxpayer. On appeal, the Seventh Circuit Court of Appeals reversed the Tax Court's decision. The Court of Appeals found that the taxpayer's payments to the third party were non-normal and non-recurrent and concluded that the payments were for the acquisition of an asset.

Woodward v. Commissioner, 397 U.S. 572 (1970)

This case involves the tax treatment of expenses incurred in appraisal litigation. The taxpayers, who were the majority stockholders of an Iowa corporation, voted for perpetual extension of the corporate charter, and, under Iowa law, became obliged to purchase at its "real value" the stock of a minority shareholder who had voted against the extension. On the parties' failure to agree on the "real value" of the minority interest, the taxpayers brought an appraisal action in state court and thereafter bought the minority stock at a value fixed by the court. In their federal income tax returns, the taxpayers claimed deductions as ordinary and necessary expenses paid for the management, conservation, or maintenance of property held for the production of income under I.R.C. § 212 for attorneys', accountants', and appraisers' fees in connection with the appraisal litigation. The Commissioner of the Internal Revenue disallowed the deductions, asserting that the fees represented capital expenditures in connection with the acquisition of capital stock of a corporation, a determination sustained by the Tax Court and the Eighth Circuit Court of Appeals. The taxpayers contended that current deductibility was justified on the ground that the "primary purpose" of the litigation was not for defense or perfection of title (a nondeductible capital expenditure) but to determine the stock's value. The Supreme Court held that the expenses incurred by the taxpayers must be treated as part of their cost of acquiring the stock, rather than as ordinary expenses, since the appraisal proceeding was merely the substitute provided by state law for the process of negotiation to fix the price at which the stock was to be purchased. The Court adopted the standard of the origin of the claim litigated, rather than the taxpayers' "primary purpose" in incurring the appraisal litigation expenses.

Georator Corp. v. United States, 485 F.2d 283 (4th Cir. 1973), *cert. denied*, 417 U.S. 945 (1974)

The taxpayer (a corporation) incurred legal costs to defend a litigation that was raised by a third party to cancel its trademark registration. The taxpayer deducted the costs in the year incurred as ordinary business expenses under I.R.C. § 162(a). The Internal Revenue Service maintained that the legal fees must be capital expenditures and determined an income tax deficiency for the years in question. The Court found that a trademark registration secured benefits of indeterminate duration and likely extended over several tax periods and that, consequently, costs of registration were capital expenditures. Also the Court found that legal costs incurred in connection with resisting cancellation of trademark registration required the same treatment as original registration costs and held that the fees in association with the cancellation proceeding were capital expenditures.

B. A SEPARATE AND DISTINCT ASSET

It is a basic principle of income taxation that the costs of producing income in a taxable year should be deductible in determining taxable income for that year. Thus, ordinary business expenses are currently deductible under I.R.C. § 162(a), while I.R.C. § 263(a) denies an immediate deduction for expenditures that are capital in nature.

However, often the determination of whether the cost of an asset should be capitalized or currently deductible is problematic. The Supreme Court ruled in *Commissioner v. Lincoln Savings & Loan Association*, 403 US 345 (1971)[10] that capitalization is required when an expense creates a separate and distinct asset. The taxpayer in *Lincoln Savings & Loan Association* was chartered under Californian law and was authorized to participate in the Federal Savings & Loan Insurance Corporation's (FSLIC) insurance program. As a member institution in the FSLIC's program, Lincoln Savings was required by a federal statute to pay two annual premiums. The first of these premium payments was used by the FSLIC to cover its expenses and insurance losses for the year, with any excess flowing as part of the FSLIC's net income into its Primary Reserve. The second premium payment was credited to the FSLIC's Secondary Reserve. As an insured institution, the taxpayer held no property interest in the funds in the Primary Reserve, which represented the FSLIC's retained earnings. However, the taxpayer held a pro rata share of the Secondary Reserve, which in certain

[10] For further discussion, see Note, *Commissioner v. Lincoln Savings & Loan Association: "Separate and Distinct Asset" as a Condition Sufficient for Capitalization*, 2 VA. TAX REV. 315 (1982-1983).

instances could be transferred by or refunded to the taxpayer and on which interest accrued to the taxpayer 's credit. Also, in some circumstances, the taxpayer's share of the Secondary Reserve could be applied toward payment of the primary premium. The taxpayer treated its share of the Secondary Reserve as an asset for financial accounting purposes and reported the interest accrued on its share as taxable income. The taxpayer claimed both premium payments as deductible ordinary and necessary business expenses under I.R.C. § 162(a) on its 1963 federal income tax return.

However, the Commissioner maintained that the premium payment into the Secondary Reserve was not an "ordinary" expense and disallowed the deduction of the second premium payment and allowed only the deduction of the first premium payment. At trial, the Commissioner relied on the principle that capitalization is generally required of costs that result in the creation of an asset having a useful life that extends substantially beyond the taxable year. The Commissioner argued that, because the payment into the Secondary Reserve provided a benefit for the taxpayer in future years, it should be capitalized. The taxpayer responded that expensing was appropriate for the Secondary Reserve payments as well as for the primary payments, because both premiums were similar, were required for its insurance protection, and were paid by all other insured institutions. Furthermore, the taxpayer contended that the possibility of a future benefit did not make the expenditures capital. Finding the taxpayer’s contentions unpersuasive, the Tax Court held that a deduction could be taken only when the FSLIC applied Lincoln Savings' pro rata share of the Secondary Reserve toward payment of its primary premium or toward FSLIC losses. The Ninth Circuit reversed on appeal with one dissent, holding that the premium payment into the Secondary Reserve is currently deductible because it is a necessary and ordinary expense. Basing its decision on the taxpayer's property interest in the Secondary Reserve created through the premium payments, the Supreme Court reversed the Ninth Circuit and held that Lincoln Savings could not deduct the secondary premium under I.R.C. § 162(a).

The Court stated:

> [T]he presence of an ensuing benefit that may have some future aspect is not controlling; many expenses concededly deductible have prospective effect beyond the taxable years; What is important and controlling is that the secondary premium payment serves to create or enhance for the taxpayer what is essentially a separate and distinct additional asset and that, as an inevitable consequence, the payment is capital in nature and not an expense deductible

under I.R.C. § 162(a) in the absence of other factors not established here.[11]

The Court noted four factors in support of its decision. First, the Secondary Reserve was available to the FSLIC for only limited purposes as prescribed by statute. Second, each institution had "a distinct and recognized property interest in the Secondary Reserve." Third, both the FSLIC and the taxpayer treated the taxpayer's pro rata share of the Secondary Reserve as a separate asset for accounting purposes. Finally, the Court found that the Secondary Reserve was more permanent than temporary in nature. However, according to the Court's ruling, the absence of a separate asset does not automatically result in the current deductibility of an expense.

C. SIGNIFICANT FUTURE BENEFIT

Even if an expense does not create a separate and distinct asset, it may require capitalization if it generates significant future benefits beyond the year of expenditure.[12] After *Lincoln Savings*, many taxpayers took the position that capitalization was required only if an expenditure resulted in the creation or improvement of a separate and distinct asset, arguing that an expenditure that merely produced a benefit extending beyond the taxable year could be deductible if it was not associated with the creation or improvement of an asset.[13] However, the Supreme Court rejected this view in *INDOPCO, Inc. v. Commissioner*, 503 U.S. 79 (1992), holding that legal and investment banking expenses incurred by a corporation to facilitate its acquisition by another corporation were nondeductible capital expenses.

INDOPCO, Inc. v. Commissioner, 503 U.S. 79 (1992)[14]

Before a negotiated friendly takeover, INDOPCO, Inc. was an independent, publicly held company formerly named the National Starch and Chemical Corporation (National

[11] Commissioner v. Lincoln Savings & Loan Association, 403 U.S. 345, 354 (1971).
[12] *See infra* INDOPCO, Inc. v. Commissioner, 503 U.S. 79, 88-89 (1992).
[13] BORIS I. BITTKER ET AL., FEDERAL INCOME TAXATION OF INDIVIDUALS 12.03(2) (3d ed. 2010).
[14] For further comments and analysis on this case, see, *e.g.*, Brett M. Alexander, *An Analysis of INDOPCO, Inc. v. Commissioner*, 54 OHIO ST. L.J. 1505 (1993); Sarah R. Lyke, *INDOPCO, Inc. v. Commissioner: National Starch Decision Adds Wrinkles to Capital Expenditure Issue*, 88 NW. U. L. REV. 1239 (1994); Jeffrey A. Friedman, *INDOPCO, Inc. v. Commissioner: the Deductibility of a Target's Acquisition Costs*, 48 BUS. LAW. 1243 (1993); Melissa D. Ingalls, *INDOPCO, Inc. v. Commissioner: Determining the Taxable Nature of a Target Corporation's Takeover Expenses*, 43 DEPAUL L. REV. 1165 (1994).

Starch). In October 1977, representatives of Unilever United States, Inc. ("Unilever") expressed interest in acquiring National Starch through a friendly transaction. National Starch's largest shareholders, the Greenwall family, were concerned with planning their estate and agreed to the transaction provided that it would be tax free and available to the other shareholders. Lawyers for Unilever and National Starch recommended a reverse subsidiary cash merger. Under the proposed terms of the deal, two new entities would be created: National Starch and Chemical Holding Corporation ("Holding"), a subsidiary of Unilever, and NSC Merger, Inc., a transitory subsidiary of Holding. In an exchange specifically designed to be tax free, Holding would exchange one share of its nonvoting preferred stock for each share of National Starch common that it received from National Starch shareholders. The remaining shares of National Starch would be converted into cash in a merger of NSC Merger, Inc. into National Starch.

In November 1977, Unilever made a formal proposal to National Starch. A law firm that National Starch had retained advised the directors that, under Delaware law, they had a fiduciary duty to ensure that the proposed transaction was fair to the shareholders. National Starch engaged an independent investment banking firm of Morgan Stanley & Co., Inc.,("Morgan Stanley") to evaluate the offer to render a fairness opinion, and generally to assist in the event of the emergence of a hostile tender offer.

In August 1978, the parties consummated the deal, agreeing upon a price of $73.50 per share, a figure that Morgan Stanley found to be fair. The transaction cost National Starch approximately $2.7 million in investment banking and legal fees. Morgan Stanley charged $2.2 million for its advice and fairness opinion, $7,586 for out-of-pocket costs, and $18,000 for the legal fees of its counsel. National Starch’s law firm charged $490,000 for its legal services, which included advice to National Starch and its board of directors, preparation of the IRS ruling request, participation in negotiations, and $15,069 in out-of-pocket costs. National Starch also incurred other costs in connection with the transaction totaling $150,962.

On its 1978 income tax return, National Starch claimed a deduction for the $2,225,586 paid to Morgan Stanley, but did not deduct the $505,069 paid to National Starch’s law firm or its other expenses. Upon audit, the Internal Revenue Service denied the claimed deduction, asserting that those expenses had to be capitalized. National Starch sought redetermination in the Tax Court, arguing it had the right to deduct those expenses currently.

The Tax Court held that the investment banking and legal fees were capital in nature and denied the deduction. According to the Court, the costs should be capitalized because of the long-term benefits that National Starch would receive from its acquisition by Unilever.

In reaching its decision, the Tax Court rejected National Starch's argument that *Lincoln Savings* mandated the deduction of these costs, because the costs did not create a separate and distinct asset. Rather, the Court held that, since the Supreme Court did not specifically address the deductibility of expenditures that did not create or enhance a separate and distinct asset, *Lincoln Savings* was inapplicable. The Tax Court also rejected National Starch's argument that the costs should be deductible, because the costs were incurred incident to the board of directors' fiduciary duty to the shareholders. The Court determined that the primary reason that the costs were incurred was to transfer stock for the benefit of National Starch.

The Third Circuit Court of Appeals affirmed the Tax Court's decision denying the deductibility of the legal costs and investment banking fees. The Supreme Court affirmed the Third Circuit's decision that the legal costs and investment banking fees were capital in nature and therefore not deductible. The Supreme Court rejected the application of the *Lincoln Savings'* "separate and distinct asset" test, reasoning that the creation of a separate and distinct asset is a sufficient but not necessary condition for capitalization. The Court found that National Starch's expenditures gave rise to neither a separate tangible asset nor a readily identifiable intangible asset. But the Court held that the investment banking fee should be capitalized.

The Court examined the relevance of a future benefit, saying that it has long been recognized that expenditures to change the corporate structure for the benefit of future operations are not ordinary business expenses. Also the Court noted that the presence of an incidental future benefit may not warrant capitalization and that the creation or enhancement of a separate and distinct asset is not a prerequisite to capitalization. The Court concluded that the expenditures at issue in *INDOPCO* had to be capitalized.

Notwithstanding the broad sweep of *INDOPCO*, the courts have continued to rely on *Lincoln Savings* if the issue can be decided by requiring capitalization on the narrower "separate and distinct asset" test.[15] The developing doctrine is that an expenditure must be capitalized if it either creates or enhances a separate and distinct asset or creates a more than incidental benefit extending beyond the taxable year in which it is incurred.[16]

Repair v. Improvement or Replacement

Treasury Regulations § 1.162-4 provides that (i) the cost of incidental repairs that

[15] BITTKER ET AL., *supra* note 13.
[16] *Id.*

neither materially increase the value of the property nor appreciably prolong its life, but simply keep it in an ordinarily efficient operating condition, may be deducted as business expenses, provided that the basis of the property is not increased by the amount expended, but that (ii) repairs in the nature of replacements, to the extent that they arrest deterioration and appreciably prolong the property's life, must be capitalized and depreciated. Treas. Reg. § 1.263(a)-1(b) similarly distinguishes between incidental repairs and capital expenditures that add to the value or substantially prolong the useful life of property or adapt it to a new or different use.

Despite the fact that amounts paid or incurred for incidental repairs may have some future benefit, the Supreme Court's decision in *INDOPCO, Inc. v. Commissioner* does not affect the treatment of incidental repair costs as business expenses that are generally deductible under I.R.C. § 162.[17]

Courts have provided a number of ways to distinguish between deductible repairs and non-deductible capital improvements. For instance, [18] Illinois Merchants Trust Co. v. Commissioner, 4 B.T.A. 103, 106 (1926), *acq.*, V-2 C.B. 2, explained that repair and maintenance expenses are incurred to keep the property in an ordinarily efficient operating condition over its probable useful life for the uses for which the property was acquired. Capital expenditures, in contrast, are for replacements, alterations, improvements, or additions that appreciably prolong the life of the property, materially increase its value, or make it adaptable to a different use. In Estate of Walling v. Commissioner, 373 F.2d 190, 192-193 (3rd Cir. 1966), the Court explained that the relevant distinction between capital improvements and repairs is whether the expenditures were made to "put" or "keep" property in ordinary efficient operating condition. In Plainfield-Union Water Co. v. Commissioner, 39 T.C. 333, 338 (1962), *nonacq*. on other grounds, 1964-2 C.B. 8, the Court stated that, if the expenditure merely restores the property to the state it was in before the situation prompting the expenditure arose and does not make the property more valuable, more useful, or longer-lived, then such an expenditure is usually considered a deductible repair. In contrast, a capital expenditure is generally considered to be a more permanent increment in the longevity, utility, or worth of the property. The Supreme Court's decision in *INDOPCO Inc. v. Commissioner* does not affect these general principles.[19]

Even if the expenditures include the replacement of numerous parts of an asset, if the

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[17] BURKE & FRIEL, *supra* note 6, at 286; *see* Rev. Rul. 94-12, 1994-1 C.B. 36.
[18] The following is excerpted from Rev. Rul. 2001-4, 2001-1 C.B. 295.
[19] *Id.*

replacements are a relatively minor portion of the physical structure of the asset or of any of its major parts, such that the asset as whole has not gained materially in value or useful life, then the costs incurred may be deducted as incidental repairs or maintenance expenses.[20] If, however, a major component or a substantial structural part of the asset is replaced and, as a result, the asset as a whole has increased in value, life expectancy, or use, then the costs of the replacement must be capitalized.[21] In addition, although the high cost of the work performed may be considered in determining whether the cost is capital in nature, the cost alone is not dispositive.[22] The characterization of any cost as a deductible repair or capital improvement depends on the context in which the cost is incurred. Specifically, where an expenditure is made as part of a general plan of rehabilitation, modernization, and improvement of the property, the expenditure must be capitalized, even though, standing alone, the item may be classified as one of repair or maintenance. [23]

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[20] *Id.*; *see* Buckland v. United States, 66 F. Supp. 681, 683 (D. Conn. 1946) (stating costs to replace all window sills in factory building were deductible repairs). *See also* Libby & Blouin, Ltd. v. Commissioner, 4 B.T.A. 910 (1926) (stating costs to replace all the tubing in sugar evaporator, which were small parts in a large machine, were deductible repairs). The same conclusion is true even if such minor portion of the asset is replaced with new and improved materials. *See, e.g.*, Badger Pipe Line Co. v. Commissioner, 74 T.C.M. (CCH) 856 (1997) (stating costs to replace 1,000 feet of pipeline in a 25-mile section of pipeline were deductible repairs, regardless of whether the new pipe was of better quality or has a longer life).

[21] Rev. Rul. 2001-4, 2001-1 C.B. 295; *see, e.g.*, Denver & Rio Grande Western R.R. Co. v. Commissioner, 279 F.2d 368 (10th Cir. 1960) (stating costs to replace major portion of a viaduct - all of the floor planks and 85-90% of the stringers - were capital expenditures); P. Dougherty Co. v. Commissioner, 159 F.2d 269, 272 (4th Cir. 1946) (stating costs to replace entire stern section of barge with new materials were capital expenditures); Vanalco, Inc. v. Commissioner, 78 T.C.M. (CCH) 251 (1999) (stating cost to replace the cell lining, an essential and substantial component of the cell, was required to be capitalized); Stark v. Commissioner, 77 T.C.M. 1181 (1999) (stating cost to replace building roof were capital expenditures); Rev. Rul. 88-57, 1988-2 C.B. 36, modified by Rev. Rul. 94-38, 1994-1 C.B. 35 (costs to perform major cyclical rehabilitations on railroad freight train cars as part of a plan of rehabilitation in which all of the structural components were either reconditioned or replaced were capital expenditures).

[22] *Compare* R.R. Hensler, Inc. v. Commissioner, 73 T.C. 168, 177 (1979), *acq. in result*, 1980-2 C.B. 1 (the fact that taxpayer's expense was large does not change its character as ordinary); *Buckland*, 66 F. Supp. at 683 (replacements of relatively minor proportions of the entire physical asset constitute repairs even where high in cost); and American Bemberg Corp. v. Commissioner, 10 T.C. 361 (1948) (deduction allowed for drilling and grouting to prevent cave-ins even though the total cost of the expenditures exceeded $1.1 million), *with* Wolfsen Land & Cattle Co. v. Commissioner, 72 T.C. 1, 17 (1979) (costs to dragline an irrigation ditch were capital expenditures, in part, because they could be as high as the cost to construct a new ditch); and Stoeltzing v. Commissioner, 266 F.2d 374, 376 (3d Cir. 1959) (expenditures could not be incidental repairs because they exceeded by almost 200% the cost of the building).

[23] Rev. Rul. 2001-4, 2001-1 C.B. 295; United States v. Wehrli, 400 F.2d 686, 689 (10th Cir. 1968).

D. SECTION 263A: THE UNIFORM CAPITALIZATION RULES

I.R.C. § 263A requires the capitalization of all direct and indirect costs allocable to real or tangible personal property produced by a taxpayer, whether held by the taxpayer for sale or for use. It also requires capitalization of costs allocable to property held for sale to customers in the ordinary course of business. These so-called uniform capitalization (UNICAP) rules were promulgated in 1986 to correct the following two perceived deficiencies in the then existing cost capitalization rules:[24] (i) taxpayers were deducting many costs that were in fact costs of producing property that would generate taxable income only in a future year when the property was used or sold, which produced an unwarranted deferral of income taxes; (ii) because the then existing capitalization rules varied with the nature of the property and its intended uses, the rules could distort economic decisions regarding investments. [25]

Tangible personal property is defined to include books, films, and sound recordings, video tapes or similar property. [26] The term "produce" includes construct, build, install, manufacture, develop, or improve.[27] However, § 263A does not apply to freelance authors, photographers, and artists. [28] In addition, § 263A does not apply to a taxpayer who acquires personal property for resale if the taxpayer's average annual gross receipts from sales over a three year period do not exceed $10 million.[29]

Taxpayers subject to I.R.C. § 263A must capitalize all direct costs,[30] which include direct material costs and direct labor costs. Direct material costs include the costs of those materials that become an integral part of specific property produced and those materials that are consumed in the ordinary course of production and that can be identified or associated with particular units or groups of units of property produced. Direct labor costs include the costs of labor that can be identified or associated with particular units or groups of units of specific property produced.[31]

Taxpayers subject to I.R.C. § 263A also must capitalize all indirect costs properly allocable to property produced or property acquired for resale and must make a reasonable

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[24] BITTKER ET AL., *supra* note 13, at ¶ 12.02(2)(a).
[25] *Id.*
[26] I.R.C. § 263A(b) (1986).
[27] I.R.C. § 263A(g)(1) (1986).
[28] I.R.C. § 263A(h) (1986).
[29] I.R.C. § 263A(b)(2)(B) (1986).
[30] I.R.C. § 263A(a)(2)(A) (1986); Treas. Reg. § 1.263A-1(e)(1).
[31] Treas. Reg. § 1.263A-1(e)(2).

allocation of indirect costs between production, resale, and other activities.[32] Indirect costs are defined as all costs other than direct material costs and direct labor costs (in the case of property produced) or acquisition costs (in the case of property acquired for resale).[33] The following are examples of indirect costs that must be capitalized to the extent that they are properly allocable to property produced or property acquired for resale: indirect labor costs; officers' compensation; pension and other related costs; employee benefit expenses; indirect material costs; purchasing costs; handling costs; storage costs; cost recovery (i.e., depreciation, amortization, and cost recovery allowances on equipment and facilities); depletion; rent; taxes; insurance; utilities; repairs and maintenance; engineering and design costs; tools and equipment; bidding costs; licensing and franchise costs; and interest.[34] However, expenses for marketing, advertising, and general business and financial planning do not have to be capitalized.[35]

III. REVIEW AND ANALYSIS OF THE RELEVANT PROVISIONS AND THEIR INTERPRETATION IN KOREA

A. STATUTORY BASIS

Article 19(1) of the Corporation Tax Law (CTL) of Korea provides that deductible expenses shall be expenses or losses that arise from transactions resulting in any decrease in the net assets of a corporation, excluding the repayment of capital or equities, appropriation of surplus, and other transactions as prescribed in this CTL. Thus, under article 19(1), capital expenditures are not deductible expenses, because a capital expenditure by concept is not an expense that decreases a net asset. However, no statutory provision directly deals with capital expenditures, even though article 31(2) of the Presidential Decree of the CTL prescribes the scope of a capital expenditure, and many administrative rulings exist.

Article 31(2) provides that the term "capital expenditures" shall be costs spent to extend the useful life of the depreciable assets of a corporation or to add the real value of the relevant assets. The provision illustrates as capital expenditures the following: (i) restructuring to change the original use; (ii) installation of elevators or cold storage equipment; (iii) installation of refuge or shelter rooms in a building; (iv) restoration of buildings, machinery,

[32] I.R.C. § 263A(a)(2)(B) (1986); Treas. Reg. § 1.263A-1(e)(3).
[33] Treas. Reg. § 1.263A-1(e)(3).
[34] Treas. Reg. § 1.263A-1(e)(3)(ii).
[35] Treas. Reg. § 1.263A-1(e)(3)(iii).

facilities, and equipment damaged or destroyed by disaster or accident to the extent that they cannot be used for their original purposes; and (v) other improvements, expansions, or installations that are similar in nature to those above.

Article 17 of the Enforcement Ordinance of the CTL illustrates a repair cost that is not a capital expenditure, but is a currently deductible business expense as follow: (i) painting of building or wall; (ii) repairs of glass or roof of the building; (iii) replacement of belts or parts of machinery; (iv) replacement of tires of cars; (v) repair of damaged exteriors, paint or glass of a building; and (vi) similar repair costs, such as maintenance costs to keep a property or machinery in an ordinarily efficient operating condition.

B. CASE LAW

The Korean Supreme Court interprets capital expenditures as repair costs spent to extend the useful life of the depreciable assets of a corporation or to add to the real value of the relevant assets,[36] which is the same meaning provided in article 31(2) of the Presidential Decree. No case in Korea analyzes a capital expenditure in detail, nor is there much scholarly literature on the subject. [37]As a result, interpretation and application of a capital expenditure in Korea rely on administrative rulings largely on an ad hoc basis.

IV. COMPARISONS OF THE LAW OF KOREA AND THE UNITED STATES FOR NEW DIRECTIONS FOR KOREAN TAX LAW

A. DIFFERENCE IN STATUTORY DEFINITION AND JUDICIAL INTERPRETATION

In Korea, even though some examples of capital expenditures are provided in article 31(2) of the Presidential Decree of the CTL, there is no statutory provision on what is a capital expenditure. Even in article 31(2) of the Presidential Decree, capital expenditures are considered in relation with repair costs. Consequently, under Korean tax law, if the cost of an acquired asset is claimed as a deductible expense, the grounds for denying that deduction are not clear.

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[36] *See, e.g.*, Supreme Court Decision, 98Du18374, Dec. 10, 1999 (S. Kor.); Supreme Court Decision, 88Nu520, Dec. 20, 1988 (S. Kor.); Supreme Court Decision, 87Nu749, Dec. 8, 1987 (S. Kor.).

[37] For one article discussing capital expenditures, see Min Taeuk, *Capital Expenditures in Tax Law,* 16-2 SEOUL TAX LAW REV. 230 (2010).

In contrast, American tax law addresses a capital expenditure through statutory provisions such as I.R.C. §§ 263 and 263A. I.R.C. § 263 provides for the disallowance of deductions for any amount paid out for new buildings or for permanent improvements or betterments made to increase the value of any property or estate or any amount expended in restoring property or in making good the exhaustion thereof for which an allowance is or has been made. In addition, I.R.C. § 263A requires the capitalization of all direct and indirect costs allocable to real or tangible personal property produced or acquired by a taxpayer (the so-called Uniform Capitalization Rules). Thus, in American tax law acquisition costs are included in capital expenditures as well as permanent improvement expenditures after acquiring. In Korea, little case law exists to interpret capital expenditures, unlike in the United States where many precedents exist to guide capital expenditures.

Korean tax law needs a clear provision that defines a capital expenditure to avoid vagueness and arbitrary application of tax law by administrative agencies. I.R.C. §§ 263 and 263A are good examples for the Korean government to follow in introducing new legislation that will provide for a capital expenditure. The Presidential Decree of the CTL specifies the expenditures that increase value or prolong useful life and that must be treated as capital expenditures. However, these provisions are too simple to reflect real capital expenditure issues. Moreover, the reason why the cost of an acquired asset such as a new building must not be currently deductible is not clear. In addition, it is more desirable that basic standards for identifying a capital expenditure should be prescribed in a statute enacted by Congress. So, statutes, such as I.R.C. §§ 263, 263A, and related case law in the United States provide a good guideline in the interpretation or reform of Korean tax law in association with capital expenditures.

B. COST OF ACQUISITION

In American tax law and its interpretation, acquisition costs of a property having a useful life beyond the taxable year constitute capital expenditures and must be capitalized.[38] When the taxpayer purchases tangible property, such as a building or a machine, or intangible property, such as a copyright or a patent, the application of this rule is not problematic to deny a deduction and to require capitalization. To this point, Korean tax practice does not differ from American tax law. Even though Korea has no clear statutory basis to deal with the acquisition cost of an asset, the cost is not deductible at the time of purchase.

[38] Treas. Reg. § 1.263(a)-2(a).

The indirect cost associated with the acquisition of a property other than the direct purchase price must also be capitalized under American tax law, but its scope is not defined by statute or regulation. Consequently, many courts have considered the issue of how a taxpayer should treat indirect costs. In *Idaho Power Co.*, for example, the Court held that equipment depreciation allocable to capital facilities must be capitalized and deducted over the depreciable lives of the capital facilities. In *Encyclopaedia Britannica, Inc*., in which the taxpayer hired a third party to write a book and paid him for the writing, the Court held that the payment had to be capitalized. In *Woodward,* in considering the appraisal expenses paid by the majority stockholders, who were obliged to purchase at "real value," to buy the stock of a minority shareholder, the Court stated that the expenses incurred by the majority stockholders must be treated as part of the cost of acquiring the stock. The Court noted that the appropriate standard to decide whether they were currently deductible or capitalized was the origin of the claim litigated, thereby rejecting the majority stockholders' argument that current deductibility was justified on the ground that the "primary purpose" of the litigation was not for defense or perfection of title (so not deductible) but to determine the stock's value. In *Georator Corp.,* the Court held that legal fees incurred in resisting cancellation of a trademark were capital expenditures.

Unlike the United States, Korea has no law or judicial decisions that address the cost associated with the acquisition of a property other than the direct purchase price. Korea has addressed this matter mainly by administrative rulings on an ad hoc basis. Korean courts have not shown a clear interpretation criterion. Thus, the practice of interpretation for indirect acquisition costs in American courts will be useful in solving problems that have arisen in Korea. The origin of the claim test suggested in *Woodward v. Commissioner* in particular will provide a useful basis for amending or interpreting Korean tax law to solve issues in relation with the acquisition cost of an asset.

C. A SEPARATE AND DISTINCT ASSET

In *Commissioner v. Lincoln Savings & Loan Association*, the Supreme Court held that capitalization is required when an expense enhances or creates a separate and distinct asset. Accordingly, if a certain expense creates a separate and distinct asset, the expense may not be deductible currently; it must instead be capitalized. This interpretation in relation to a capital expenditure may be applicable to the interpretation of Korean tax law. Thus, if some expenses result in a separate and distinct asset to produce future benefits in Korea, those

expenses should be capitalized. When the issue arises whether a certain expense creates a separate and distinct asset, Korean courts can get a useful clue from the *Lincoln Savings* or other similar cases to solve this matter.

D. SIGNIFICANT FUTURE BENEFIT

Under American tax law regarding a capital expenditure, even if an expense does not create a separate and distinct asset, it may require capitalization if the expense generates significant benefits beyond the year of expenditure as shown in *INDOPCO, Inc. v. Commissioner*. In *INDOPCO, Inc.,* the Supreme Court held that legal and investment banking expenses incurred by a corporation to facilitate its friendly acquisition by another corporation were nondeductible capital expenses even though those expenses did not create a separate and distinct asset, since they resulted in the long-term benefits the former would receive from its acquisition by the latter. The Court clarified that expenses for a mere incidental future benefit is not a capital expenditure and that the creation or enhancement of a separate and distinct asset is not a prerequisite to capitalization. And in interpreting current American tax law, an expenditure must be capitalized if it either creates or enhances a separate and distinct asset or creates a more than incidental benefit extending beyond the taxable year during which it is incurred.

Under Korean tax law regarding a capital expenditure, the future benefit test may be applicable. Implicitly, Korean courts and administrative agencies have borrowed the meaning of a capital expenditure from financial accounting, where in general an expense to contribute a future economic benefit must be capitalized. However, Korean courts or administrative agencies should interpret independently of financial accounting according to the tax law standard. In this regard, the U.S. Supreme Court's ruling in *INDOPCO* and similar cases provide a guideline to the Korean courts and administrative agencies.

E. OTHER RELATED ISSUES – REPAIR V. IMPROVEMENT OR REPLACEMENT

Treasury Regulations § 1.162-4 provides that (i) the cost of incidental repairs that neither materially increase the value of the property nor appreciably prolong its life, but simply keep it in an ordinarily efficient operating condition, may be deducted as business expenses, provided the basis of the property is not increased by the amount expended, but that (ii) repairs in the nature of replacements, to the extent that they arrest deterioration and

appreciably prolong the property's life, must be capitalized and depreciated. Treas. Reg. § 1.263(a)-1(b) similarly distinguishes between incidental repairs and capital expenditures that increase the value or substantially prolong the useful life of property or adapt it to a new or different use. Also, courts have provided a number of ways to distinguish between deductible repairs and non-deductible capital improvements.

However, Korea has no rules like these. Consequently, no standard exists in Korea to determine whether a certain expense for repairing a property is incidental and currently deductible or a non-deductible improvement or replacement. This issue is mainly solved by administrative rulings on an ad hoc basis. Thus, for clarification, Korea needs a provision to allow a deduction for the cost of incidental repairs that neither materially increase the value of the property nor appreciably prolong its life while keeping it in an ordinarily efficient operating condition as provided in Treas. Reg. §§ 1.162-4 and 1.263(a)-1(b). Also, Korean courts may find useful resources for interpreting a capital expenditure related to the issue of incidental repair or improvement from such American cases as *Illinois Merchants Trust Co. v. Commissioner, Estate of Walling v. Commissioner*, and *Plainfield-Union Water Co. v. Commissioner*.

V. CONCLUSION

If an expense is a capital expenditure, it is not currently deductible but deductible via depreciation over a period of years related to the asset's useful life or at its final disposal if the asset acquired is of infinite useful life such as land. Generally, a capital expenditure is an expense that will yield benefits in future years in the taxpayer's business or income-producing activities. This article reviewed and analyzed the tax law in the United States and in Korea to gain new perspective for interpretative guidelines for Korean tax law for a capital expenditure. The review and analysis has led to the following conclusions:

Korea does not have a clear statutory provision to define a capital expenditure even though article 31(2) of the Presidential Decree of the CTL describes meaning of a capital expenditure while providing some examples of capital expenditures. Further, the reason why the cost of an acquired asset such as a new building must not be currently deductible is not clear, because only permanent improvement or similar expenditures are prescribed as capital expenditures. In contrast, American tax law has statutory provisions, such as I.R.C. §§ 263

and 263A, which define a capital expenditure, and so acquisition costs are clearly considered as capital expenditures.

I.R.C. § 263, which is a general provision for a capital expense, and its supplement provision, I.R.C. § 263A, provide cost allocation standards that can be good models for Korean tax reform to avoid vagueness in dealing with a capital expenditure.

An asset benefiting beyond the taxable year must be capitalized. It is not difficult in either the United States or in Korea to require that tangible property, like a building or machine, or intangible property, like a copyright or a patent, be capitalized. However, Korea needs to provide a clearer basis therefor. Costs in association with the acquisition of a property other than by direct purchase price must also be capitalized. In this matter, even though American tax law does not provide a clear standard, many courts have developed many interpretative rules. In contrast, in Korea, the issue of whether a cost in association with the acquisition of a property other than by direct purchase price is deductible has mainly been solved by administrative rulings on an ad hoc basis. Korean courts have not provided a clear interpretative ruling on this issue. Thus, the interpretation for indirect acquisition costs practiced in American courts and their rationales, especially the origin of the claim test suggested in *Woodward,* would be useful to solve problems in Korea on this matter.

The Supreme Court's ruling in *Commissioner v. Lincoln Savings & Loan Association* that, when an expense enhances or creates a separate and distinct asset, that expense must be capitalized may be applicable to the interpretation of Korean tax law. Consequently, if, in Korea, a certain expense creates a separate and distinct asset to produce future benefits, the expense should be capitalized.

The Supreme Court ruled in *INDOPCO, Inc.* that, even if an expense does not create a separate and distinct asset, the expense must be capitalized if the expense produces a long term benefit to the firm beyond mere incidental future benefit. The Court clarified that the creation or enhancement of a separate and distinct asset is not a prerequisite to capitalization. As a result, under current American tax law, an expenditure must be capitalized if it either creates or enhances a separate and distinct asset or creates a more than incidental benefit extending beyond the taxable year in which it is incurred. This future benefit test can be applicable in interpreting Korean tax law regarding a capital expenditure and would be guidance to the Korean courts and administrative agencies.

In Korea, since there is not a clear standard to decide whether a certain expense for repair is incidental to be currently deductible or is a non-deductible improvement or replacement, and since Korea needs to adopt a clear provision to allow a deduction for the

cost of incidental repairs that neither materially increase the value of the property nor appreciably prolong its life while keeping it in an ordinarily efficient operating condition, Korea should consider introducing provisions like U.S. Treas. Reg. § 1.162-4 and § 1.263(a)-1(b), which prescribe the standard and scope of incidental repairs. In addition, Korean courts may find useful the interpretation of a capital expenditure related to the issue of incidental repairs or improvement from American courts in their interpretation of this matter.

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KEYWORDS

Capital Expenditure, Future Benefit, Separate Asset, Indopco, Repair, Capitalization

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SPECIAL FEATURE:
THE FUTURE OF LAY ADJUDICATION IN KOREA AND JAPAN

INTRODUCTION

Hiroshi Fukurai[1] *& Valerie P. Hans*[**]

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I. INTRODUCTION

Three years after Korea introduced the jury system for the first time in its history, and two years following the Japanese introduction of a mixed court in which citizen and professional judges decide serious criminal cases, the Second East Asian Law and Society Conference was held on September 30th and October 1st, 2011 in the vibrant city of Seoul, South Korea. This Special Issue of the *Yonsei Law Journal* offers an opportunity to present work on some of the key issues that were discussed and debated at this remarkable conference. In particular, the special issue offers new research on the advent of lay

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participation in legal decision making in East Asia at a very auspicious period in time.

II. The 2011 Second East Asian Law and Society Conference in Seoul, South Korea

The international conference was jointly organized by the Law and Society Association (LSA), Collaborative Research Network on East Asian Law and Society (CRN-EALS), the Korean Society for the Sociology of Law, and Yonsei University, School of Law. The CRN-EALS was first established in 2007 under the authorization of the LSA. Since the LSA meeting in Montreal in 2008, the CRN-EALS has regularly organized many sessions at Law and Society meetings and successfully held its first East Asian Law and Society Conference in February 2010 in Hong Kong. In this second East Asian Law and Society Conference, with the theme of "Dialects and Dialectics: East Asian Dialogues in Law and Society," more than 150 delegates came together from the U.S., Japan, China, Hong Kong, Taiwan, Sweden, Malaysia, Hong Kong, Australia, Singapore, and many other countries in the world.

The Conference began with the Welcome Remarks by Yonsei University Law Professor Jeongoh Kim and a keynote speech by Aoyama Gakuin Law School Professor Setsuo Miyazawa, followed by a total of thirty-six concurrent sessions. Presentations by these panel sessions covered a wide range of law and society topics, including the Fukushima nuclear disaster, legal professions, corporate governance, lay adjudication, gender and law, legal education, citizenship and migration, law and language, dispute resolution, constitutional review, media and internet law, criminal justice, and legal pluralism, among many others. The Conference also concluded with a Plenary Session with presentations by University of Washington Law School Dean Kellye Y. Testy, Korea University Professor Hasung Jang, and University of Wisconsin Professor John Ohnesorge. University of Pittsburg Professor Douglas Branson chaired the session, while American Bar Foundation Professor Terence Halliday and University of Sydney Professor Luke Nottage participated as discussants. The conference proceedings were also created and distributed to conference participants under the leadership of Yonsei Law Professor Chulwoo Lee.

Conference presentations and collaborative scholarly exchanges all revealed the depth of academic energy, keen interests in ongoing judicial changes and reforms, and multiplicities of scholarly research recognizing recent transformative changes and legal development in East Asia. The exchanges also provided collaborative possibilities and fertile grounds for future

sociolegal research and regionally-specific studies in East Asia.

III. LAY ADJUDICATION IN EAST ASIA: A PRIME MOMENT IN HISTORY

The timing of the conference, and of this Special Issue, could not be more significant. As we noted, in 2008, Korea introduced a jury element in its legal system,[2] and a systematic review of the jury system is scheduled to be undertaken in 2013. Likewise, Japan's mixed court will be subject to its first thorough governmental review process in 2012.[3] In both countries, the courts and research scholars have studied the consequences of introducing a lay element into their justice systems. Thus, it is an excellent moment to take stock. The publication of these articles devoted to the Korean and Japanese lay participation systems provide detailed insights, and should prove to be helpful in the review process. But even more fundamentally, they offer theoretical insights about the purposes and phenomenon of lay adjudication.

Japan introduced its version of lay adjudication, *Saiban-in seido* (a quasi-jury or mixed tribunal) system in 2009. Several accounts of the period of time leading up to the adoption of *Saiban-in seido* suggest that it was the product of compromise between those who wanted no change to the exclusive use of professional judges in Japanese courts and those who wanted an all-citizen jury system. Many grassroots organizations and progressive civic activists had advocated for the introduction of all-citizen jury trials for decades.[4] Unlike America's or

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[2] Gukminui hyeongsajaepan chamyeoe gwanhan beopryul [Act for Civil Participation in Criminal Trials], Law No. 8495, June 1, 2007, art 1(1) [hereinafter the Jury Act]. An official English translation is posted at UC Santa Cruz Professor Hiroshi Fukurai's homepage, available at http://people.ucsc.edu/~hfukurai/. *See also* Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes*? 12 ASIAN-PAC. L. & POL'Y J. 58 (2010).

[3] Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in Law): An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 283 (2004) (citing Article 8 "Where additional investigation into the status of the law's implementation is recognized as necessary three years after the law comes into effect, … the Government will create the necessary measures … [in order to] facilitate the people's participation in justice to realize adequately its role").

[4] *See generally* Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315 (2007). The most prominent grassroots organization that has been opposing the *Saiban-in* system and promoting the re-introduction of Japan's all-citizen jury system is called "Baishin Seido o Fukkatsusuru Kai [The Organization to Resurrect the Jury System]." The organization has its own radio program every Sunday to educate the public about many problems of the mixed tribunal system and promote the reintroduction of the jury system. Its main homepage is: http://baishin.blog.fc2.com/ (last visited Apr. 19, 2012). Another prominent organization that began to question the merit of the mixed tribunal system is called "Baishin Saiban

Korea's all-citizen jury, the *Saiban-in* panel consists of three professional and six citizen judges. Deliberative participation of bureaucratic judges, however, has worried many progressive activists who warned that professional judges would dominate lay judges in deliberation and verdict.[5] Examining the conviction rates in Japanese trials with and without lay participation is instructive. Japan had a previous brief foray into the world of juries. During fifteen years of jury operation from 1928 to 1943, Japan's all-citizen jury acquitted defendants in 81 out of 484 cases (17% acquittal rate).[6] Prior to the introduction of the *Saiban-in* trial, when only professional judges decided case outcomes, Japan's professional judges convicted 99.9% of all indicted suspects in criminal matters, leading one scholar to call Japan a "prosecutor's paradise."[7]

What has happened since lay citizens have joined professional judges to decide serious criminal cases? Recent research on Japan's mixed tribunal system has suggested the strong influence of professional judges on the deliberation and verdict.[8] As results, Japan's mixed court system continues to exhibit a near perfect conviction rate (99.9%). Mixed panels convicted nearly all defendants indicted by Japanese prosecutors since its introduction in 2009.[9]

The polarity of verdict patterns between Japan's pre-war jury trial and today's mixed panel suggests that the absence of professional judges in the deliberative process likely benefits the defendant, while professional judges' participation in deliberation tends to go against the interests of the defendant. As Hans observes, citizen participation in the administration of justice seems to protect against certain professional tendencies in a government's judiciary.[10] For example, Japanese judges appear to be influenced by confession evidence extracted under physical and psychological duress or even torture while in police or prosecutors' custody.[11]

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o Kangaeru Kai [Research Group on Jury Trial]."

[5] TAKEO ISHIMATSU, KOKEN TSUCHIYA & CHIHIRO ISA, ENZAI O UMU SAIBANIN SEIDO [A QUASI-JURY SYSTEM THAT LEADS TO WRONGFUL CONVICTIONS] (2007); CHIHIRO ISA, *SAIBAN-IN* SEIDO WA KEIJI SAIBAN O KAERUKA [DOES THE QUASI-JURY SYSTEM CHANGE CRIMINAL TRIALS?] (2006).

[6] *See generally* CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [THE RESURRECTION OF JURY TRIALS] (1996).

[7] DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 215 (2002) (citing numerous sources to substantiate Japan's near perfect conviction rates).

[8] *See generally* Makoto Ibusuki, "*Quo Vadis?" First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 24 (2010).

[9] *Id.*

[10] Valerie P. Hans, *What Difference Does a Jury Make?* YONSEI L.J. (this issue)

[11] TAKASHI MARUTA, BAISHIN SAIBAN O KANGAERU [RESEARCH ON JURY TRIALS] 11-4 (1991); Hiroshi Fukurai & Kaoru Kurosawa, *Impact of the Popular Legal Participation on Forced*

The less than 0.1% acquittal rate in Japan stands in contrast to Korea's 8.8% acquittal rate in the first two years of its jury system.[12] As Han and Park observe in their article, in the current Act authorizing jury determinations of serious criminal cases in Korea, the verdict of the jury is advisory and does not bind the judge, who reaches an independent verdict after hearing the jury's decision.[13] In addition, if jurors cannot agree unanimously on a decision, the judge may consult with them. However, in contrast with the Japanese system, there is at least an opportunity for independent decision making on the part of the lay citizens. Although the acquittal rate in Korean jury trials is not as large as in common law countries with fully independent juries that reach binding decisions, it exceeds that of Japan.[14]

The jury system is a political institution. The advent of lay participation in legal decision in the countries of Korea and Japan has an interesting political twist. In each country, there is now an opportunity for citizen judgments in criminal cases involving foreign military personnel. Korea and Japan hold two of the largest U.S. military bases in the world. Japan serves as a strategic home to the U.S. Third Marine Division, the U.S. Seventh Fleet, and the U.S. Forces Japan. More than 48,000 active military personnel are stationed at one-hundred-eight U.S. military bases that have been strategically established throughout the Japanese islands, including Okinawa.[15] Additionally, 45,000 American dependents and 27,000 civilian employees of the Department of Defense also live inside or near the military bases. Korea also serves as a home to the Eight U.S. Army Division, the U.S. Air Forces Korea, and the U.S. Naval Forces Korea, with nearly 30,000 military personnel strategically placed at

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Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan, 7 US-CHINA L. R. 3-7 (2010) (citing numerous causes of Japan's wrongful convictions, including the use of substitute prisons, limited access to defense council, physical and psychological torture and violence to obtain forced confessions, Japanese judges' uncritical attitudes toward the use of confession documents, and the absence of pre-trial release of the accused and the lack of Miranda rights in criminal process).

[12] Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes*? 12 ASIAN-PAC. L. & POL'Y J. 58 64 (2010) ("In a majority of cases (91.2%), the jury found the defendants guilty").

[13] Sang Hoon Han & Kwang Bai Park, *Citizen Participation in Criminal Trials of Korea*, YONSEI L.J. (this issue).

[14] Neil Vidmar, Sara Sun Beale, Mary Rose & Laura F. Donnelly, *Should We Rush to Reform the Criminal Jury? Consider Conviction Rate Data*, 80 JUDICATURE 286 (1997) (finding federal and state conviction rates over a period of 50 years ranged from a low of about 60% to a high of 85%).

[15] *See* U.S. Dep't of Defense, Base Structure Report Fiscal Year 2011 Baseline: A summary of DoD's Real Property Inventory 7 [hereinafter Base Structure], available at http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf. *See also* U.S. Dep't of Defense, Active Duty Military Personnel Strength by Regional Area and by Country 3, Mar. 31, 2011, available at http://www.globalsecurity.org/military/library/report/2011/hst1103.pdf. *See also* CHALMERS JOHNSON, NEMESIS 178 (2008) (using various governmental data, Johnson stated that "the United States had stationed some 36,365 uniformed military personnel in Japan, not counting 11,887 sailors attached to the Seventh Fleet at its bases at Yokosuka (Kanagawa Prefecture) and Sasebo (Nagasaki Prefecture").

eighty-two U.S. armed forces bases on the Korean Peninsula.[16] A similar number of military dependents and civic employees also reside inside or near military bases, airfields, and other military facilities.

These American military bases generate wide employment opportunities for local residents and help support many commercial industries and business establishments in nearby communities.[17] At the same time, local residents who live near military bases have, over the years, experienced criminal victimization by foreign soldiers, their families, and civic military employees. Incidents have included bar fights, drug violations, rapes, murders, muggings, robberies, criminal trespass, abductions, arsons, and hit-and-run accidents.[18] Research has also documented the fact that the U.S. military presence spurred the creation of sex industries and the establishment of many brothels outside military bases in Korea, Okinawa, Vietnam, Thailand, and the Philippines.[19]

The Status of Forces Agreements that the U.S. government signed with Korea and Japan have so far successfully shielded many American soldiers, their dependents, and civic employees from local prosecution in the courts. Instead, the crimes have typically been processed in U.S. military courts. However, Korean and Japanese citizens observe what appear to be only limited consequences for wrongdoing. Between 1998 and 2004 in Japan, for instance, the U.S. government processed 2,024 crimes and accidents through its military justice system.[20] Only one case led to a court-marshal; commanders ordered "administrative discipline" in 318 instances, and other remaining 1,700 instances went unpunished.[21] Local governments and many grassroots organizations have demanded renegotiation of the Status of Forces Agreements in order to secure the right to exercise primary jurisdiction over crimes committed by foreign troops and their families in local communities.[22] Recent judicial reforms in Korea and Japan, nonetheless, have begun to challenge the status quo. Local

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[16] Base Structure, *supra* note 14. *See* U.S. Dep't of Defense, Briefing by Defense Secretary Gates and Minister of National Defense Lee Sang-Hee from the Pentagon Briefing Room, Arlington, VA, Oct. 17, 2008, available at http://www.defense.gov/transcripts/transcript.aspx?transcriptid=4306.

[17] Johnson, *supra* note 14, at 178.

[18] *Id*, at 179-90.

[19] Isabelle Talleyrand, *Military Prostitution: How the Authorities Worldwide Aid and Abet International Trafficking in Women*, 27 SYRACUSE J. INT'L L. & COM. 152-54, 160 (2000); U.S. Dep't of State, Trafficking in Persons Report 99 (2004).

[20] *Only the Removal of U.S. Bases Can Ensure the End of U.S. Military Crimes*, JAPAN PRESS WEEKLY, June 18, 2005.

[21] *Id.*

[22] Park Si-soo, *Seoul Poised to Seek Revision of SOFA*, KOREA TIMES, Oct. 11, 2011, available at http://www.koreatimes.co.kr/www/news/nation/2011/10/116_96475.html; *New Organ Eyed for Revision of Accord on U.S. Military in Japan*, DAILY MAINICHI, Apr. 2, 2012, available at http://mainichi.jp/english/english/newsselect/news/20120402p2g00m0dm036000c.html.

residents who have long been victimized by military felons now are being given the opportunity to adjudicate illegal activities and unethical conduct of military personnel who live in their communities.

In Japan, in May of 2010, a mixed court tried an American soldier, convicting and sentencing a nineteen-year-old U.S. serviceman to three to four years in a Japanese prison.[23] The trial became the first ever lay adjudication of American military crimes in Japan. In December 2010, another American soldier was tried in Okinawa for illegal entry and sexual assault.[24] He too was convicted, and sentenced to three years and six months in Japanese prison.[25]

Still, today, not a single U.S. soldier has been tried by the Korean jury, mainly due to the Korean Jury Law requirement that the consent of the defendant is needed for jury trial.[26] Such a requirement *de facto* has prevented lay adjudication of military felons in Korea. When Korea's jury system is reviewed in 2013, there will be an opportunity to examine and modify various aspects of jury trial proceedings, including the possible elimination of the defendant's consent requirement. That would enable lay adjudication of crimes committed by American military personnel in Korea.

These beginnings of lay adjudication of military crimes carry an important symbolic meaning to the citizenry, and deserve to be carefully monitored. While the demands to end the U.S. military occupation or renegotiate the Status of Forces Agreements will continue, citizens of Korea and Japan may learn some important lessons from each other's experience about the political significance of citizen legal participation in military cases. It offers a way of asserting some measure of independence and sovereignty.

And speaking of independence, both Korea and Japan lay participation reforms offer fascinating insights about how best to structure legal decision making by citizens to ensure full engagement and power for lay decision makers. Undoubtedly, as they undertake their systematic reviews of the two systems, policymakers in Japan will want to consider whether lay judges are able to play significant roles in the mixed court. We expect some lawyers to advocate for various procedural and other mechanisms in order to promote lay voices, or to

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[23] *See generally* Hiroshi Fukurai, *People's Panel v. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan and South Korea*, 12 ASIAN-PAC. L. & POL'Y J. 95 (2010).

[24] *Kyosei Waisetsu Chisho Beihei no Koso Kikyaku [Denial of Appeal Made by American Soldier Convicted of Sexual Assault],* OKINAWA TIMES, May 11, 2011.

[25] *Id.*

[26] The Jury Act, art. 36 (1) ("when a defendant manifests that he/she desires a participatory trial, [a presiding judge shall] commence preparatory proceedings").

modify Japan's professional judges' influence over lay participants. Of course, effective antidotes might be to reinstitute Japan's Jury Act, which was suspended by the military government in 1943, or to introduce the modern version of all-citizen jury trial. The Venezuelan government introduced both the all-citizen jury and mixed court systems in 1999.[27] Japan can certainly duplicate such an effort. Meanwhile, progressive grassroots organizations and civic groups continue to educate the public on the benefit of all-citizen jury trials, while mounting the political pressure on the Japanese government to consider the introduction of the modern jury system.[28]

IV. ARTICLES IN THE SPECIAL ISSUE

The five articles in this Special Issue of *Yonsei Law Journal* provide a sampling of key issues and questions raised at the conference.

Professor Valerie Hans takes up the important question: What difference does it make to include a lay fact finder in a legal system? Her article identifies the fact finding differences that theorists predict will distinguish lay and professional judges. Professional judges have an obvious advantage over lay judges in their legal knowledge and experience. But lay fact finders represent a broader range of the public and are able to incorporate their insights based on closer understanding of community norms of justice and fairness. Hans draws on empirical research to illustrate the strong overlap in case outcomes for professional and lay judges. When they do not overlap, lay judges tend to be more lenient toward defendants in their judgments of culpability and punishment.

In an informative piece, Professor Sang Hoon Han and Professor Kwangbai Park provide a detailed look at the first four years of the advisory jury experiment in Korea. One key feature of the Korean jury trial is that it depends on the defendant's consent. This has clearly reduced the proportion of cases heard by juries. For example, defendants requested that their cases be tried by juries in just 6.8% of eligible felony cases. A substantial number of these initial requests were subsequently withdraw or were rejected for various reasons by the courts, so that ultimately defendants had their cases heard by juries in only 2.9% of eligible felony trials. However, Han and Park show that the number of requests has steadily

[27] STEPHEN THAMAN, STRAFPROZESSRECHT UND MENSCHENRECHTE: FESTSCHRIFT FUR STEFAN TRECHSEL 765-79 (Andreas Donatsch et al., eds., 2002).
[28] *See* Fukurai, *supra* note 3.

increased over the four year period. Other statistics, concerning the jury selection process, the length of the trial and the jury deliberation, and the fate of jury trial outcomes at the appellate level provide very useful information about how the new jury system is operating. As with other analyses showing strong overlap between the professional judges and lay jurors in their case judgments,[29] these data will be invaluable as Korean policymakers consider whether to modify features of the advisory jury system, including the requirement for the defendant's consent.

Professors Hiroshi Fukurai and Sunsul Park's paper makes two important suggestions for Korea's lay adjudication systems: (1) a possible introduction of Japan's Prosecution Review Commissions (PRC) as Korea's new grand jury system; and (2) an elimination of defendants' consent required for jury trial, thereby allowing the lay adjudication of American military personnel. Recent sex and bribery scandals of Korean prosecutors forced the Korean government to examine the possible introduction of a grand jury system in order to institute the effective oversight of Korean prosecutors and criminal justice officers. Fukurai and Park first examine the U.S. grand jury system in which the civic panel is asked to make a decision to indict the accused. Under Japan's PRC system, the citizen panel is asked to examine and review the appropriateness of the prosecutor's failure to bring an indictment against the accused. Fukurai and Park suggest that Japan's PRC may be better positioned with an ability to critically evaluate the decision-making process in the prosecutor's office. The PRC is also empowered to examine and possibly reverse Korean prosecutors' non-indictment decisions involving U.S. military personnel. The article concludes that lay adjudication of military felons further strengthens the sense of geopolitical independence and sovereignty in Korea.

The article by Professor Mami Okawara presents a forensic linguistic analysis of a Japanese criminal case of complicity in a lay adjudication trial. After the introduction of the *Saiban-in* system in 2009, a mixed panel of professional and citizen judges presided over serious and violent criminal cases, including a complicity case where multiple accomplices were implicated in the same crime. Though different citizen judges were chosen for the trial of each accomplice in the complicity case, the professional judges presided over all trials of accomplices in the identical case. Using the court transcript, Okawara's article analyzes the danger of having the same professional judges in all the trials, thereby questioning the objective and impartial application of their judgment in each of complicity trials. The paper

[29] Sangjoon Kim, Jaihyun Park, Kwangbai Park & Jin-Sup Eom, *The First Three Years of the Korean Jury System: Judge-Jury Agreement in Criminal Cases*, 12 J. EMPIRICAL LEGAL STUD. (forthcoming 2013).

also analyzes the danger of excessive prosecutorial coaching of accomplices to serve as prosecution witnesses, and questions the authenticity of their testimony and statements. Professor Okawara recommends that lay judges be informed of professional judges' potential involvement in other complicity cases and the extent of prosecutors' contact and preparation of testimony by their witnesses.

Professor Mari Hirayama examines all sex crimes adjudicated by the *Saiban-in* panels for the first two years of its operation (n=208). She warns that not all sex crimes were tried by the *Saiban-in* panel. Many sex offenses such as indecent assault or grouping were placed outside the scope of the *Saiban-in* trial.[30] Nonetheless, her analysis finds that the severity of punishment rendered in sex crime trials was greater than the punishment in other criminal trials. She points out that lay judges' sentences exceeded prosecutors' recommended punishment in some sex crime cases. While many crime victims participated in sex crime trials, Professor Hirayama suggests that more research is needed on the effective use of victim participation programs in order to protect victims' privacy and facilitate the equitable proceeding of sex crime trials in Japan.

V. CONCLUSION

Today South Korea and Japan are major economic and political partners in East Asia. Research concerning the system of lay adjudication in Korea and Japan carries important theoretical and practical implications for how best to include lay citizens in legal decision making. In addition, there are important political dimensions to the reform. The recent introduction of lay participation systems in both Korea and Japan have created the potential for local residents to serve as lay judges to try military felons in their local courts, thereby creating an effective institution of checks-and-balances between the U.S. military forces and the local citizenry.

The Second East Asian Law and Society Conference, at which many papers in this Special Issue were discussed and presented, is thus a testimonial to the emergence of exciting scholarship and international collaboration among progressive researchers and critical scholars to engage in comparative and creative analysis and studies on the system of lay

[30] JAPANESE MINISTRY OF JUSTICE, WHITE PAPER ON CRIME 2008, Part 6, Section 2 (1) (Section 2: *Saiban-in* (Lay Judge) System) (2009), available at http://hakusyo1.moj.go.jp/en/57/nfm/n_57_2_6_0_2_1.html.

adjudication. Exciting research is emerging to answer a number of politically relevant research questions on the role and function of citizen participation in legal decision-making. The articles in this Special Issue thus illustrate the new and incisive ways in which comparative research and collaborative scholarship can inform domestic and international policies and democratic processes in Korea, Japan, and other neighboring countries in East Asia.

WHAT DIFFERENCE DOES A JURY MAKE?

Valerie P. Hans[*]

TABLE OF CONTENTS

ABSTRACT

A number of countries have introduced or proposed new methods of lay adjudication for their legal systems. This article addresses what differences might occur as a result. Drawing on theories of lay adjudication, the article identifies potential benefits and drawbacks of lay judge decision making, including both fact finding differences and broader effects. Empirical research findings suggest that introducing juries or lay judges as fact finders may lead to modest differences in case outcomes. Lay and professional judges are likely to overlap substantially in their trial judgments. When they diverge, in most instances, lay adjudicators are inclined to be somewhat more lenient than professional judges toward criminal defendants. As for broader effects, introducing a lay element into a previously all-professional legal system is likely to promote the credibility and legitimacy of the courts among members of the public. Finally, the experience of service as a lay juror or lay judge may increase other forms of political activity.

[*] Professor of Law, Cornell University Law School, Myron Taylor Hall, Ithaca, NY 14853 USA. Email: valerie.hans@cornell.edu. This article builds on and updates a previous effort of mine to understand the distinctive contributions of lay adjudication: Valerie P. Hans, *What Difference Do Juries Make?*, 105 EMPIRICAL STUDIES OF JUDICIAL SYSTEMS 2008 (Kuo-Chang Huang ed., 2009).

I. INTRODUCTION

There is a remarkable renaissance in the use of juries and other forms of lay participation worldwide. In recent years, in Asia and elsewhere, countries have revitalized or expanded their existing jury or mixed court systems, or have introduced new decision making bodies that include lay citizens as decision makers.[1] Historically, before the modern development and maturation of the legal profession, the use of lay citizens to decide legal cases was a widespread practice. Ordinary members of the local community were cheap and readily available to be conscripted into service as decision makers, and they possessed the additional advantage of knowing local norms and customs. Today, there are substantial numbers of lawyers and law-trained judges in most countries around the globe. Even though law-trained decision makers are plentiful, many countries have shown new interest in incorporating lay citizens into decision making bodies in their legal systems.

Several major approaches to employing lay citizens have been taken. In some countries, jury systems, where the decision making body is composed exclusively of laypersons, are used. In other nations, laypersons and professional judges decide together in mixed courts or mixed tribunals.[2] In some jurisdictions, lay judges or lay magistrates, either individually or together in panels, decide legal cases.[3]

Korea and Japan have taken distinctive paths in their efforts to expand lay participation in legal decision making. Korea introduced an advisory jury system during an experimental period that has now spanned four years.[4] Korean judges, lawyers, and court professionals worked to prepare the public and the courts for the introduction of the new jury system.[5] Korea's first jury trial in its history took place in February 2008.[6] The courts have

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[1] Nancy S. Marder, *An Introduction to Comparative Jury Systems*, 86 CHI.-KENT L. REV. 453 (2011).

[2] Valerie P. Hans, *Introduction: Citizens as Legal Decision Makers: An International Perspective*, 40 CORNELL INT'L L. REV. 303 (2007); Valerie P. Hans, *Jury Systems around the World*, 4 ANN. REV. L & SOCIAL SCI. 257 (2008); NEIL VIDMAR, WORLD JURY SYSTEMS (2000).

[3] DORIS M. PROVINE, JUDGING CREDENTIALS: NON-LAWYER JUDGES AND THE POLITICS OF PROFESSIONALISM (1986).

[4] Sang Hoon Han & Kwangbai Park, *Citizen Participation in Criminal Trials of Korea: A Statistical Portrait of the First Four Years*, YONSEI L. J. (this issue); Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Change?*, 12 ASIAN-PAC. L. & POL'Y J. 58 (2010).

[5] Kwangbai Park et al., *Preparing the Ground: The Case of Korea*, paper presented at the annual meeting of the Law & Society Ass'n, Baltimore, MD (July 7, 2007) (describing the research conducted by members of the Presidential Reform Commission). The survey data were published in Korean in: Presidential Committee on Judicial Reform, Republic of Korea, Reform for the Judicial Advancement: White Book (2007).

[6] *South Korea Holds Its First-Ever Trial by Jury as Part of Judiciary Reforms*, ASSOCIATED PRESS, Feb. 12, 2008, www.law.com; *Jury Bill Gets Parliamentary Go-Ahead*, DIGITAL CHOSUNILBO

systematically collected data from their bold experiment with direct democracy, and a picture of the first several years of Korea's advisory jury is beginning to emerge.[7]

In contrast, Japan introduced a mixed decision making body, *Saiban-in seido*, which is composed of lay and professional judges who decide on verdicts and sentencing decisions in serious criminal cases.[8] The first trial was held in 2009 and was accompanied by considerable publicity and acclaim.[9] The Japanese Supreme Court and Japanese and international scholars have accumulated a wealth of information about public reaction to *Saiban-in seido* and the outcomes of trials decided by the new tribunal. Taiwan's Judicial Yuan has proposed the implementation of *Guan Shen*, a lay observer system in which ordinary citizens will observe trials and share their views and perspectives with professional judges prior to the professional judges' determination of the verdict.[10]

This article aims to provide an overview, and to describe the changes – both benefits and detriments – that are likely to accompany these new uses of lay citizens as opposed to professional judges as legal decision makers. It presents empirical research findings from the US jury context and elsewhere that show what differences occur in practice when lay citizens are the decision makers.

II. BENEFITS AND DRAWBACKS OF LAY JUDGE DECISION MAKING SYSTEMS

There are two broad theoretical expectations about the effects of introducing a jury or a lay judge system. First, one might expect fact finding differences between lay judges and professional judges. These may occur whether the lay judges decide independently as

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(English Edition), May 1, 2007, http://english.chosun.com/w21data/html/news/200705/ 20070501 0023.html. *See also* Eric Seo, *Creating the Right Mentality: Dealing with the Problem of Juror Delinquency in the New South Korean Lay Participation System*, 40 VAND. J. TRANSNAT'L L. 265 (2007).

[7] Han & Park, *supra* note 4; Sangjoon Kim, Jaihyun Park, Kwangbai Park & Jin-Sup Eom, *The First Three Years of the Korean Jury System: Judge-Jury Agreement in Criminal Cases*, 10 J. EMPIRICAL LEGAL STUD. (forthcoming 2013).

[8] Zachary Corey & Valerie P. Hans, *Japan's New Lay Judge System: Deliberative Democracy in Action?*, 12 ASIAN-PAC. L. & POL'Y J. 72 (2010).

[9] *Id.* at 72-73.

[10] Mei-Tong Chen, participant in roundtable, The Role of Professionals in Lay Tribunals, presented at the International Law & Society Conference, Honolulu, HI (June 7, 2012) (describing the proposed lay observer system). For a description of a Taiwanese public opinion poll about the lay observer reform, see Kuo-Chang Huang, *How Do the Taiwanese Citizens Think of Lay Participation of Judicial Decision Making*, paper presented at the Asian Empirical Legal Studies conference, William S. Richardson School of Law, Univ. of Hawaii, Honolulu, HI (June 4, 2012).

members of a jury or collaboratively with professional judges in a mixed tribunal. These fact finding differences would be present in the cases decided by lay or professional judges. Second, in addition to expected differences in the outcomes of individual cases, there are also theoretical predictions that the inclusion of lay judges will create broader social and political effects. These might include effects on deterrence, education of the public, and increased legitimacy for the legal system.

Many of those who write about lay adjudication presume that lay and professional judges will decide cases differently. Interestingly, each is thought to bring particular advantages to the fact finding task. Professional judges are drawn predominantly from the elite in a society, are usually better educated, have specialized training in law and legal procedure, and have extensive experience in legal fact finding. In deciding on the outcome for a criminal offense, they will be able to draw on many prior experiences resolving similar kinds of cases. By possessing broad knowledge about different types of cases, they are better able to place the particular case before them in context.

Those who advocate lay adjudication see a strong advantage in the lay citizen's lack of specialized knowledge and experience. Lay citizens can act as a check on overzealous prosecution or a biased judiciary. Over the years, judicial fact finding becomes routine. Judges may become jaded, habitually favor one party or another, or jump to premature conclusions because of similar fact patterns in prior cases. Lay persons who decide a single case offer a fresh perspective. Because many lay decision making systems draw people from multiple subgroups in the community, a group of jurors or lay judges is more likely than elite judges to represent the range of views and attitudes of the community at large. Indeed, in most countries, judges are much less reflective of the population than juries or lay judges. This representativeness contributes directly to fact finding, because life experiences, views, and attitudes shape how people evaluate legal disputes.[11] The fact that lay fact finders are more likely to reflect the community's social and political characteristics helps to ensure that legal judgments are in line with community attitudes.[12] There are also other benefits that come from the group nature of the decision making. Lay citizens who decide in juries or mixed courts reach their decisions after deliberation. Because these groups include individuals who have diverse backgrounds and experiences, the deliberation of the case is

[11] NORMAN J. FINKEL, COMMONSENSE JUSTICE: JURORS' NOTIONS OF THE LAW (1995); NEAL FEIGENSON, LEGAL BLAME: HOW JURORS THINK AND TALK ABOUT ACCIDENTS (2000).

[12] FINKEL, *supra* note 11; John H. Langbein, *Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?*, 6 AM. B. FOUND. RES. J. 195 (1981).

likely to be rich and robust.[13] The deliberation provides an environment within which differing assessments of the evidence can be tested and refined.[14]

In sum, professional judges have the advantage of legal expertise, while lay judges bring a diversity of perspectives and a strong grounding in community norms to the fact finding task. All this presumes that judges and lay jurors decide cases with integrity. As in any profession, there is the possibility of corruption in the judiciary. Citizens offer some oversight.[15] Although lay citizens too can be subject to corrupt influence, there is less opportunity for systematic corruption, because the jury decides only one case or a small number of cases. They are not repeat players.

Beyond hypothesized differences in fact finding and potential corruption, there is a second broad set of theoretical propositions about the contributions of lay adjudication. Theorists have asserted that participation in judging – as either a juror or a lay judge member of a mixed court – promotes participatory democracy. It is said to educate the public about law and encourage other forms of political participation.[16] Ideas about the political significance of the jury have been around for centuries. The French political thinker Alexis de Tocqueville wrote two centuries ago about the American jury as an ever-open public school that educates the American public about the law.[17] From his perspective, serving as a juror helps to cement the bonds between a citizen and the state. Contemporary scholars likewise maintain that including citizens in mixed courts will have a democratizing influence.[18]

Greater legitimacy is a related benefit that is anticipated to come from involving lay citizens in decision making. When legal decisions are exclusively the province of legal elites, even if they reach decisions that are very similar to those that lay judges would reach, the legal elite's decisions may not be granted the same degree of credibility. Especially when the

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[13] JEFFREY ABRAMSON, WE THE JURY: THE JURY SYSTEM AND THE IDEAL OF DEMOCRACY 99-101 (Harvard Univ. Press 1994); *see also* NEIL VIDMAR & VALERIE P. HANS, AMERICAN JURIES: THE VERDICT (2007).

[14] Phoebe Ellsworth, *Are Twelve Heads Better than One?*, 52 LAW & CONTEMP. PROBS. 205, 206 (1989) (describing benefits of diversity on the jury); *see also* Samuel R. Sommers, *On Racial Diversity and Group Decision Making: Identifying Multiple Effects of Racial Composition on Jury Deliberations*, 90 J. PERSONALITY & SOC. PSYCHOL. 597 (2006) (demonstrating fact finding benefits of racial diversity).

[15] SANJA KUTNJAK IVKOVIĆ, LAY PARTICIPATION IN CRIMINAL TRIALS: THE CASE OF CROATIA (1999).

[16] *See generally* JAMES P. LEVINE, JURIES AND POLITICS (1992); *see generally* Richard Lempert, *A Jury for Japan?*, 40 AM. J. COMP. L. 37 (1992); *see also* Richard O. Lempert, *Citizen Participation in Judicial Decision Making: Juries, Lay Judges and Japan*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 1, 9-10 (2002).

[17] ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA, VOL. 1, 331-39 (Henry Reeve trans., Schocken Books 1961) (1835).

[18] IVKOVIĆ, *supra* note 15, at 31-62 (describing benefits attributed to lay participation).

court arrives at a politically unpopular decision, having lay citizen involvement is likely to provide some cover for judges and other legal and political authorities.[19]

The mixed tribunal presents something of a challenge for theorists. This form of lay participation combining professional and lay judges offers the potential of an ideal mix: the legal expertise of the professional members combined with the greater diversity and sensitivity to community norms of the lay members. But this happy state of affairs depends on the full participation of both professional and lay judges. If a legal system can achieve this state of equilibrium, then the decisions of a mixed court should combine the strengths and insights of both professional and lay judges. However, most scholars conclude that this is unlikely to occur because they presume that professional judges will dominate the less experienced and less legally knowledgeable lay judges.[20]

III. TESTING THE IMPACT OF A JURY OR LAY JUDGE SYSTEM

Taking a theoretical perspective, then, we predict that lay adjudicators will arrive at verdicts that are distinctive from those of professional judges in individual cases. We also expect that a jury or lay judge element in a legal system will produce salutary effects on public education and public support for the legal system. Testing whether jury systems and lay assessor systems actually achieve these purposes, though, is quite complicated.

Scholars have adopted a number of different research approaches to studying judge and jury decision making. Some scholars take an archival approach by studying patterns of decisions made by the two types of fact finders, and this can be quite informative. For example, in France during the Vichy regime, France's all-citizen jury system was transformed into a mixed court of professional and lay judges. Conviction rates increased following the change to a mixed court.[21] We need to be cautious, though, about concluding on the basis of these data alone that juries are more lenient than mixed courts with professional judges. Other factors, including changes over time in legal doctrines or legal procedures and other changes in the litigation landscape can lead to differences in case outcomes. Shifts in litigation strategies, and in decisions to proceed to trial or to settle a case, can change the composition

[19] NANCY MARDER, THE JURY PROCESS (2005).
[20] Sanja Kutnjak Ivković, *Exploring Lay Participation in Legal Decision Making: Lessons from Mixed Tribunals*, 40 CORNELL INT'L L.J. 429 (2007).
[21] Valerie P. Hans & Claire Germain, *The French Jury at a Crossroads*, 86 CHI.-KENT L. REV. 737 (2011).

of the cases heard by professional and lay judges and complicate the making of inferences about any differences that are found. A change in the decision maker – judge or jury – constitutes just one of multiple factors that might explain case outcomes. It seems especially likely that attorneys will adopt different approaches to cases they wish to take to trial when the decision maker is a jury versus a judge. They may share some of the expectations that theorists have about differential fact finding by the two types of decision makers. During the trial, attorneys might present different evidence or assert distinctive arguments, again relying on their presumptions about how professional and lay judges will react. In short, case selection is critical. The trials that judges and juries hear could be very different.

IV. EMPIRICAL TESTS OF PROFESSIONAL JUDGE AND LAY JURY DECISION MAKING

Comparing decisions reached by judges and juries, or professional judges and mixed tribunals, may not give us a clear picture of how the lay fact finder influences the outcome. One alternative approach to determining the jury's unique contributions to the legal system is to compare the actual verdicts of juries with the views of the professional judges who preside over their cases. We know that in a jury trial, the presiding judge is present in the courtroom. This is something that approximates a scientific control. In addition, the judge's perspective on the case is worthwhile. It allows us to compare the untutored judgment of the lay decision maker with the experienced approach of the professional judge. And, of course, the judge is the most likely alternative decision maker to the jury.

One informative line of jury research, then, compares outcomes in jury trials with the hypothetical verdicts and other judgments of the professional judge presiding over the trial. A substantial number of research projects have taken just this approach.[22]

A classic study of the American jury, by Harry Kalven, Jr. and Hans Zeisel, adopted this research angle.[23] They sent questionnaires to thousands of American judges, asking them to describe the details of the jury trials over which they presided, and to indicate how they would have decided each jury trial had it been a bench trial. Kalven and Zeisel analyzed the hypothetical decisions of the judges and the actual decisions of the juries to determine rates of agreement between judges and juries. The results were fascinating. In criminal cases,

[22] The work is summarized in VIDMAR & HANS, *supra* note 13, at 148-51.
[23] HARRY KALVEN JR. & HANS ZEISEL, THE AMERICAN JURY (1966).

judge and jury agreed on conviction for the defendant 64 percent of the time. In 14 percent of cases, they agreed on an acquittal for the defendant. Hence, the overall agreement on verdict was 78 percent. The remaining 22 percent of cases in which the judge disagreed with the jury verdict revealed a striking difference. In 19 percent of trials, the jury acquitted but the judge would have convicted. In 3 percent of trials, the judge would have acquitted but the jury convicted. This innovative study was the first to suggest that judge and jury overlap is likely substantial. But, importantly, when juries disagree with judicial inclinations, juries are likely to favor the defense.

This basic finding has now been replicated multiple times.[24] Replication studies built on the edifice created by the Kalven and Zeisel project, taking advantage of methodological and statistical developments. The Kalven and Zeisel project was limited to judges, whereas other researchers have surveyed both judges and juries (and, in some cases, attorneys), providing opportunities to compare judge and jury assessments of defendants and trial evidence as well as verdict preferences. Obtaining multiple jurors' responses to the same cases also offers insight into the range of individual responses and how they are combined into group judgments.

In one research project I conducted with collaborators from the National Center for State Courts, we gave questionnaires to judges, jurors, and attorneys in close to 400 felony cases from four jurisdictions in the USA.[25] The questionnaires asked jurors for their individual verdict preferences at the start and end of deliberations, and asked judges for the verdict they would have reached had they been deciding the case alone. In addition, questionnaires for both judges and jurors contained many of the same items, such as questions about the perceived strength of the evidence, ratings of the defendant and victim, and views about the complexity of the evidence and the law. Both judges and jurors rated the strength of the prosecution's case and the defendant's case on a 7-point scale that ranged from a low of 1 to a high of 7. That allowed us to compare how perceptions of the overall strength of the case overlapped or differed for individual jurors and for judges, and how those views were related

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[24] Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Mott & G. Thomas Munsterman. Are Hung Juries a Problem? Williamsburg, VA: National Center for State Courts (2002), http://www.ncsconline.org/WC/Publications/Res_Juries_HungJuriesProblemPub.pdf; Valerie P. Hans, Paula L. Hannaford-Agor, Nicole L. Mott & G. Thomas Munsterman, *The Hung Jury: THE AMERICAN JURY's Insights and Contemporary Understanding*, 39 CRIM. L. BULL. 33 (2003); Theodore Eisenberg, Paula L. Hannaford-Agor, Valerie P. Hans, Nicole L. Waters, G. Thomas Munsterman, Stewart J. Schwab & Martin T. Wells, *Judge-Jury Agreement in Criminal Cases: A Partial Replication of Kalven & Zeisel's THE AMERICAN JURY*, 2 *J. EMPIRICAL LEGAL STUD.* 171 (2005). For a summary of the multiple jury-jury agreement studies, see VIDMAR & HANS, *supra* note 13, at 150-51.

[25] Hannaford et al., *supra* note 24; Hans et al., *supra* note 24.

to the actual jury verdict or the hypothetical judge verdict in the case.

Not surprisingly, the judge's hypothetical verdict is closely associated with the judge's views about the strength of the evidence in the case. When judges evaluate the case as a weak one, judges mostly acquit the defendant. Likewise, in cases with strong evidence, judges tend to convict the defendant. A very similar pattern is found with juries. What is perhaps more surprising is that judges' and juries' evaluations of the case – and their resulting verdicts – are also strongly correlated. The *judge's* view of the evidence strength is also a strong predictor of the *jury's* verdict in the case.

However, the two types of fact finders tend to diverge in the cases that are evaluated as in the mid-range of strength. Here, the judge is more likely to convict the defendant than the jury. Compared to juries, judges are willing to convict in cases seen as less favorable to the prosecution. In fact, even when juries perceive the evidence as mostly favorable to the defense, judges are willing to convict over half the time. Thus, although there is considerable overlap in judge and jury assessments, juries seem to demand more evidence to convict than do judges. In short, juries appear to adopt a more generous view of the concept of reasonable doubt.[26] To estimate how much a difference having a judge or a jury makes on the verdict, we undertook statistical analyses to control for a number of other important factors, including case characteristics and juror characteristics. The analyses discovered that the marginal effect of a judge as decision maker compared to a jury as a decision maker is approximately a 12% increase in the likelihood of conviction.[27]

Studies of new systems of lay participation in East Asian countries provide an exciting opportunity to add to the body of research on professional and lay adjudication. In Japan, the introduction of the mixed tribunal *Saiban-in seido* added lay members to the decision making body. The criminal defense bar anticipated the possibility that including lay members to the tribunal might shift what they considered to be the strong prosecution proneness of the professional judiciary.[28] However, only a handful of acquittals have resulted and no change in the extraordinarily high 99% conviction rate has been observed.[29] As with the comparison of judge and jury verdicts in the US, where case selection is an important variable that complicates direct comparisons of conviction rates, whether or not the *Saiban-in* are deciding

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[26] Eisenberg et al., *supra* note 24, at 194–96.
[27] *Id.* at 196.
[28] Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315 (2007).
[29] Makoto Ibusuki, '*Quo Vadis?' First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 25 (2010).

the same universe of cases as professional judges once did is open to debate. Prosecutors have been extraordinarily cautious, reportedly bringing only strong cases to the *Saiban-in*.[30]

The Korean advisory jury reform offers a stronger test of the difference between judge and lay decision making on verdicts. Here, we can be confident that both judge and lay decision makers are deciding the same set of cases. As Han and Park report, Korean judges agree with the advisory jury in a very substantial 91% of the criminal trials with jury participation.[31] In the infrequent cases in which they disagree, the disagreement is quite asymmetrical. In 50 of the 54 cases in which the judges disagreed with the jury's advisory verdict, the juries advised an acquittal but the judges convicted the defendants. The judges overrode the jury's advisory verdict of conviction with an acquittal in just 4 of the inconsistent cases.[32]

V. COMMON SENSE JUSTICE OF THE JURY

There is a recurring joke about juries that helps to illustrate the circumstances under which judge and jury verdicts might differ. The jury considers the justice of the situation, but it is "common sense" justice rather than the formal legal system's application of justice. Consider the following joke about a Tennessee jury that heard evidence in a criminal trial about the defendant's theft of a mule:

> As the proof developed in the trial, the evidence was rather overwhelming that the man in fact did steal the mule. But the proof also showed that the defendant was basically an honorable and decent fellow who was really down on his luck and desperately needed the mule to help him on his family farm. After deliberating, the jury returned and the foreman announced the verdict: "Not guilty, but he has to give back the mule." The wise and learned judge said, "ladies and gentlemen of the jury, I must reject your verdict. It is an inconsistent verdict, and I must request that you resume your deliberations and return a consistent verdict." The jurors looked at one another and then filed back into the jury room. Five minutes later they returned. "Have you reached another verdict?" inquired the judge. "Yes, we have, Your Honor," reported the

[30] *Id.*
[31] Han & Park, *supra* note 4.
[32] *Id.* at 63.

foreman. "Not guilty and he can keep that mule!"[33]

Like the mule thief's humorous case, in some circumstances the strict application of legal rules might not lead to the appropriate result. Sometimes, circumstances arise that lawmakers did not anticipate, or there are contextual factors that make a conviction an undesirable outcome. Judges are bound to follow the law, wherever it leads, but juries can apply a dose of common sense as they interpret the evidence and apply the law. In common law jurisdictions, juries need not explain their verdicts in most criminal cases. Therefore, if juries apply common sense in a way that deviates from the strict legal requirements, it may remain subterranean. That is not likely to be possible in a mixed court where professional judges will presumably insist on strictly applying the law.

Jury research has explored the extent to which jurors incorporate common sense into their legal judgments.[34] In a number of ways, the jury (or a group of lay judges on a mixed court) constitutes an ideal body for the injection of community sentiment. Communities are heterogeneous, differing along many dimensions such as gender, race, ethnicity, religion, and income. If the selection system succeeds in drawing broadly from these multiple subgroups in a community, the deliberation allows for the exchange of diverse perspectives on the case. In this way, the community's ideas about what is fair and just in a case is injected into the process of jury and lay judge decision making.

Theoretical and empirical work on the story model of juror decision making suggests that jurors develop a narrative account, or a story, of the case.[35] Jurors process evidence presented during the trial, arranging it into a coherent story about what happened. Jurors draw on their own world knowledge, previous experiences, preconceptions, and beliefs to construct the story. They are also inclined to fill in gaps and resolve conflicts in ways that are consistent with the overall story. At the end of the trial, jurors match the available verdict options (guilty, not guilty, guilty of a lesser offense) to the story they have developed. Because jurors draw on their own experiences and beliefs as they construct the narrative story of the case, this provides a vehicle for community standards and expectations to be

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[33] Valerie P. Hans, *Jury Jokes and Legal Culture*, paper presented at the 18th Annual Clifford Symposium, A Celebration of the Thought of Marc Galanter, DePaul College of Law, Chicago, IL (Apr. 26, 2012) (quoting a joke from ROY HERRON & L.H. "COTTON" IVY, TENNESSEE POLITICAL HUMOR: SOME OF THESE JOKES YOU VOTED FOR (2000)).

[34] FINKEL, *supra* note 11.

[35] Reid Hastie, *What's the Story? Explanations and Narratives in Civil Jury Decisions*, *in* CIVIL JURIES AND CIVIL JUSTICE: PSYCHOLOGICAL AND LEGAL PERSPECTIVES 23-34 (Brian H. Bornstein, Richard L. Wiener, Robert F. Schopp & Steven L. Willborn eds., 2008).

incorporated into verdicts. An interesting question is whether judges also approach legal fact finding with a story model approach. If they do, judges' world knowledge, experiences, and attitudes are likely to differ from those of jurors. Hence, we would expect at times that judge and jury narratives would differ.

Both judges and jurors may be biased by evidence and extra-legal factors in criminal trials. There is a widespread presumption that juries are more susceptible to bias than professionally trained judges. Perhaps judges' extensive training and experience do help to counteract common forms of bias. As suggested earlier, it could create bias too. As experienced fact finders, judges might become jaded over time, or may jump quickly to conclusions in a current case based on familiar patterns. We know that political scientists studying appeals court outcomes have found differences in selected case outcomes for Republican versus Democratic judges.[36] Researchers who have studied judicial decision making have found judges are prone to some of the same influences that affect lay adjudicators. For example, both judges and jurors are biased by a defendant's criminal record information, even when they are explicitly told to disregard it.[37] Judges and jurors both show the common human tendency called the hindsight bias, in which the outcome of an action influences how the person perceives that action.[38]

In sum, both judges and jurors are undoubtedly influenced by their backgrounds, life experiences, beliefs, and attitudes as they engage in legal fact finding. Both are affected by some extra-legal factors. Although commonalities of background and perspective may lead judge and jury to overlap in many cases, jurors bring a common sense justice approach into the law which at times may diverge from a judicial approach.

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[36] JEFFREY A. SEGAL & HAROLD SPAETH, THE SUPREME COURT AND THE ATTITUDINAL MODEL REVISITED (2002).

[37] Stephan Landsman & Richard Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994) (judges); Theodore Eisenberg & Valerie P. Hans, *Taking a Stand on Taking the Stand: The Effect of a Prior Criminal Record on the Decision to Testify and on Trial Outcomes*, 94 CORNELL L. REV. 1353 (2009) (jurors).

[38] DANIEL KAHNEMAN, THINKING, FAST AND SLOW (2011); Chris Guthrie, Jeffrey J. Rachlinski & Andrew J. Wistrich, *Inside the Judicial Mind*, 86 CORNELL L. REV. 777 (2001) (demonstrating judges' susceptibility to common cognitive biases); *but see* Jeffrey J. Rachlinski, Chris Guthrie & Andrew J. Wistrich, *Probability, Probable Cause, and the Hindsight Bias*, 8 J. EMPIRICAL LEGAL STUD. 72 (2011) (showing that judges can resist some common cognitive biases in making certain decisions).

VI. PUNISHMENT DIFFERENCES

Another important question is whether judges and juries prefer different criminal punishment. The judge-jury verdict agreement studies in criminal trials suggest that there is substantial overlap in the factors considered and decisions reached by judges and juries, but when they disagree, lay persons tend to be somewhat more lenient. Although in other countries it is not uncommon for professional and lay judges to decide on both guilt and sentence collaboratively in mixed courts, jury sentencing in the United States is mostly limited to the capital punishment context.[39] In the handful of U.S. jurisdictions with felony jury sentencing, prosecutors have used the fear of punitive juries to encourage plea bargaining with felony defendants.[40]

Looking more directly at the studies of capital decision making in the United States, there is some evidence pointing to the likelihood that a jury capital sentencing regime may be more favorable to defendants than a judge or hybrid approach. For example, consider judicial overrides of life recommendations when the state permits it. Michael Radelet's examination of judicial overrides in the small number of states that allow judges to overturn jury determinations of life or death sentences show that the bulk of the overrides are judicial impositions of the death penalty after jury recommendations of life imprisonment.[41] In Florida, the jury makes an advisory recommendation to the judge, who has the final say. Florida judges have overridden jury recommendations for life and imposed death 166 times; they have imposed life when the jury recommended death 91 times.[42] In Alabama, judges have overridden 98 jury decisions favoring life but only 9 jury recommendations of death.[43]

In a current research project, my Cornell Law School colleagues and I are using the change over time in the state of Delaware's death penalty procedure to examine what

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[39] Nancy J. King & Rosevelt E. Noble, *Felony Jury Sentencing in Practice: A Three-State Study*, 57 VAND. L. REV. 885 (2004) (describing a small number of states that use jury sentencing outside the capital punishment context); Hans, *Jury Systems around the World*, *supra* note 2 (describing use of lay and professional judge decision making about guilt and sentencing in other countries); VIDMAR, *supra* note 2 (2000) (also describing use of lay and professional judge decision making about guilt and sentencing in other countries).

[40] King & Noble, *supra* note 39.

[41] Michael L. Radelet, *Overriding Jury Sentencing Recommendations in Florida Capital Cases: An Update and Possible Half-Requiem*, 2011 MICH. ST. L. REV. 798 (2011).

[42] *Id.* at 795. However, Radelet observes that the last judicial life-to-death override occurred in 1999, suggesting the practice has fallen out of favor. *Id.*

[43] Equal Justice Institute, The Death Penalty in Alabama: Judge Override, http://eji.org/eji/files/Override_Report.pdf (July 11, 2011).

difference a jury makes in capital punishment.[44] Our project examines time patterns from 1977 to 2007, a thirty year period of capital punishment. In Delaware, starting in 1977, juries decided whether a capital defendant should be sentenced to death or life in prison. They had to be unanimous to recommend a death sentence. Very few death sentences occurred during this period. However, after a notorious capital trial in 1991, in which the jury could not agree unanimously on death sentences for four defendants who were convicted of murdering two armored truck guards, the legislature changed the procedure. In the revised procedure, juries provide only an advisory recommendation to the judge, who makes the binding decision. This hybrid approach bears some similarity to Korea's current advisory jury system. Finally, in 2002, the US Supreme Court decided an important case that reasserted the role of the jury in capital trials.[45] This required an additional change in Delaware's procedure. To preserve the jury's role in determining whether the case was eligible for a death sentence, the Delaware capital jury is required to determine, unanimously and beyond a reasonable doubt, the existence of at least one statutory aggravating factor. Once the jury finds at least one statutory aggravating factor, the jury provides an advisory recommendation and the judge makes the binding decision.

The Delaware experience allows us to take advantage of naturally occurring variation to observe the difference it makes to have a judge or a jury as the final sentencer. The comparison is striking. Until the shift to greater judge involvement in sentencing in 1991, Delaware's death sentence rate did not differ much from those of other states. However, once judges became the key decision makers in capital punishment, Delaware's rate became high and volatile through 2002. In 2002, following the key Supreme Court decision, Delaware's rate declined. Even so, if we compare the death sentencing rate under judge and jury regimes, there is a significant difference. Replacing the jury with a judge made a substantial and significant difference, increasing the likelihood of a death sentence.

These punishment patterns reinforce the conclusions of the judge-jury agreement studies that lay decision makers – at least in the US - tend to be more lenient than professionally trained judges. Of course, even if jury sentencing is more likely to be favorable to defendants in many capital cases, there are other cases – cases with highly unpopular defendants, or those involving mental illness or mental retardation defenses - in which judicial determinations might be more favorable to defendants.

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[44] Sheri Lynn Johnson, John H. Blume, Theodore Eisenberg, Valerie P. Hans & Martin T. Wells, *The Death Penalty in Delaware: An Empirical Study*, IOWA L. REV. (forthcoming).
[45] Ring v. Arizona, 536 U.S. 584 (2002).

In the future, as more data accumulate, it will be interesting to observe whether lay participation changes punishment choices in the Japanese, Korean, and Taiwanese systems. One distinctive feature of the Japanese system is that each *Saiban-in* panel reviews a chart of previous sentences before they reach a decision in the current case. The chart review may reduce the likelihood of change over time.

Nonetheless, Mari Hirayama observes that the sentencing in cases of sexual assault under the *Saiban-in* regime appears to have shifted toward greater severity.[46] Whether the increased severity is due to the participation of lay *Saiban-in* is open to debate. There are more women on the *Saiban-in* panels than on panels consisting of professional judges only. A substantial body of research confirms that men and women tend to take different perspectives in trials of sexual assault, with women finding victims more credible and believable.[47] This gender difference in the composition of the fact finding body might help to explain an observation of greater severity of punishment. But another legal change occurred about half a year prior to the introduction of *Saiban-in seido* – victim participation in trials.[48] Victims are now entitled to participate in the criminal trial, question witnesses, and provide statements about the impact the crime has had on them. Any increased severity in sentencing might well be due to the enhanced role of crime victims.

VII. LEGITIMACY

One strong motivation for introducing new lay adjudication systems is to produce change at the societal level. Low regard and negative public views of the judiciary and the legal system have stimulated activists in many countries to call for the inclusion of lay fact finders. Citizen participation in legal decision making is said to improve public understanding of law and legal procedure, produce greater support for verdicts, and enhance legitimacy of the judiciary and the legal system.[49] Democracy is also thought to be strengthened. As citizens engage directly in one civic activity, they may be more likely to

[46] Mari Hirayama, *Lay Judge Decisions in Sex Crime Cases: The Most Controversial Area of Saiban-in Trials*, YONSEI L.J. (this issue).
[47] VALERIE P. HANS & NEIL VIDMAR, JUDGING THE JURY (1986) (citing gender differences in rape and sexual assault cases).
[48] Valerie P. Hans, *Juries and the Impact of Victim Participation in Criminal Trials: Insights from the American Experience*, paper presented at the 16th World Congress of the Int'l Soc'y for Criminology, Kobe, Japan (Aug. 7, 2011); Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT'L J. L. CRIME & JUST. 149, 151-53 (2010).
[49] Corey & Hans, *supra* note 8.

engage in others.[50]

We noted earlier that it was challenging as a scientific matter to determine the differences between lay judges' and professional judges' fact finding. The scientific challenge of determining whether lay participation has broader societal-level effects is even more substantial. A host of variables contribute to views and perceptions of a nation's legal system. In existing systems of lay adjudication, such as the common law jury system or the mixed courts of Germany, the systems have been in place for centuries and it may be impossible to tease apart the distinctive effects of the jury or the lay judges. Even in countries with new systems where it should be easier to identify potential effects, other new programs and new laws may be introduced and complicate the determination of causality. We saw this in Japan, where a new law expanding victim participation was introduced shortly before *Saiban-in seido*.

As a starting point in our inquiry, it is useful to assess how individuals who participate directly as jurors or lay assessors respond to the experience. Post-trial surveys of those who have served in juries in the US regularly show very positive assessments of their jury service; what is more, jurors report that they have more favorable attitudes toward the courts and the jury system as a result of their service.[51] In one large study of over 8,000 US jurors from 16 federal and state courts, 63% said that their view of jury service was more favorable after serving.[52] Other studies find that jurors are more apt to say that they see the courts as fair, assessing the justice and equity of the legal system more favorably.[53] Public opinion about the jury also tends to be quite favorable. In countries with long-standing jury systems, surveys reveal that the jury is evaluated highly, even though on occasion the public concludes that an individual high profile jury trial is wrongly decided.[54] Nations with new jury systems show greater volatility in public support, and favorability toward the jury can be driven down by a single high profile jury verdict with which the public disagrees.[55]

A fascinating project has explored whether and how citizen participation in legal fact finding promotes other forms of civic engagement. The Jury and Democracy Project was developed to expand insights from a line of theory and research on deliberative democracy.[56]

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[50] *Id.*
[51] Shari Seidman Diamond, *What Jurors Think: Expectations and Reactions of Citizens Who Serve as Jurors*, *in* VERDICT: ASSESSING THE CIVIL JURY SYSTEM 282, 284–86 (Robert E. Litan ed., 1993).
[52] *Id.* at 285.
[53] *Id.* at 286.
[54] Hans, *Jury Systems around the World*, *supra* note 2.
[55] *Id.*
[56] The Jury and Democracy Project, http://depts.washington.edu/jurydem/index.html.

The essential idea behind deliberative democracy is that citizen involvement in face-to-face debates over political issues offers a useful vehicle for encouraging meaningful civic engagement. The relationship to jury service is obvious. The Jury and Democracy Project researchers have done several research projects to study the links between jury service and other forms of civic engagement, most notably voting.[57]

In an initial study, researchers analyzed the statistical relationship between voting and jury service. They compared pre- and post-jury service voting of approximately 800 jurors who served in criminal cases in Thurston County, Washington. Jurors who deliberated on a jury and reached a verdict in criminal cases voted more frequently than would have been expected given their previous voting records.[58]

In subsequent work, the project was expanded to seven additional counties and thousands of jurors who served across the US.[59] The combined data set of all eight counties included over 13,000 jurors. This substantial and diverse sample allowed the researchers to attempt to replicate the basic finding and to explore the effects of different types of jury experiences.

Jurors with a low record of prior voting showed a statistically significant voting effect from their experience serving on a criminal jury that deliberated, whether the jury was able to reach a verdict in the case or not. These individuals had been only minimally engaged prior to their jury service, and jury duty boosted their likelihood of voting. Jurors who regularly voted before their jury service were not influenced; they continued to vote regularly after jury service, and no boost was found. Finally, the voting effect was found in criminal cases but not in civil trials.[60] Thus, the research confirms that a meaningful deliberative experience as a legal fact finder can boost other forms of civic engagement and political participation. The data we have so far suggest that the civic engagement effect depends on the type of jury experience and an individual's prior level of political activity.

Although to date there are no comparable studies of lay adjudication and other forms of civic engagement in other countries, Hiroshi Fukurai's important work on the Japanese grand jury system reveals some striking effects for citizen participation in this form of lay

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[57] *See generally* THE DELIBERATIVE DEMOCRACY HANDBOOK: STRATEGIES FOR EFFECTIVE CIVIC ENGAGEMENT IN THE TWENTY-FIRST CENTURY (John Gastil & Peter Levine eds., 2005).
[58] John Gastil, E. Pierre Deess & Phil Weiser, *Civic Awakening in the Jury Room: A Test of the Connection Between Jury Deliberation and Political Participation*, 64 J. POL. 585, 591-92 (2002).
[59] JOHN GASTIL, ET AL., THE JURY AND DEMOCRACY: HOW JURY DELIBERATION PROMOTES CIVIC ENGAGEMENT AND POLITICAL PARTICIPATION (2010).
[60] *Id.*

adjudication.[61] Fukurai discovered that Japanese citizens who were members of the grand jury evaluating the non-indictment decisions of prosecutors increased their positivity toward the Japanese legal system. This suggests that the experience of direct engagement with other grand jurors about this legal determination is a positive one for those who are involved, and it works to help legitimize the legal system in Japan. Ivković also found that lay members of Croatian mixed tribunals reported very positive views of the institution.[62]

Although work on societal level effects is not as frequent as work on fact finding differences, new projects that specifically address these potential effects in the recently introduced systems in East Asia offer great promise from both scientific and practical perspectives. There are some suggestive results, although it is early. In both Korea and Japan, lay judges and jurors report being very positive about their experiences. In Korea, 63% of jurors who were surveyed by the court reported more positive feelings after jury service; just 2% said they felt more negatively.[63] Similarly, in Japan, 94% of the lay judges reported that their service was a "good experience." Japan's lay judges are often active participants at trial, questioning witnesses directly. Many lay judges participate in the regular press conferences that follow the trials.[64] The Japanese public also seems to have attended more to *Saiban-in* trials. A 2011 public opinion survey undertaken by the Supreme Court of Japan discovered that trials and the justice system have become more familiar (increasing from 9% to 68%); trial processes and content are seen as more comprehensible (6% to 45%). Judgments of trial outcomes, though, remain unchanged, with their fairness rated positively 46% before and 47% after the introduction of *Saiban-in seido*.[65]

VIII. CONCLUSION

This article has attempted to summarize what we currently know about the differences that lay adjudication brings to a legal system. Some of the efforts to introduce new systems of citizen participation in the legal systems of Asian countries are motivated by ideas about what

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[61] For evidence that participation in Japanese grand juries enhanced regard for the justice system, see Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: Cross-National Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT. L. J. 315 (2007).

[62] Ivković, *supra* note 20.

[63] Valerie P. Hans, *Lay Citizens and Legal Decision Making Around the World: Insights for Taiwan's Proposed System*, colloquium presented at College of Law, Nat'l Taiwan Univ., Dec. 12, 2011.

[64] *Id.*

[65] *Id.*

lay voices might contribute to case deliberations and case outcomes. I tried to highlight what empirical research suggests about the differences between lay and legally trained judges. Research that compares judge and jury decisions finds that in many cases, having a jury or mixed tribunal decide the case instead of a professionally trained judge might not make much difference in the case outcome. The evidence indicates that juries are generally competent fact finders, and their verdicts overlap substantially with those that a professional judge would reach. Instances in which the two fact finders disagree, however, show a consistent pattern. Jurors appear to require more evidence to convict a defendant, and as a result, the jury verdict is more likely to favor the defendant. Jurors and professional judges have divergent backgrounds, education, and experiences, all of which lead them to evaluate the case somewhat differently. The jury's experiences are likely to reflect to a greater degree the common sense justice of the community. Finally, there are tantalizing new findings about the legitimizing influences of the presence of a jury in a legal system, and the ways in which jury service itself helps to promote political engagement, suggesting its value as a democratizing influence too.

This is a remarkable moment that offers new opportunities to expand our understanding of citizen participation. The introduction and expansion of new systems of lay participation – like the new jury system of Korea, *Saiban-in seido* in Japan, and the lay observer system proposed for Taiwan - offer unparalleled opportunities to do scientific tests of the effects of lay adjudication. Careful survey research studies can track general social and political support for government, the rule of law, and the legal system before and after the introduction of a jury system. Claims that jury service promotes civic engagement can be tested on populations that are newly introduced to the opportunity to participate directly in legal decision making. The work on new lay participation systems will be challenging, of course, but it is a truly wonderful opportunity to understand how this form of democratic participation can best support the interests of justice. All of this work will enable us to better answer the question in the title of this piece: What difference does a jury make?

KEYWORDS

Jury, Lay Judge, Mixed Court, *Saiban-in seido*, Advisory Jury, Lay Observer System, *Guan shen*, Legal Decision Making, Judicial Decision Making, Deliberative Democracy, Legitimacy, Empirical Research, East Asia, Japan, Korea, Taiwan

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CITIZEN PARTICIPATION IN CRIMINAL TRIALS OF KOREA: A STATISTICAL PORTRAIT OF THE FIRST FOUR YEARS*

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ABSTRACT

Participatory trial (jury trial) was introduced to South Korea in 2008 by the "Act on Citizen Participation in Criminal Trials" to enhance the public confidence in the judicial system. The Supreme Court of Korea, concerned about the negative public sentiments against the judiciary and motivated to increase the transparency of trials by strengthening the principle of oral proceeding in open court, is currently driving a policy to facilitate secure implementation of the new trial system and expand its scope of eligibility to all cases that are traditionally assigned to a panel of three judges. Accordingly, an additional courtroom designed for participatory trials is currently under construction in each of the 18 district courts throughout the country. The present paper evaluates the participatory trials with juries in South Korea for the last 4 years since its first introduction in 2008 by looking at the statistical trends and suggests some possibilities for further improvements.

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In part 2 of this paper we analyze a total of 574 criminal cases which have been tried with jury in Korea since 2008 in terms of request, withdrawal of the defendant, or exclusion of the court, jury size, jury selection process, deliberation, verdict, and appeals by the prosecution and/or defendant. In part 3, the paper discusses important issues that may arise this year when the Committee for Citizens' Participation in the Judicial System will be formed by the Supreme Court of Korea to discuss and decide a bill about the final form or type of lay participation in criminal trials.

I. INTRODUCTION

Two recent movies based on real criminal trials attracted enormous popularity in South Korea. SILENCED(도가니, Samgeori Pictures 2011), directed by Hwang Donghyuk, highlighted corruption among judicial officials and lenient punishment for teachers who raped disabled children in a special education facility over a period of years. Within five days of the film's release, more than one million people bought tickets to watch the movie. Another movie, UNBOWED (부러진 화살, Aura Pictures 2012), directed by Cheong Jiyoung, was released in January 2012 to even greater commercial success. Unbowed tells the story of a former mathematics professor who confronted an appellate judge with a crossbow in his hand at the gate of the judge's residence. The professor's legal struggle for 12 years to reverse the denial of tenure appointment by his university was ultimately decided against him by an appeals court presided over by the judge. During a brief physical struggle, the crossbow was fired and allegedly injured the appellate judge in the abdomen. But the judge's inner shirt showed no sign of blood from an arrow; an arrow stained with the judge's blood was never found; and the appellate judge refused to show his wound in court. Nonetheless, the former professor was convicted in a non-jury criminal trial. The film raises questions about the evidence presented at trial, and dramatically portrays the trial proceedings in which the court handled the defendant's motions and objections in an extremely biased and authoritarian manner.

The popularity of both movies reflects grave public distrust of the fairness and integrity of the judiciary.[1] According to a recent survey by a legal watchdog, 77 percent of respondents

[1] *Movie Sheds Light on Distrust in Judiciary*, KOREA TIMES, Jan. 20, 2012, http://www.koreatimes.co.kr/www/news/nation/2012/01/117_103276.html. *See also Judiciary Under Attack*, KOREA TIMES, Jan. 27, 2012, http://www.koreatimes.co.kr/www/news/bizfocus/2012/03/376103600.html

believed that the Korean justice system is unfair.[2]

Participatory trial (jury trial) was introduced to South Korea in 2008 by the Gukmin-eui Hyongsa Jaepan Chamyeo-e Gwanhan Beobryul [Act on Citizen Participation in Criminal Trials], Act. No. 11155, Jan. 17, 2012 ("the Act" hereafter) to enhance public confidence in the judicial system. Under the current Act, the verdict of the jury is not binding on the judge, and the judges and the jurors deliberate partly together, so the Korean system should be called "trial with jury" rather than "trial by jury" that is found in common law countries such as the USA and Great Britain. Another key feature of the Korean jury trial is that the defendant's consent is required. The court shall ask a defendant in an eligible case whether he or she requests a trial with the participation of the jury. The Supreme Court of Korea, concerned about the negative public sentiment against the judiciary and motivated to increase the transparency of trials by strengthening the principle of oral proceedings in open court, is currently supporting the full implementation of the new trial system and working to expand its scope of eligibility to all cases that are traditionally assigned to a panel of three judges. Accordingly, an additional courtroom designed for participatory trials is currently under construction in each of the 18 district courts throughout the country.[3]

This article describes statistical trends in the use of participatory trials with juries in South Korea during its first four years of implementation, and suggests some possibilities for further improvements.

II. STATISTICS AND TRENDS

A. REQUEST, WITHDRAWAL, AND EXCLUSION

The defendant shall submit a written statement, describing whether he/she requests a participatory trial, within seven days from the date on which a duplicate of the indictment is serviced or before the first day of pretrial proceeding (Art. 8 of "the Act"). If the defendant fails to submit a written statement, it is assumed that the defendant does not request a participatory trial. The defendant may change his/her previously stated intention before the

(suggesting that Koreans usually view politics, government, and the judiciary as corrupt). *See also S. Koreans View Society and Government as Corrupt, Study Shows*, HANKYOREH, Dec. 10, 2011.

[2] *U.S. Prosecutor Shares Jury System Know-how*, KOREA HERALD, Feb. 19, 2012, http://view.Koreaherald.com/kh/view.php?ud=20120219000220.

[3] *Toward the Communicative Court*, LAW TIMES, Mar. 12, 2012 (in Korean).

initial (preparatory) proceeding of a trial begins.

Table 1 Number of requests for participatory trial and exclusions by the courts

Year	Request	Processed				In progress
		Withdrew	Tried with jury	Excluded	Total	
2008	233	90	64	61	215	18
2009	336	138	95	75	308	46
2010	437	176	162	75	413	70
2011	484	178	253	63	494	60
Total	1,490	582	574	274	1,430	60

Source: The Supreme Court of Korea (unpublished)

Table 1 shows the number of defense requests for the jury trial and reveals that the number of requests has increased steadily over the first four years: 233 cases in 2008, 336 cases in 2009, 437 cases in 2010, and 484 cases in 2011. However, defendants may withdraw their requests at a later time, and courts may determine that the case is unsuitable for jury trial. Table 1 shows the numbers in each of these categories as well.

Table 2 Numbers of eligible, requested, withdrawn, excluded, and tried with jury cases by offense type

Case	Homicide(including. attempt)	Battery, injury	Robbery (resulting in death)	Violent Sex Crime	Other	Total
Eligible	3,237 (14.8%)	844 (3.9%)	6,371 (29.1%)	8,280 (37.8%)	3,180 (14.5%)	21,912 (100%)
Requested	352 (23.6%)	86 (5.8%)	394 (26.4%)	329 (22.1%)	329 (22.1%)	1,490 (100%)
Withdrawn	105 (18.0%)	26 (4.5%)	155 (26.6%)	148 (25.4%)	148 (25.4%)	582 (100%)
Excluded	38 (13.9%)	13 (4.7%)	76 (27.7%)	82 (22.1%)	65 (23.7%)	274 (100%)
Tried with jury	209 (33.0%)	47 (7.4%)	163 (25.7%)	99 (15.6%)	116 (18.3%)	634 (100%)

Source: The Supreme Court of Korea (unpublished)

Table 2 breaks down these data further by the type of case. Felony cases are eligible for the participatory trial. Among the 21,912 eligible cases, defendants requested a trial with a jury in 6.8% (1,490) of the cases. Interestingly, defendants were seemingly more reluctant to request a trial with a jury in violent sexual assault cases. Defendants withdrew their requests in 39.1% (582) of the cases in which they originally made requests, and another 18.4% (274) were excluded by the courts. Thus, the number of cases that were actually tried with jury was 634 (42.6% of the requests), including 60 cases that are currently in progress. Overall, 2.89% of all eligible cases have been heard by a trial with a jury.

Tables 3 and 4 identify the reasons the courts provided for ruling that a trial with a jury was inappropriate. Article 9 of the Act provides that a court may decide not to proceed to a trial with jury for a period after the indictment is filed and before the preparatory proceeding ends. Article 11 of the Act provides that the court may decide to remove the case from the participatory trial and transfer it to a collegiate panel of a competent district court. Exclusion by Article 9 is made before the participatory trial convenes, while a transfer for "ordinary proceeding" (bench trial) by Article 11 is made at a point during the proceeding of a participatory trial.

Table 3 Clauses applied by the courts for exclusion

Clause	Number of Excluded Cases
9-(1)-1: Risks for the safety and fairness of jurors	1 (0.4%)
9-(1)-2: Accomplices opting against participatory trials	41 (15.0%)
9-(1)-3: Other reasons	232 (84.7%)

Source: The Supreme Court of Korea (unpublished)

Table 3 shows that the third clause ("other reasons for inappropriateness") was used by the courts most frequently to exclude the cases from the participatory trial. Table 4 shows that the defendant's intention to withdraw, the refusal of the victim (of a sex crime), and the absence of a particular issue or argument were the most frequent reasons for the inappropriateness

Table 4 Reasons for judicial determination of a case's inappropriateness for the participatory trial

Reason		Number
Defendant's side	Intention to withdraw (D's change of mind)	85
	Incompetence	12
	Expectation for additional indictments against the D	7
	Expectation for prolonged detention of the D	6
	Disease or illness	9
	Uncertainty of the D's attendance for trial	3
	Unpredictability of the D's demeanor	3
	Failure to file the request on time	2
Subtotal		127
Witness's side	Victim of Sexual crime	31
	Crime against family members	5
	Others	21
Subtotal		57
Case specification	No argument between the parties	43
	Complication with difficult issues or many witnesses	21
	Case with little consequence	6
	Not eligible for citizen participation trial	7
	Excessively gross and cruel crime	2
	The case being subject to dismissal (withdrawal of indictment)	9
	Court's assignment to a bench trial	9
Subtotal		97

Note. Only the major reason for the exclusion of a case was counted. When multiple major reasons were specified, all of them were counted separately. When both the victim and the defendant in a case of sex crime refused the participatory trial, the case was counted in the "Witness" category.
Source: The Supreme Court of Korea (unpublished)

B. CONFESSIONS

A defendant who makes a confession can also be tried with jury because the jury can recommend a sentence to the judge. Among the 574 participatory trials that have been concluded, in 167 cases (29.1%) the defendant confessed to the primary offense.[4] The percentage of confession cases was 28.1% in 2008, 29.5% in 2009, 22.2% in 2010, and 50.9% in 2011.

C. JURY SELECTION

The number of jurors serving for a participatory trial can be 5, 7, or 9 depending on the severity of the offense (Article 13 of the Act). Table 5 shows that the percentage of the cases tried with 5 jurors was 9.9%, with 7 jurors was 57.1%, and with 9 jurors was 32.9%. Among the confession cases, 61.1% (102) were tried with 7 jurors.

Table 5 Number of cases of each jury size, and average numbers of summons and show-ups

Jury Size	Number of Cases	Number of Summons of prospective jurors			Average Number of Show-up
		Average	Maximum	Minimum	
5	57 (9.9%)	81.4	134	50	22.6 (27.8%)
7	328 (57.1%)	97.2	180	55	27.5 (28.3%)
9	189 (32.9%)	137.9	500	80	38.9 (28.2%)
Total	574 (100%)	109.1	-	-	30.8 (28.2%)

Source: The Supreme Court of Korea (unpublished)

A juror candidate can be dismissed either by a challenge for cause or a peremptory challenge of the parties during the jury selection procedure. Successful challenge for cause was rare. On the average, just .35 candidates per case were dismissed by a challenge for cause. In 384 cases, no candidate was dismissed by the challenge. The parties need not give a reason to dismiss a juror candidate by exercising their limited number of peremptory challenges. Each party is entitled to 5 dismissals in a case with the jury size of 9 jurors, 4 dismissals in a case with 7 jurors, and 3 dismissals with 5 jurors. On the average, 4.9

[4] Confession of defendant in Korea is different from guilty plea in USA, in that the defendant who confessed shall be tried however speedy the trial may be.

candidates per case were dismissed by the peremptory challenges of both parties. However, for sex crime cases, 6 candidates per case on average were dismissed by peremptory challenges. The average number of candidates dismissed by the peremptory challenge was 1.2 greater in cases with not-guilty pleas compared to cases with confessions.

Jury selection procedure took 1 hour and 14 minutes on the average for the cases with the jury size of 5 jurors, 1 hour and 17 minutes for the cases served by 7 jurors, and 1 hour and 27 minutes for the cases tried with 9 jurors. It took 1 hour and 27 minutes for sex crime cases and 1 hour and 13 minutes for the other cases on the average, which shows that the length of jury selection procedure seemed to depend more on the way in which the judge directed the procedure and the degree to which the counsel were prepared for questioning than on whether the defendant confessed, or the severity and the type of the offense.

D. TRIAL PROCEEDING

The first proceeding of a participatory trial was held, on average, 89.5 days from the receipt of indictment or the defendant's request. It was quicker than the first proceeding of the ordinary collegiate bench trials with the defendant detained (89.6 days on the average) or without detention (127.2 days on the average), as shown in Table 6.[5]

Table 6 Average days elapsed between the defendantse request and the first day of trial

Participatory Trials			Collegiate Bench Trials with defendant detained
From Request to Preparatory Hearing	From Preparatory Hearing to Trial	From Request to Trial	
35. 5 days	54.0 days	89.5 days	89.6 days

Source: The Supreme Court of Korea (unpublished)

All defendants of participatory trials are mandatorily assisted by defense counsels. In 81.5% (468) of the cases tried with citizen participation, the courts appointed defense lawyers for the defendants, if they cannot afford to hire their own attorney.

E. DELIBERATION

Table 7 reports the average and range of jury deliberation times for different types of

[5] For the first year of the lay-judges trials in Japan, the average procedural period from the indictment to the judgment was between 5.8 months and 6.0 months in guilty-plea cases and 6.8 months in contested cases. Makoto Ibusuki, *"Quo Vadis?": First Year Inspection to Japanese Mixed Jury Trial*, 12 ASIAN-PAC. L. & POL'Y J. 24 (2011).

offenses, jury sizes, and pleas. Jury deliberation took 89 minutes for the confession cases, and 105 minutes for the not-guilty plea cases on average. However, the variability in the deliberation time was substantial, ranging from 20 to more than 180 minutes even among similar types of cases. The deliberation time seemed to vary depending more on issue complexity and sentencing factors than on the pleas or offense types. According to a study, an average jury in Oregon, USA deliberates for 114 minutes prior to reaching a decision.[6]

Table 7 Jury deliberation time

		Number of Cases	Maximum	Minimum	Average
Plea	Confession	167	3 h 30 min	20 min	1 h 29 min
	Not-guilty	409	3 h 30 min	20 min	1 h 45 min
Jury Size	5	57	2 h 30 min	30 min	1 h 14 min
	7	328	4 h 10 min	20 min	1 h 35 min
	9	189	4 h 50 min	30 min	1 h 51 min
Offense	Homicide	192	3 h 30 min	30 min	1 h 36 min
	Robbery	158	4 h 50 min	20 min	1 h 46 min
	Injury resulting death	46	2 h 40 min	30 min	1 h 35 min
	Sex Crime	91	4 h 10 min	30 min	1 h 46 min
	Others	87	3 h 25 min	30 min	1 h 21 min
Total			-	-	1 h 38 min

Source: The Supreme Court of Korea (unpublished)

F. JURY DECISION AND VERDICT

In the participatory trials, the jury deliberates alone on the issue of guilt after receiving instructions from the judge, provided that the jury may hear opinions of the judges when a majority of jurors requests it. If the jury is initially unable to reach a unanimous verdict, the jurors shall hear the judge's opinion; then the jurors may find the defendant guilty or not guilty by a simple majority outside the presence of the judge. If the jury finds that the defendant is guilty, they deliberate with the judge on the sentence, and each individual juror gives a punishment recommendation (e.g., 9 recommendations of sentence from a jury composed of 9 jurors) (the Act, art. 46 § 1-3). The jury's recommendations on the issues of guilt and sentence do not bind the judge's verdict and sentence (the Act, art 46 § 5).

The juries reached unanimous decisions on all counts in 470 cases (81.9%); 419 convictions and 51 acquittals. while the juries' decisions in other cases were partial guilty verdicts reached either unanimously or by simple majority. In 90.6% of all cases tried with

[6] *See* Thomas L. Brunell et al., *Factors Affecting the Length of Time a Jury Deliberates: Case Characteristics and Jury Composition* 5 REV. L. & ECON. (2009).

jury, the judges' verdicts were consistent with the juries' recommendations. In 50 inconsistent cases, the juries acquitted but the judges convicted the defendants. The reverse was true in 4 inconsistent cases. The number of cases in which the judge disagreed with the jury's decision to acquit was 7 in 2008, 6 in 2009, and 13 in 2010. But the number increased sharply to 24 in 2011.

During the four years from 2008 to 2011, the defendants in 48 trial cases with jury received "not-guilty" verdicts by the judges on the major counts, which accounts for 8.4% of all participatory trials during the period. In the same period, the overall rate of not guilty verdicts from all cases tried by a collegiate bench was 3.3%. The acquittal rate of the participatory trials was almost 3 times as high as that of ordinary bench trials.

If the jury's verdict is guilty, jurors discuss sentencing with the judges and express their opinions. For the sentence deliberation, the presiding judge explains the extent of punishment, conditions of sentencing, and, when they are applicable, sentencing guidelines. Consequently, judges' sentences were very close to the majority opinions of the jurors in 92.6% of all cases of conviction. The discrepancy between the judges' sentences and the majority opinions of the jurors was no greater than 1 year in 450 cases (92.6%), juror's recommendation was harsher than judge's sentence in 13 cases (2.7%), the opposite was 23 cases (4.7%).[7] In Korea, sentencing guidelines on major crimes came into effect in 2009, and in many cases the guidelines are provided to the jury during deliberation, even though they are not mandatory to the judge or the jury.

G. APPEALS

The appeal rate of the cases tried with citizen participation was 85.5%, which is somewhat higher than that (68.0%) of ordinary bench trials. The defendants of the participatory trials (66.6%) appealed more frequently than the defendants of ordinary trials (59.4%).[8] Appeals by prosecutors showed a more dramatic difference between participatory

[7] For the first year of lay-judges trials in Japan, where no sentencing guidelines are in effect, notable differences emerged not in verdicts but in the patterns of sentencing: (1) heavier penalties on sexual crimes, (2) wider variations of the incarcerative penalty on other crime categories, and (3) a higher rate of requests for parole in suspended sentences. The lay-judge panel gave probation sentences in 59.2 percent of the cases. On the other hand, in the professional judge trial, the probation rate was given in 36.6 percent of the cases. Ibusuki, *supra* note 5.

[8] A report issued by the Supreme Court Office of Japan indicated that the rate of appeals in the lay-judges trial was 29 percent, which is lower than the professional judge trial for the same crimes (Supreme Court Office, *Saiban-in Saiban no Jisshi Jokyo ni tsuite* [The Status of the Implementation of the Lay Judge Trial] (2010), http://www.saibanin.courts.go.jp/topics/pdf/saibanin_kekka.pdf.)

trials (50.2%) and ordinary bench trials (23.3%). Although prosecutors in Korea have a legitimate right to appeal, an abuse of the right by the prosecutors may raise problems.

In the appellate courts, the appeal was dismissed in 319 cases (76.0%) out of 420 cases in total. The verdict from the participatory trial was overturned in 23.3% and the sentence was changed in 19.8% of the appealed cases. The percentage of sentence change by the appeals court was smaller for the participatory trials than for ordinary trials (32.2%) appealed to higher courts throughout the nation.

The cases tried with citizen participation were appealed all the way to the Supreme Court more frequently (42.8% of the cases reviewed at an appellate court) than were the cases of bench trials (36.1% of the cases reviewed at an appellate court). Among the 169 cases that were appealed to the Supreme Court from an appellate court, the appeals of 158 cases (93.5%) were dismissed. The Supreme Court overturned just a single case that was originally tried with citizen participation. Thus, the reversal rate at the Supreme Court was much lower (0.6%) for the cases that were originally tried with citizen participation than for the cases that were originally tried by a bench panel (3.9%).

III. DISCUSSION

The trial with jury in Korea is now a kind of experimental form. Article 55 of the Act provides that the Supreme Court shall establish "Gukminui Sabeob Chamyeo Wiwonhoe " [the Committee for Citizens' Participation in the Judicial System] in order to make a decision on the final form of the participatory system through analysis on the progress of implementation of the participatory trial system. The committee is expected to convene in July to draft an amendment of the Act.

There are several important issues that should be considered by the committee to sculpture the "final form" of the participatory system of Korea.[9] One issue is the status of jury's decision in the criminal procedure of Korea which is currently advisory; another is the status of the jury itself in the judiciary which is currently not independent from the judges. Finally, the committee should consider the status of the participatory trial in the judicial

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Unfortunately, there have been no surveys conducted in an effort to uncover the reasons as to why the defendants decided to give up their rights to appeal. Ibusuki, *supra* note 5.

[9] *What will be the Korean Participatory Trial Model*, LAW TIMES, Apr. 12, 2012 (in Korean).

system which is currently optional and peripheral rather than mandatory and central.

The first issue is whether the jury's decision, which is currently advisory for the judge's verdict, should bind the court.[10] Although the statistics of the participatory trials in the first four years showed that the judicial verdict was consistent with the jury's decision in about 90% of the cases, some argue that the 10% discrepancy between the two judgments may still negatively affect public confidence in the judiciary.

The basic motivation underlying the introduction of the participatory trial system to Korea was to improve public confidence in the judiciary. However, double judgments, which would inevitably be incongruent with each other from time to time, can reduce the confidence of the public in the judicial verdict.[11] As cases accumulate in which the court's verdict is incongruent with the jury's decision, public confidence in the judiciary may significantly deteriorate in the long run. Thus, an advisory jury may be antithetical to the very purpose of the jury system in Korea.

The status of the jury is the second issue. The current system has both elements of European mixed tribunal system and Anglo-American jury trial system. For instance, the jury renders a verdict, albeit advisory, rather independently from the influences of judges, but sentencing recommendations of the jurors depend heavily on the judges' leads. It will be an issue whether the Korean system of citizen participation should lean more heavily on either style. Given the importance of and the emphases on sentencing for criminal trials in Korea, the function and the competence of professional judges, and the absence of experience in citizen participation in the history of Korea, it is also possible that the current style would still be maintained at least for a while.

The third issue is the status of the participatory trial. In the current system, the participatory trial is optional for the defendants in eligible cases. But it is conceivable that the bench trial is made optional while the participatory trial is assumed to be the basic right of the defendants. Or as is the case in Germany and Japan, the participatory trial could be mandatory for certain types of cases. By making a participatory trial mandatory for felony cases, cases like the SILENCED case and the UNBOWED case would be adjudicated with the participation of lay citizens.

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[10] HEE SUNG TAK & SOO HYEONG CHOI, STUDIES ON THE CRIMINAL JUSTICE POLICIES AND JUDICIAL SYSTEMS (V) - FOCUSED ON EVALUATION RESEARCH ON CIVIL PARTICIPATION IN CRIMINAL TRIALS, (Korean Institute of Criminology, 2011) (in Korean).; Dong Hee Lee, *The Reality of Korean Jury System and Its Remedy,* 30 CHONBUK L. REV. 29 (2010) (in Korean).; Gidu Oh, *The Ability of Jury to find Fact*, 96 THE JUSTICE 124 (2007) (in Korean).

[11] Kwangbai Park, et al., *The Effect of Double Judgments on Public Confidence in Court Decisions for the Trial by Citizen-Participation in Korea*, 38 INT'L J. L. CRIME & JUST. 166 (2010).

Other important issues may include jury size,[12] jury selection method,[13] the court's exclusion of cases from the participatory trial, the length of participatory trials,[14] the procedure of jury decision-making,[15] jurors' participation in sentencing, and a limitation on the prosecutor's right to appeal.[16]

The introduction of the citizen participation in criminal trials was a stunning landmark in the history of law in Korea. A trial was considered as property monopolized by elite judges for a long time and there has been no way for ordinary citizens to take parts in or influence legal decisions and judicial policies. Such an institutional hypocrisy and legal defect was at odds with the overall trend of Korea since 1987 when all social sectors began substantial democratization. The four years of experience in citizen participation has been encouraging enough to raise expectations about the capacity of ordinary people of Korea and about the sincerity of the judiciary to democratize themselves. The National Assembly has now passed a revision bill (Act no. 11155) to expand the scope of eligibility for a participatory trial to all cases that are traditionally assigned to a collegiate panel of three judges, which will take effect on July 1, 2012. And the Supreme Court is also seeking for diverse ways to restore and improve public confidence in the judiciary with the assistance of civil participation.

The reforms that reshaped the judicial system since 2008 were responses to the demands of Korean society to democratize the judicial process. However, those reforms seem to be just the beginning of a bigger change. The democracy in the justice system and judicial processes is far from completion. In this sense, the year 2012 will be an important one for citizens' participation in the judicial system in Korea

KEYWORDS

Jury, Citizen, Lay Participation in Criminal Trials, Korea

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[12] Tak & Choi, *supra* note 10.

[13] Sang Hoon Han, *A Study on Jury Selection Process of 「Civil Participation in Criminal Trials Act」 in Korea ─ Focusing on a Mock Jury Trial on April 12, 2006*, 19 KOREAN J. CRIMINOLOGY 65 (2007) (in Korean).

[14] Lee, *supra* note 10.

[15] Tak & Choi, *supra* note 10; *see also* Jae Suk Lee, *Reforms of Criminal Justice System: The Judicial Participation System of Citizens at Criminal Trials*, 8 KOREAN J. COMPARATIVE CRIM. L. 777 (2006) (in Korean).

16 These issues will be addressed later in other papers.

KOREA'S TWO KEY LEGAL REFORMS OF LAY ADJUDICATION: THE POSSIBLE INTRODUCTION OF THE GRAND JURY (JAPAN'S PROSECUTORIAL REVIEW COMMISSION) SYSTEM AND THE ELIMINATION OF CONSENT REQUIREMENT TO ALLOW LAY ADJUDICATION OF AMERICAN MILITARY FELONS IN SOUTH KOREA

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ABSTRACT

This article examines two specific proposals to adopt citizen panels for prosecutorial review. We first analyze and contrast two different systems of lay participation suggested for possible adoption in South Korea, i.e., an American-style criminal grand jury system and Japan's new Prosecution Review Commission (PRC, or Japan's grand jury – Kensatsu Shinsakai) system. In examining oversight abilities of these two systems, we recommend that South Korea may adopt a system modeled on Japan's new PRC, rather than the American grand jury system, as the former is better equipped with a superior ability to assess and examine the governmental abuse of power, such as unethical or illegal conduct of police personnel, public prosecutors, and even powerful politicians and bureaucrats in the government. A second part of this article contemplates the way to restore Korea's rights and path to prosecute and try American military personnel committing crimes in Korea. We propose the elimination of an American defendant's consent requirements for a Korean jury trial, particularly when a defendant is accused of committing serious and violent crimes. The elimination of the defendant's consent embodied in the current Jury Law will allow the direct adjudication of American military crimes committed against Korean residents. The final section of this paper examines opinion survey results of Koreans with respect to the possible adoption of Japan's grand jury system and direct lay adjudication of military crimes in Korean jury courts.

I. INTRODUCTION

On June 18, 2010, in a nationwide videoconference with 1,700 Korean prosecutors, then Prosecutor General Kim Joon-gyu proposed the introduction of all-citizen panel commissions to maintain the credibility of the prosecution office and evaluate the activity of Korean prosecutors.[1] In South Korea, government prosecutors hold exclusive power to make a decision to indict.[2]

Following a series of sex and bribery scandals involving nearly 100 active and retired government prosecutors in 2010 in Busan, Kim suggested the time has come to create an oversight review panel, which would consist of lay citizens, similar to the U.S.-style criminal grand jury system or Japan's Prosecution Review Commission (PRC, or Japan's grand jury)

[1] Son Southerton, *South Korea Ponders Move Towards U.S.-Style Grand Jury System*, June 20, 2011, http://www.koreaexpertwitness.com/blog/news/south-korea-moves-towards-u-s-style-grand-jury-system/.

[2] Ser Myo-ja, *Top Prosecutor Against Tough Reform*, JOONGANG DAILY (Korea), May 13, 2010, http://joongangdaily.joins.com/article/view.asp?aid=2920403.

system.[3] Kim insisted that such a review panel should be different from an investigative bureau, which would consist exclusively of senior public servants or non-judicial government bureaucrats.[4] The new independent and non-governmental panel of lay citizens would function as an important oversight of Korea's prosecutors.

Before all-citizen grand juries could be introduced, however, Kim believed that the use of jury trials, introduced in 2008, must first become more accepted in South Korean courts, suggesting that it would take another two to three years before formally introducing the review system.[5] The National Assembly already had been considering legislation to formalize the introduction of all-citizen grand juries, for which the power to indict individuals would be primarily in the hands of Korean citizens chosen from local communities.[6]

The first part of this article examines the proposal to adopt citizen panels for prosecutorial review. It first describes and contrasts two different systems of lay participation suggested for adoption in South Korea. Those are: (1) an American-style criminal grand jury system; and (2) Japan's Prosecution Review Commission (PRC, or Japan's grand jury – Kensatsu Shinsakai) system.

Comparing the two systems, our recommendation is that South Korea adopt a system modeled on Japan's new Prosecution Review Commission (PRC), rather than the American grand jury system, as the former is better equipped with a superior ability to examine the governmental abuse of power, such as unethical or illegal conduct of police personnel, public prosecutors, and even powerful politicians and bureaucrats in the government.

Both American and Japanese institutions are composed of groups of residents selected at random from local communities. The difference lies in the task of deliberation assigned to the civic panel. Under the American grand jury system, the civic panel is asked to make a decision about whether or not to indict the accused. Under Japan's PRC system, a people's panel is asked to examine and review the appropriateness of the prosecutor's failure to bring an indictment against the accused. In other words, Japan's PRC is better positioned with an

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[3] *Id*. *See also* Hiroshi Fukurai, *Japan's Prosecution Review Commissions: Lay Oversight of the Government's Discretion of Prosecution*, 6 EAST ASIA L.R. 1, 15 (2011) (reviewing the unique function of Japan's new grand jury system introduced in 2009).

[4] *Id.*

[5] Evan Ramstad, *The Slow Road to Grand Juries*, WALL ST. J., June 15, 2011, http://blogs.wsj.com/korearealtime/2011/06/15/the-slow-road-to-grand-juries/.

[6] Interview with Dr. Kwangbai Park, Assistant Dean of Law School, Chungbuk University, at the Judicial Research and Training Institute (JRTI) in Seoul, Korea (Sept. 28, 2011). He stated that the Korean government recently introduced the review panel empanelled by non-judicial government officers An all-citizen grand jury system, whether it is modeled after America's criminal grand jury system or Japan's PRC, has not been introduced in Korea at the time of the interview.

ability to critically evaluate the decision-making process in the prosecutor's office.

A second part of this article contemplates the way to restore Korea's rights and path to prosecute and try American military personnel committing crimes in Korea. This paper proposes the elimination of an American defendant's consent requirements for a Korean jury trial, especially when a defendant is accused of committing serious and violent crimes. The elimination of the defendant's consent embodied in the current Jury Law will allow the direct adjudication of American military crimes committed against Korean residents.[7] The final section of this paper examines opinion survey results of Koreans with respect to the possible introduction of Japan's grand jury system in Korea and direct lay adjudication of military crimes in Korean jury courts.

II. PEOPLE'S INDICTMENT OF GOVERNMENT OFFICIALS –THE STATE ATTORNEY GENERAL, U.S. VICE PRESIDENT, JAPAN'S POLICE CHIEF, AND A SECRETARY OF JAPAN'S RULING PARTY

A. THE AMERICAN GRAND JURY PROCESS

Nearly four years ago in November 2008, a panel of randomly chosen citizens making up a grand jury of South Texas accomplished something that many American politicians and civil rights organizations failed to do. This South Texas grand jury indicted U.S. Vice President Dick Cheney for a conflict of interest pertaining to his investment in a private firm that runs federal prisons.[8] This direct conflict of interest cast a great shadow over Cheney's political influence over federal contracts awarded to the prison industrial complex in America. The same grand jury also indicted Attorney General Alberto Gonzalez, America's top prosecutor, for obstruction of justice, based on what were alleged to be his efforts to stop the investigation of Cheney's collusion with prison industries.[9] The grand jury's actions

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[7] Gukminui Hyeongsajaepan Chamyeo-e Gwanhan Beopyul [Act for Civil Participation in Criminal Trials], Law No. 8495, June 1, 2007, art. 36, para. 1 (S. Kor.) [hereinafter Jury Act] ("when a defendant manifests that he/she desires a participatory trial, [a presiding judge shall] commence preparatory proceedings"), *translated in* http://people.ucsc.edu/~hfukurai/documents/ACT_ON_CITIZEN_PARTICIPATION_IN_CRIMINAL_TRIALS1_000.pdf.

[8] *'With Great Sadness', Texas Grand Jury Indicts Cheney, Gonzales for Organized Criminal Activity*, PR NEWSWIRE, Nov. 19, 2008.

[9] *Grand Jury Indicts US Vice President*, NORTHERN TERRITORY NEWS (Australia), Nov. 20, 2008, at 13 (included in the indictment are then Vice-President Dick Cheney, former U.S. Attorney General Alberto Gonzalez, and Texas State Senator Eddie Lucio, Jr. who allegedly accepted bribes from private prison companies).

followed years in which the Justice Department and Congress failed to bring criminal charges in the matter, despite considerable debate.

Like in Korea, American prosecutors hold enormous power in the administration of justice, presiding over not only criminal but also civil investigations. Nonetheless, in many states and in the federal system, the power to bring a prosecutorial decision rests upon the civic panel of a grand jury, whose members have been selected at random from local communities. Even America's top prosecutor or vice president cannot escape the civic investigation of their alleged illegal activities. Historically speaking, the indictment has been considered a tremendous triumph for concerned citizens in the U.S. in general, and in Texas in particular, where people have been outraged by high-powered politicians who have egregiously pursued their own economic interest and financial gain, regardless of questionable criminal, ethical or moral implications.[10]

In December 2008, however, under enormous political pressure from the White House, a politically-motivated county judge dismissed the indictments returned by the grand jury.[11] The judge of the county in which a grand jury is empanelled holds the ultimate power to proceed with the grand jury indictment. In this case, if the judge acted with equitable professionalism, the prosecution of these two high-ranking politicians might have been possible.[12] The criminal investigation and subsequent indictment, nonetheless, demonstrated that there is no political immunity from prosecution when it comes to equitable judgment made by a select group of fair-minded citizens.

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[10] *Id.* The indictment indicates that Dick Cheney invested $85 million in the Vanguard Group that also owned the GEO Group, the second largest private prison operator which runs federal prisons in Texas. The widespread abuse of inmates in GEO owned private prisons has been reported. *See* Rania Khalek, *How Private Prisons Game the System*, SALON, Dec. 1, 2011 ("One of the most egregious examples … took place at the West Texas juvenile prison run by GEO Group where inmates were found living in filth." The ACLU report also pointed out "private companies, including GEO Group … have extracted more than $100 million in revenue from the facility's operation"). *See also* Niaz Kasravi, *Private Prisons Profit Off Race Prejudice*, RED, BLACK & BLUE, Nov. 15, 2010 ("When NPR broke a story revealing the link between the private prison companies and SB 1070 [Arizona's anti-immigration bill], many expressed outrage at how the prison industry is working to profit off of immigrant communities").

[11] *Indictment against Cheney, Gonzales Dismissed*, ASSOCIATED PRESS STATE & LOCAL WIRE, Dec. 2, 2008.

[12] *Willacy County Charges Dismissed Against Cheney, Gonzales, Others*, MONITOR, Dec. 2, 2008 ("District Judge Manuel Banales dismissed the indictment … on the basis that two alternative jurors who participated in the grand jury had been improperly seated and the indictments were therefore defective"); *see also* Matt Clark, *Cheney and Gonzales Indicted in Connection with Private Prison in Texas*, PRISON LEGAL NEWS, Apr. 30, 2012 (citing that [Prosecutor] Guerra who brought the indictment "tried to have Judge Banales recused due to his close relationship with Senator Lucio [who was also indicted]. Instead, on December 10, [Judge] Banalez removed Guerra from any further cases related to the defendants charged in the indictments and ordered him to turn over his files to another prosecutor").

B. JAPANESE PROSECUTION REVIEW COMMISSIONS (PRC)

Japan experienced a similar so-called Mogadishu moment of civic insurrection two years ago. In January 2010, a former deputy chief of police became the first person in Japanese modern history to be formally indicted by Japan's grand jury panel, called the Prosecution Review Commission (PRC).[13] In this criminal negligence case, which resulted in the death of 11 people and 247 people injured in a human stampede over a partially enclosed pedestrian overpass leading to Akashi Train Station after a fireworks show, the Japanese prosecution made numerous decisions not to indict the police officer, despite public calls and civic demands for his prosecution.[14] The PRC recommendation was its second public demand for his prosecution after the implementation of a new Prosecution Review Commission Law (PRC Law) which took effect in May 2009, making the second PRC indictment decision legally binding.

According the new PRC Law, the second PRC recommendation for prosecution carries legally-binding authority, thereby requiring the criminal prosecution of a suspect or defendant, whom the Japanese prosecutors previously decided not to indict.[15] In other words, the PRC has emerged as a popular legal institution in Japan with the authority to critically challenge the propriety of a prosecutor's indictment decision and to possibly reverse the previous governmental judgment in criminal matters. This is quite significant, because throughout the Japanese modern history, government prosecutors long held the exclusive legal authority to make an indictment decision.

Next, Ichiro Ozawa, Japan's political powerhouse equivalent of Vice President Dick Cheney, was indicted in October 2010 by the PRC over falsified reports issued by his political organization.[16] The indictment decision was the essence of the PRC's second recommendation to prosecute the most prominent Japanese political powerbroker in the post-

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[13] *Ex-Police Officer to be Charged over Stampede in Line with New System* [hereinafter *Ex-Police Officer*], JAPAN ECONOMIC NEWSWIRE, Jan. 27, 2010; Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI.-KENT L. REV. 789 (2011).

[14] *Editorial: 'Forced Indictment' a Heavy Responsibility*, DAILY YOMIURI (Tokyo), Jan. 29, 2010, at 2; *see also* Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L. L. J. 315, 345-47 (2007) (examining causes of a deadly human stampede that occurred on July 21, 2001 in Akashi, Hyogo Prefecture, Japan, eventually killing 11 people and injuring 247 others).

[15] *Keiji Soshōhōto no Ichibu o Kaiseisuru Hōritsu*, Law no. 62 of 2004, art. 41, para. 6 [hereinafter PRC Act], *available at* http://law.e-gov.go.jp/htmldata/S23/S23HO147.html.

[16] Alex Martin & Setsuko Kamiya, *Ozawa in Quest Panel Rules for Indictment: DPJ Don Can't Duck Charges for '04-05' Funds Report*, JAPAN TIMES, Oct. 5, 2010.

war era. The judge in the Tokyo District Court then appointed three attorneys to act in the role of public prosecutors to begin the formal prosecution against Mr. Ozawa.[17] Ozawa was ultimately acquitted, but nonetheless the fact that he stood trial showed the potential power of the citizenry in holding those in power accountable, and the prosecutor's decision to appeal his acquittal further hampered his ability to return to the political scene.[18]

After WWII, the Allied forces led by the U.S. government occupied war-torn Japan and tried to initiate judicial reforms.[19] One of the significant initiatives was to weaken the prosecutors' dominant role and authority in the criminal investigative and adjudicatory process by introducing a citizen's panel to review government decisions in prosecutorial matters.[20] If the public prosecutor decided not to indict a suspect in a criminal case, the victim of the crime or the victim's families or proxy was empowered to demand a hearing regarding the prosecutorial decision.[21] Today this hearing is conducted by a people's panel, called the PRC, which is composed of eleven citizens chosen at random from local registered voting rolls. If the PRC decides that the indictment is proper in the given case, it delivers a written recommendation to the prosecutor's office.[22]

Before the implementation of the new PRC Law in 2009, the Japanese prosecutors held the exclusive authority to make an indictment decision, and the PRC recommendation had been regarded as merely advisory rather than legally binding. The prosecutors consistently failed to follow the PRC's indictment recommendations, especially in cases involving government bureaucrats, prominent politicians, and economic elites as likely defendants.[23] The refusal of the government to facilitate the rightful prosecution of privileged elites has been well-documented throughout Japanese modern history.[24]

Even today, there are instances of unethical conduct and illegal activities by high-ranking government officers that have not been subject to prosecutorial scrutiny, indictment, or trial. Similarly, police officers and prosecutors have not been properly prosecuted for the lengthy detention of innocent civilians and the use of physical and psychological torture

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[17] *Ozawa Appeals Rejection by High Court*, JAPAN TIMES, Oct. 28, 2010, http://www.japantimes.co.jp/text/nn20101028a7.html. Ozawa was eventually acquitted on April 26, 2012. *See* Hiroko Tabuchi, *Japan Power Broker Acquitted in Scandal*, N.Y. TIMES, Apr. 26, 2012, at 11.
[18] Tabuchi, *supra* note 17.
[19] Hiroshi Fukurai, *People's Panel vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. POL'Y J. 95, 102-04 (2010).
[20] *Id.*
[21] *Id.*
[22] *Id.* at 324.
[23] *See generally* Fukurai, *supra* note 3.
[24] *Id.* at 30.

during interrogation, all of which has plagued the equitable disposition of criminal cases in Japan.[25]

C. WORK IN TANDEM: JAPAN'S QUASI-PETIT JURY TRIAL OF AMERICAN MILITARY CRIMES

Despite the inability of the prosecution to bring an indictment of individuals in power, the implementation of the new PRC Law in 2009 has transformed the Japanese legal landscape. Even before Ichiro Ozawa was indicted by the Tokyo PRC, the Kobe PRC reached a decision in 2009 about recommend indictment for the three past presidents of the railway company JR West for their actions relating to a JR West train derailment in 2005 that killed 107 passengers and injured 555 others.[26] After the Kobe prosecutors decided not to indict the presidents, victims' families filed another complaint to the PRC to review the prosecutors' refusal to indict them. In March 2010, the Kobe PRC decided to reverse the decision, and the three JR West presidents were formally indicted for professional negligence resulting in injury and death, thereby making the indictment decision legally binding.[27]

Even illegal activities committed by officers or employees of a foreign government are no exception. For example, Japanese prosecutors' decisions not to prosecute American soldiers stationed in Japan for alleged crimes have been critically evaluated and, in some cases, reversed by the PRC. Furthermore, another system of civic legal participation introduced in 2009 allows the direct adjudication in Japanese courts of military crimes committed by American military personnel.

This system is called the *Saiban-in* Seido (the quasi-petit jury system); and the first ever civic trial of an American soldier in Japan took place in May 2010. A 19-year-old soldier from Philadelphia, Pennsylvania was originally assigned as a "keeper" at a military warehouse of the base camp in Okinawa.[28] He sought to advance his military career by being

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[25] *Tapes Show Route to Confession: Recordings of Sugaya Interrogation Reveal Prosecutor's Tactics*, DAILY YOMIURI, Oct. 10, 2009, at 2 (being placed under tremendous psychological stress and torture, Toshikazu Sugawa who was later found to be innocent said: "I can't forgive that prosecutor. I want him to apologize."); *see also* Hiroko Tabuchi, *Retrial Clears Japanese Wrongly Convicted of Child Killing: Defendant Jailed 17 Years was Bullied to Confess, Judge Says in Acquittal*, INT'L HERALD TRIB., Mar. 27, 2010, at 3.

[26] *Crash Inquest Panel: Indict Ex-JR West Heads*, JAPAN TIMES, Oct. 23, 2009.

[27] *Fukuchiyama-sen Jike: JR Nishi Rekidai 3 Shacho no Kisogiketsu: Kobe Daiichi Kensatsu* [*Fukuchiyama-Line Derailment Incident: Kobe PRC Decides on Indictment against Three JR-West Presidents*], MAINICHI SHIMBUN, Mar. 26, 2010.

[28] HANKETSU YOSHI [JUDGMENT SUMMARIES] [hereinafter Judgment Summaries], *issued by* Naha District Court Judge Hideyuki Suzuki, May 29, 2010 (on file with the author); *See also* David Allen & Chiyomi Sumida, *Kinser Marine Gets Jail Time for Robbing Cabbie*, STARS & STRIPES, May 29, 2010, http://www.stripes.com/news/kinser-marine-gets-jail-time-for-robbing-cabbie-1.104603.

assigned to the Marine Corps Special Operations duties.[29] In order to expedite his effort to join the special operation team, he trained rigorously; he got up early every morning and went through rigorous physical exercises and practiced special forces training routines before reporting to the warehouse.[30] He expressed his future military aspirations to his superiors and asked them for special operation duties in his future assignments.[31]

In August 2009 in downtown Naha, he decided to try out the military training of scare and intimidation tactics in order to prove his ability and impress his superiors.[32] In this exercise of forced coercion and submission, he targeted and abused an Okinawan 58-year-old taxi driver.[33] But the Okinawan driver physically resisted and fought back.[34] After a verbal and physical fight, the soldier ended up injuring the cab driver with a knife and ran away with a bag of money.35

He was soon arrested, detained in Camp Hansen, and confessed the details of his motives and actions.36 The Japanese prosecutor soon indicted him, and he was handed over to the Japanese authority.[37] The prosecution called for his trial, and pre-trial conferences were held to determine appropriate evidential materials, testimonial schedules, and procedural plans for court hearings by a *Saiban-in* trial.[38]

Despite the long history of lay adjudication in Japan, American military personnel had never been tried in a Japanese lay court.[39] Japan had once held all-citizen jury trials from

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[29] Allen & Sumida, *supra* note 28.

[30] Interview with Ryota Ishikawa, Legal Reporter at Okinawa Times [hereinafter Ishikawa], July 10, 2010. The interview information also includes his emailed responses to our questions on February 22 and March 12, 2010 (responses and interview notes on file with the first author). Reporter Ishikawa closely followed the Jonathan Kim case from the pretrial conference procedure to the completion of the quasi-petit jury trial and published numerous articles on the case in the Okinawa Times, Okinawa's main daily newspaper.

[31] Allen & Sumida, *supra* note 28.

[32] *Id.*

[33] Judgment Summaries, *supra* note 28, at p.1.

[34] *Id.*

[35] Allen & Sumida, *supra* note 28.

[36] *Takushigoto de Beihei o Shoruisoken: Beigunjin-hikoku de Kennaihatsu no Saibanin Saiban mo* [*Taxi Robbery and Committing an American Soldier to Trial: First American Soldier Defendant for the Quasi-Jury Trial in the Prefecture*], RYUKYU SHIMPO, Aug. 25, 2009, http://ryukyushimpo.jp/news/storyid-148935-storytopic-1.html.

[37] *Zenkokuhatsu Beihei o Kiso Saibanin Saibanjiken Takushi goto Chisho* [*First Ever Indictment Against American Soldier for Saiban-in Trial: Robberies of Taxi Driver*], RYUKYU SHIMPO, Oct. 21, 2009, http://ryukyushimpo.jp/news/storyid-151575-storytopic-1.html.

[38] Ishikawa, *supra* note 30.

[39] After the U.S. built the military bases in Japan in 1945, Okinawa became the only place where all-citizen jury trials were held from early 1960s to 1972. Research indicates that no American soldiers were ever tried by the lay judge panel. *See generally* Anna Dobrovolskaia, *An All-Laymen Jury System Instead of the Lay Assessor (Saiban'in) System for Japan? Anglo-American Style Jury Trials*

1928 to 1943, but the war-time military government decided to suspend it in the midst of WWII.[40] Other American-style jury tribunals were also introduced in U.S.-occupied Okinawa between the early 1960s and 1972.41 Under American rule, Okinawan residents were allowed to participate in both petit and grand juries. 42 A mixed panel of American citizens, Okinawans, Japanese citizens, Koreans, Filipinos, and other Asian residents in the island participated in jury trials in Okinawa.43 This system of lay adjudication continued until 1972, when the Japanese government finally reclaimed its sovereignty over Okinawa.[44] During these periods under the U.S. military occupation, no American soldiers were ever tried in a lay court in the Island of Okinawa.[45] This is despite the fact that there was substantial evidence of crimes committed by the military on the island.

D. THE PRC AND AMERICAN MILITARY CRIMES

In addition to the introduction of the new *Saiban-in* trial which allowed citizen participation to try American military personnel, the new PRC also began to play a prominent role in the prosecution of alleged military crimes for which Japanese prosecutors refused to bring charges. The first PRC decision to indict American military personnel was rendered in Okinawa in May 2011.[46]

In January 2011, a vehicle driven by a 23-year-old American military employee Rufus J. Ramsey III from an Army and Air Force Exchange Service (AAFES) in Okinawa swerved into oncoming traffic, striking a compact car and killing the 19-year-old driver Koki Yogi who just returned to his hometown to attend the official adulthood ceremony of his twentieth birthday organized by the local municipal government.[47] Ramsey was on the way home after

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in Okinawa under the U.S. Occupation, 12 J. JAPANESE L. 57 (2007), http://law.anu.edu.au/anjel/documents/ZJapanR/ZJapanR24/ZJapanR24_09_Dobrovolskaia.pdf.

[40] Mamoru Urabe, *A Study on Trial by Jury in Japan, in* THE JAPANESE LEGAL SYSTEM 483-491 (Hideo Tanaka ed., 1976).

[41] Dobrovolskaia, *supra* note 39.

[42]. *Id.* at 67-68.

[43]. *Id.* at 68-69.

[44] *Id.* at 66.

[45] *See generally* Japanese Federation of Trial Lawyers Association, OKINAWA NO BAISHIN SAIBAN [JURY TRIALS IN OKINAWA] (1992).

[46] *Beigunzoku, Kisosoto Chiikyotei ga Hikokusekini* [*'Indictment is Proper' for Military Employee: SOFA is on Defendant's Seat*], OKINAWA TIMES, May 29, 2011.

[47] Travis J. Tritten & Chiyomi Sumida, *AAFES Employee Indicted in Fatal Collision*, STARS & STRIPES, Nov. 25, 2011, http://www.stripes.com/news/aafes-employee-indicted-in-fatal-collision-1.161616.

he consumed alcohol at an official party at the military base prior to the accident.[48] The U.S. military decided to punish Ramsey by revoking his driving privileges for five years.[49]

But, the Okinawa prosecutors decided not to indict Ramsey because the accident occurred while he was on official duty, citing that Article 17 of the US-Japan Status of Forces Agreement (SOFA) gave the American military the primary right to exercise jurisdiction over all accidents or crimes committed while on official duty.[50] Yogi's mother soon filed a complaint with the Naha PRC in order to review the prosecutors' non-indictment decision.[51] In May, the Naha PRC reversed the Japanese prosecutors' refusal to indict Ramsey, determining that the indictment was proper for the given case. The PRC cited the 1960 U.S. Supreme Court decision that excluded the civilian employees and contractors of U.S. military bases and dependents of military service members from military rules and regulations governed by the Uniform Code of Military Justice (UCMJ), thereby excluding Ramsey from the privileges granted under the SOFA provision.[52] The PRC also reasoned that the NATO SOFA signed with European countries similarly extends no right for the U.S. military to exercise its jurisdiction over civilian military employees during peacetime.[53]

In November 2011, the Japanese and U.S. governments then reached a new agreement that allowed Japanese courts to try civilian military employees even if they were on official duty at a time of crime or accident.[54] Specifically, the new agreement first allows American authorities to determine whether or not they will bring criminal prosecution over a case and notify the Japanese side of their decision. If U.S. authorities decide not to prosecute their personnel, the Japanese authorities can then request a trial within thirty days after the U.S. notification.[55] Two days after the new agreement was reached, the Naha prosecutors' office indicted Ramsey who worked at a supermarket inside Camp Foster.[56] On February 2012, the

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[48] *Drinking at USF 'Official Event' is Regarded as Party of 'Official Duty*, JAPAN PRESS WEEKLY, Apr. 24 & 26, 2011, http://www.japan-press.co.jp/modules/news/index.php?id=1784.
[49] *Id.*
[50] The term, SOFA (or U.S.-Japan SOFA in this article), refers to the Agreement under Article VI of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan.
[51] *Beigunzoku Fukiso Izoku, Kenshin ni Fufuku Mositate* [*Victim's Family File Complaint to the PRC Against the Non-Indictment of American Military Employee*], RYUKYU SHIMPO, Apr. 25, 2011, http://ryukyushimpo.jp/news/storyid-176467-storytopic-111.html.
[52] *Id.*
[53] *Id.*
[54] *Okinawa Prosec Indict U.S. Base Employee*, HOUSE OF JAPAN, Nov. 25, 2011, http://www.houseofjapan.com/local/okinawa-prosec-indict-us-base-employee.
[55] *U.S. Civilian Worker in Okinawa Indicted for Fatality*, ASAHI SHIMBUN, Nov. 25, 2011, http://ajw.asahi.com/article/behind_news/politics/AJ201111250057.
[56] *Id.*

Okinawa court sentenced Ramsey to eighteen months in prison for vehicular manslaughter.[57]

III. THE EVOLUTION OF THE PRC AND ITS OVERSIGHT OF GOVERNMENTAL PROSECUTION

Japan's lay participation systems have been created in governmental response to external political pressures mounted by many civic activists and grassroots organizations. The original Jury Law was passed by the Japanese government in 1923 in the midst of Taisho democracy, a time of idealism for the Japanese petty bourgeoisie and working classes. They found themselves increasingly capable of participating in national governmental policy discourse.[58] After five years of a preparatory period, all-citizen petit jury trials were finally introduced in 1928, and the jury system lasted until 1943 when the centralized Japanese military government decided to suspend its operation.[59] Japan's first grand jury system (i.e., prosecutorial review commissions (PRC) or Kensatsu Shinsakai) was also created as the Japanese government's response to the external pressure imposed by the Supreme Allied Command forces immediately after WWII.[60]

Today in Korea, similar exterior pressure from the citizenry and/or foreign governments may be necessary in order for the Korean people and the government to establish its initial grand jury system and make it not only function and able to perform and provide effective civic oversight of the government, but also institute a strong deterrent against future illegal conduct and unethical activities of foreign troops stationed on Korean soil. As an example that might be followed, Korea might follow Japan's path explained by a brief historical background of Japan's initial establishment of the grand jury (PRC) and *Saiban-in* (a petit-quasi jury) systems.

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[57] Travis J. Tritten & Chiyomi Sumida, *American on Okinawa Gets 18 Months in Prison for Vehicular Manslaughter*, STARS & STRIPES, Feb. 22, 2012.

[58] Han Jung Sun, *Envisioning a Liberal Empire in East Asia: Yoshino Sakuzo in Taisho Japan*, 33 J. JAPANESE STUD. 357 (2007) (discussing the adoption of a parliamentary system known as "Taisho Democracy," which also featured the introduction of all-citizen jury trials).

[59] *See generally* Chihiro Saeki, BAISHIN SAIBAN NO FUKKATSU [The Resurrection of Jury Trials] (1996).

[60] Fukurai, *supra* note 13, at 806-08.

A. THE ORIGINAL CONCEPTION OF THE PRC AND ITS CREATION

Soon after WWII, the PRC was proposed in Japan following joint collaborative work between the Japanese government and the Supreme Commander of Allied Powers (SCAP) led by the U.S. government. The SCAP was concerned about the tremendous power and authority vested in the Japanese government's prosecution authorities before the end of WWII.[61] SCAP officers believed that prewar prosecutors had misused their authority by trampling human rights and pursing political objectives in promoting Japan's imperial policies both at home and abroad.

The SCAP reformers thus aimed to increase the prosecutors' responsiveness to become more transparent and democratically accountable. Japan's grand jury system was then proposed as a hybrid of America's criminal and civil grand jury systems. The former performs the function of deciding whether or not to issue an indictment on the basis of investigative materials, evidence, and witness testimony from the prosecution. The latter performs the civic function of oversight of the government institutions and public officers who work in these offices. The institutional framework for the grand jury was first suggested by American lawyer Thomas Blakemore who was appointed as a chief of the Civil Affairs and Civil Liberties Branch under the SCAP.[62] Similar to the civil grand jury, the PRC was designed to examine and inspect the proper functioning of local government offices, including the prosecutors' office, and their decision-making process. Like America's criminal grand jury, the PRC would also retain the power to make a decision to indict. Finally, like America's grand jury, Blakemore also proposed the use of a randomized design to help select a pool of potential grand jurors.[63]

In 1947, the SCAP then helped draft Article 14 of the Public Prosecutor's Office Law, which gave the minister of justice (i.e., an elected politician, not a government bureaucrat) the authority to direct the Prosecutor General in the investigation and disposition of individual criminal cases, thereby creating an institutional structure that left prosecution decisions open to outside community influence.[64] The civilian review commission (i.e., the PRC) was then proposed and established by the passage of the PRC Law in 1948;[65] and a

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[61] Fukurai, *supra* note 13, at 806.
[62] *Id.* at 807
[63] *Id.* at 807-08.
[64] Frank Jacob Schwartz & Susan J. Pharr, THE STATE OF CIVIL SOCIETY IN JAPAN 261 (2003).
[65] *Kensatsu Shinsakai Hō*, Law No. 147 of 1948 [hereinafter PRC Law]. *See also* Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 688 (1992) ("Occupation radically altered Japan's judicial system and created

total of 201 commissions were created, with at least one in each of Japan's fifty district court jurisdictions.[66]

Eleven members of the commission are selected at random from voter rolls and asked to serve for six months, reviewing the prosecutors' discretionary powers not to prosecute.[67] A case comes to the PRC when a victim, his or her proxy, or a commission itself brings a complaint against the prosecutors' failure to issue an indictment to pursue the prosecution of an alleged offense.[68] The PRC then reviews the case and issues one of three recommendations: (1) the non-indictment is proper, supporting the prosecutor's decision; (2) the non-indictment is improper, questioning the prosecutor's decision; and (3) an indictment is proper, reversing the prosecutor's non-indictment decision. Prior to 2009, the commission's recommendations for the initiation of formal prosecution were often ignored because they were regarded as merely advisory. Nonetheless, the new PRC Act implemented in 2009 changed the adjudicatory power of the PRC decision by making the second PRC prosecutorial decision legally binding.[69]

Prior to the implementation of the new PRC law, Japanese citizens had absolutely no influence on the prosecutorial process. The controversial "Shobun Seikun" (special requests for instructions on prosecutorial steps to be taken within the office of Japanese prosecution) has led to many political cases being dismissed or ignored from further investigation. Karel von Wolferen, who wrote *the Enigma of Japanese Powers*, once stated, "Individual prosecutors … are expected, before taking [any] action against influential officials, ministers, Diet members or local government leaders, to write preliminary reports for their supervisors all the way up to the ministry of justice, and to wait for their consent [and further instructions]."[70]

These inter-connected networks of the decision-making process often resulted in the outright dismissal of the criminal charges against powerful politicians, high-ranking governmental bureaucrats, and economic elites. The implementation of the new PRC law has

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the modern structure that still functions today … [including] The Constitution and the Criminal Procedure Code, [that were] authorized by U.S. reformers under the leadership of General MacArthur").

[66] PRC Law, art. 1.

[67] PRC Law, arts. 4, 14, 21.

[68] PRC Law, art. 30.

[69] PRC Act, art. 41, para. 6. If the PRC initially recommends the indictment and the prosecutors still decide not to prosecute or fail to indict within three months, the prosecutors will be invited to explain their inaction to the commission. The PRC's first indictment decision is yet to be legally binding. The PRC will re-evaluate the case and then can make a legally-binding decision in favor of indictment.

[70] KAREL VAN WOLFEREN, THE ENIGMA OF JAPANESE POWERS 221 (1990).

thus effectively established powerful civic oversight of the Japanese prosecutors and their decision-making process.

Still today, given the fact that nearly 100% of indictments issued by Japanese prosecutors result in conviction,[71] the PRC's examination of non-prosecution decisions is crucial in checking the prosecutorial abuse of power. The potential abuse of prosecutorial power lies in their discretion in decisions not to prosecute potential suspects or criminals. The prosecutor's refusal to issue indictments may be influenced by politicians, governmental leaders, or other power elites in political organizations. The PRC's role to review and challenge the prosecutor's non-indictment decision became a potent tool of the citizenry to ensure the proper functioning of the local government.

B. THE SAIBAN-IN (QUASI-PETIT JURY) SYSTEM

The *Saiban-in* trial, another institution of lay adjudication, was implemented in 2009, along with the new PRC. Unlike Korea's all-citizen jury trial, however, the *Saiban-in* is a hybrid panel composed of three professional judges and six lay citizens. [72]

Beginning in the late 1980s, significant political pressure to change the existing legal system began to emerge due to prominent Supreme Court decisions involving wrongful conviction cases, in which four death row inmates were ultimately exonerated by the Japanese Supreme Court, after the defendants spent a total of 130 years in prison before being released.[73] The media and the public began to examine the causes of wrongful convictions. Professional judges' uncritical acceptance of confessionary evidence extracted under physical and psychological torture while in police or prosecutors' custody emerged as a likely cause.[74]

In 1999, the late Prime Minister Obuchi established the Justice System Reform Council (JSRC).[75] The reform council's final report came out in 2001, recommending that the *Saiban-in* trial examine all applicable cases, regardless of whether the defendant admits or

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[71] J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate so High*?, 30 J. LEGAL STUD. 53, 53 (2001) ("Conviction rates in Japan exceed 99 percent").

[72] *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [hereinafter *Quasi-Jury Act*], Law No. 63 of 2004, art. 2, para. 3.

[73] They included the Menda, Zaidagawa, Matsuyama, and Shimada cases. *See* CHIHIRO ISA, BAISHIN NO FUKKATSU [REINSTATEMENT OF JURY TRIAL] 155-56 (1996).

[74] Takashi Maruta, SAIBAN-IN SEIDO 11-14 (2004).

[75] Kent Anderson & Mark Nolan, *Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND J. TRANSNAT'L L. 935 (2004).

denies the charges.[76] Similarly, it agreed that defendants should have no right to refuse the *Saiban-in* trial.[77]

From May 2009 to October 2010, there were more than 1,200 *Saiban-in* trials, and three-quarters of the trials ended in 4 days or less (76.8%).[78] This is in stark contrast to Korean jury trials; nearly all of them are concluded in a single day. In the same period, out of more than 1,300 defendants, only five defendants received outright acquittal by the *Saiban-in* panel (i.e., 99.98% conviction rate).[79] The first full acquittal was issued in June 2010 in a drug-related case. Since December 2010, there have been a total of 4 full acquittals, in which two defendants were acquitted of murder and the other two of drug-related charges. Despite the introduction of *Saiban-in* trials, the conviction rate remained nearly identical to that of the bench trial system.[80] Out of five acquittal verdicts, the Japanese prosecution appealed four of those non-guilty verdicts.[81]

The less than 0.1% acquittal rate in Japan stands in contrast to Korea's 8.4% acquittal rate in the first four years of jury operation.[82] During the fifteen years of jury operation from 1928 to 1943, Japan's all-citizen jury acquitted defendants in eighty-one out of four-hundred-eighty-four cases (i.e., 17.1% acquittal rate).[83] The significant polarity of verdict patterns also suggests that, regardless of historical or geo-political differences, the absence of professional judges in the deliberative process is likely to benefit the defendant, while professional judges' deliberative participation and joint collaboration with citizen judges are likely to go against the interest of the defendant. Citizen participation in the administration of justice thus may protect against certain tendencies in a professional judiciary and excessive judicial formalism in procedure and practice, such as Japanese judges' uncritical attention to

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[76] *See Kokuminteki Kiban no Kakuritsu* [*Establishment of the Popular Base of the Justice System*], June 1, 2001, *available at* http://www.kantei.go.jp/jp/sihouseido/dai62/pdfs/62-4.pdf.

[77] *Id.*

[78] Saikō Saibansho [Sup. Ct. Office], *Saiban-in saiban no Jisshi Jokyo ni Tsuite (Seido Shiko~Heisei 22nen 10gatumatu, Sokuho)* [*Implementation of Saiban-in saiban (From Its Inception to the End of October, 2010)*] (2010).

[79] *Id.*

[80] Fukurai, *supra* note 13, at 818-21.

[81] *Kakuseizai Mitsuyu Aitsugu Muzaihaki Saibanin Saiban to Kososhin Handan Zure* [*Smuggling Stimulant Drugs and Reversal of Not Guilty Saiban-in Verdicts: Gap between Lay Judge Trials and Appellate Reviews*], SANKEI SHIMBUN, Apr. 15, 2012 (showing four non-guilty verdicts currently under review by appellate courts), http://news.goo.ne.jp/article/sankei/nation/snk20120415082.html.

[82] Sang Hoon Han & Kwangbai Park, *Citizen Participation in Criminal Trials of Korea: A Statistical Portrait of the First Four Years,* YONSEI L. J. (this issue); *See also* Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes*? 12 ASIAN-PACIFIC L. & POL'Y J. 58, 64 (2010) ("In a majority of cases (91.2%), the jury found the defendants guilty," suggesting 8.8% acquittal rate for the first two years of jury operation in Korea).

[83] Chihiro Saeki, BAISHIN SAIBAN NO FUKKATSU 10-14 (1996).

confession evidence extracted under physical and psychological duress or even torture.

The same thing can be said of the PRC in its evaluations of the propriety of non-indictment decisions made by public prosecutors. Citizen participation in legal decision-making process is more likely than that of professional judges to increase the adversary and accusatorial character of the criminal trial, strengthening the principle of immediacy and the presumption of innocence in the criminal trial. And similar legal principles and criminal justice safeguards should apply to the lay adjudication of illegal activities and unethical conduct by American military personnel stationed in both Korea and Japan.

IV. KOREA'S JURY TRIALS AND MILITARY CRIMES: HOW TO ADJUDICATE THEM?

Intense public scrutiny and media attention have been paid to American military crimes in Korea. Many crime victims, their families, and residents in local communities have often demanded governmental negotiations on the jurisdictional authority over military felons and their adjudication in local courts. In the future, such political discussion and legal negotiations must involve a potential revision of the Status of Forces Agreement (SOFA) that the U.S. signed with Korea. South Korea currently serves as a strategic home to the Eight U.S. Army Division, the U.S. Air Forces Korea, and the U.S. Naval Forces Korea, with more than thirty-thousand military personnel strategically placed at eighty-two U.S. armed forces bases on the Korean Peninsula.[84]

The original SOFA between South Korea and the U.S. was signed in 1966 and there have been numerous negotiations for revisions over the years, with the most recent and significant revision coming in 2000-2001.[85] In December 2000, the Korean government finally reached a new accord with the U.S. government. Since 1995, this had followed eleven rounds of talks during which the Korean police was given the right to detain American servicemen suspected of rape and murder, as part of a revised agreement governing U.S. troops stationed throughout the country.[86]

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[84] *See* US Dep't of Defense, *Base Structure Report Fiscal Year 2011 Baseline: A Summary of DoD's Real Property Inventory* 7, *available at* http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf.

[85] R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, CONGRESSIONAL RESEARCH SERVICE 1, June 18, 2009.

[86] San-hun Choe, *U.S., South Korea Agree on New Rules Governing U.S. Troops*, NORTH COUNTY TIMES, Dec. 29, 2000.

Under the revised treaty, U.S. soldiers accused of murder, rape, arson, drug trafficking and other serious crimes are to be turned over to South Korea upon an indictment.[87] In murder or rape cases, South Korean police have the right to arrest and detain U.S. military suspects. Under the old treaty, the U.S. military held custody of accused soldiers until all appeals had been exhausted in the South Korean legal system.[88]

The Korean government, however, still has no legal jurisdiction over American military personnel involved in accidents or misconduct while on duty, similar to the SOFA signed with the Japanese government.[89] The U.S. government relies on its own military court to try military personnel who committed crimes or caused accidents during their official duty, and oftentimes they are acquitted or punished very lightly.

For example, the 2002 killing of two Korean schoolgirls was adjudicated, not in the Korean court, but in a U.S. military tribunal. In June 2002, an armored vehicle driven by Sergeant Mark Walker and Sergeant Fernando Nino of the U.S. Army fatally ran over two 13-year-old schoolgirls on a civilian road in a northern Korean village.[90] The killing of two young girls was classified as an accident in the performance of official duty. In December 2002, a U.S. military tribunal acquitted the two offenders of negligent homicide.[91]

A Korean Congressional report indicated that, between 1967 and 1998, 50,082 crimes were committed by U.S. military personnel in Korea, and 56,904 American soldiers and their families were involved in crimes, including murder, brutal rapes, and sexual abuse.[92] The report also stated that the actual figure might be much higher, if military crimes that were handled by the U.S. military police have been included in the overall statistics. The report suggested that the total number of crimes committed by U.S. soldiers from September 8, 1945, when American troops were first stationed in Korea, to the beginning of millennium, was estimated to be around 100,000.[93] Another study by the Ministry of Justice also showed a slightly different figure from the congressional report, suggesting that, between 1967 and 1987, 45,183 American soldiers were involved in 39,452 criminal cases, but the Korean government was able to exercise its jurisdiction only in 234 cases, punishing only 351

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[87] *Id.*
[88] *Id.*
[89] *Id.*
[90] *U.S. Soldiers Charged for Korean Deaths*, BBC NEWS WORLD EDITION, July 5, 2002, http://news.bbc.co.uk/2/hi/asia-pacific/2097137.stm.
[91] *Id.*
[92] *Statistics on Crimes Committed by U.S. Troops in South Korea*, *in* REPORT ON US CRIMES IN KOREA 1945-2001 [hereinafter REPORTS ON U.S. CRIMES], *as reprinted in* THE INTERNATIONAL ACTION CENTER, http://www.iacenter.org/Koreafiles/ktc-civilnetwork.htm.
[93] *Id.*

American soldiers, in which 84 soldiers were convicted of rape and 89 were convicted of murder and robbery.[94]

Similar to rape cases in Okinawa, many rape cases were also intentionally hidden and forgotten in South Korea, while the countless cases of rape were committed by American soldiers, including a woman gang raped by 4 soldiers in March 1946; a 14-year-old schoolgirl raped in 1956; a daughter and a mother both raped in 1967; a woman raped by 8 soldiers in the mountains in 1971; one-month pregnant teacher raped in 1986 by 5 soldiers in the middle of Team Spirit military exercise; a handicapped schoolgirl sexually assaulted in 1996; and a 6-year-old girl sexually harassed in 1997.[95] In 2000, a U.S. serviceman confessed to murdering a Korean bar hostess after he repeatedly demanded abnormal sexual activities after one sexual intercourse.[96] More recently in 2011, a 21-year-old U.S. solder brutally raped a 17-year-old girl, while threatening her with a knife and pair of scissors.[97] Former U.S. government official Gregory Henderson, who served at the U.S. Embassy in Seoul in the 1950s and 1960s, completed in his thesis entitled, "Politically Dangerous Factors in U.S. Troops Exercising Operation and Control Right in Korea," in which he stated that "every U.S. soldier from officer down enjoys material indulgence in Korea. Material indulgence includes abundant supply of fresh bodies of young local women."[98]

Political pressure was mounted by the Korean government to engage in new negotiations with the U.S. government to modify the SOFA. As well in 2008, the Korean public demanded the establishment and introduction of the jury system. The Korean jury was introduced in 2008, and immediately offered a potential vehicle for adjudicating heinous crimes committed by off-duty American military personnel in Korea. Unfortunately, no soldiers, their dependents, or civic military employees have ever been subjected to the jury trial. As the consent of the defendant is required for jury trials, such a requirement *de facto* have prevented lay adjudication of military felons in Korea.[99] Equity demands that the South Korean government must change and eliminate the defendant's consent requirement when it

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[94] *Id.*
[95] *Id.*
[96] *U.S. Soldier confessed to Barmaid Murder*, KOREA TIMES, Feb. 22, 2000 ("Upon having his demands rejected, he beat and strangled her to death").
[97] Jon Rabiroff & Yoo Kyong Chang, *U.S. Soldier Gets 10 Years in Rape of Korean Teenage Girl*, STARS & STRIPES, Nov. 1, 2011.
[98] REPORTS ON U.S. CRIMES, *supra* note 92.
[99] The Jury Law, art. 8, para. 1.
Under the "Ascertainment of Intention of Defendant," the law states "[A] court shall inquire a defendant of an eligible case, in writing or by other means without exception, of whether he/she desires a participatory trial.")

reviews the Jury Law in 2013.[100]

At the same time, the possible introduction of Japan's grand jury system (i.e., the PRC) provides another legal path to adjudicate military felons in Korea. The PRC makes it possible to evaluate the Korean government's decision not to prosecute military felons because of the lack of jurisdictional authority or other procedural reasons. Similar to the 2011 Naha PRC's decision to indict an American military employee for the death of a 19-year-old Okinawa youth, the PRC can evaluate the prosecutors' non-indictment decision based upon a request by victim's families or their proxy, examine evidence and investigative materials, listen to testimony, and make a decision whether or not to issue an indictment against the accused. Although this accident took place while on-duty, the Naha PRC decided to indict the military personnel. The PRC decision later forced the Japanese and American governments to negotiate the jurisdictional authority over on-duty crimes and helped establish new criminal procedures, which eventually allowed the Japanese prosecutor to indict and convict the military employee for his on-duty crime.

Do Korean citizens support the lay adjudication of military felons in jury court? Do they also support the possible introduction of the PRC in Korea? What are their opinions about these crucial issues? The following section examines the attitudes and opinions of a group of Korean university students who responded to a number of questions involving the possible establishment of the PRC system in Korea and its potential function in the indictment of American soldiers. The survey was conducted at Kyonggi University in Korea in October, 2010. A total of 309 students participated in the survey research and gave their responses to both open and closed ended questions.[101] The majority of respondents were woman (63.4%), and their age ranged from 19 to 33 (mode of 20, and median age of 22).

Since this survey is the first of its kind to examine Korean people's perception and opinions on the possible introduction of Japan's grand jury system in Korea, the questionnaire was designed, first, to educate college respondents about Japan's PRC system, the deliberative procedure, the legally binding authority of its second indictment decision, as well as its potential oversight function over the Korean prosecutors. Another system of lay adjudication, i.e., *Saiban-in Seido* (a quasi-jury system) in Japan, was also explained briefly. The questionnaire also included a series of questions about their attitudes and opinions about

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[100] Jae-Hyup Lee, *Getting Citizens Involved: Civic Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. R. 177, 181 ("In 2013, the final format and scope of the [jury] system will be determined.").

[101] Research assistants for the second author helped distribute survey questionnaires at a number of undergraduate classes at the College of Humanities in Kyonggi University in Korea.

lay participation in Korea.

For example, when asked whether or not they wanted to participate in the jury trial in Korea, the majority of students said that they were uncertain for jury participation (50.2%), while only one-fifth said that they wished to be a juror (19.7%). With respect to the adjudication of military crimes, the great majority said that American soldier's crimes were improperly handled by U.S. military courts (72.5%) and that Korean citizens should have the right to hold military felons accountable when military personnel victimized them (69.4%). When asked if they personally knew victims of military crimes, 13.7% of them said that they did. The majority also said that, if they served in the trial of military felons, they would be concerned about the threat of potential retaliation by defendants and/or their families (57.0%). The majority also agreed that having Korean residents in a jury would help prevent future crimes by American soldiers (55.8%). Nearly a half of respondents also said that local residents were capable of rendering a fair verdict in the trial of foreign soldiers (48.7%).

Nearly all of respondents supported the introduction of the PRC system in Korea (81.2%), and the great majority said that they wanted to participate in the PRC deliberation to review the non-indictment decision on alleged crimes committed by American soldiers (69.1%). Most respondents also said that the Korean jury trial should be able to adjudicate military crimes regardless of the duty status of soldiers (82.5%).

Various questions on military crimes and their adjudication tend to trigger special emotive reactions from Korean participants. The majority of respondents supported the introduction of the PRC system and was willing to participate in its deliberation to examine non-indictment decisions involving alleged military crimes. The following are detailed narrative responses to questions involving the introduction of the PRC system in Korea, showing the multitudes of concerns and new ideas about why the PRC's oversight is needed in Korea.

A. College Student Survey and Interview

1. "Should the Prosecution Review Commission (PRC) be Introduced in Korea?"

Since most respondents supported the likely introduction of Japan's PRC in Korea, the opinions that supported the introduction included: that the introduction of Japan's PRC "[is] necessary to secure the right of people and their safety" and "further prevents the commission of military crimes [in Korea]." One respondent indicated that "we need to introduce our own

independent system [in addition to the PRC] to proactively try military felons." Another respondent who supported the PRC introduction in Korea warned that "while the oversight system like the PRC may be necessary in Korea, but [I am] not certain whether the system is truly meant for Korea because its deliberation may involve hundred-percent [anti-American] personal biases."

Other critical views included that: "[the introduction of PRC becomes] a symbol of democracy [in Korea];" "[the PRC is] possible to be misused politically. But if many people feel the indictment is imminent, we still should respect their decision"; "the introduction [of the PRC] should decrease the instance of unfair handling of criminal cases in Korea"; "the prosecutors' decision is most likely to be politically influenced, and thus the PRC allows the citizens to make objective decisions." Finally, the PRC is important to neutralize power differences between the Korean and U.S. governments, suggesting that "many military felons had gone unpunished because of U.S. political influence, so this [PRC] will neutralize the power differential"; and "the PRC is necessary to institute measures to ensure the fairness [of trial proceedings]." Some also suggest that: "if external pressures forced Korean prosecutors to decide not to prosecute, [we need to reply on the PRC] to issue the indictment and prosecute [military felons]"; and "the indictment by the general citizenry is imminent, because the [Korean] prosecution is likely not to prosecute [military felons] as they are afraid of [retaliation from the] U.S. military."

These who opposed the establishment of the PRC stated that: "since the first non-indictment decision obviates the need of prosecution, the PRC's pro-indictment decision will not have legally binding authorities"; and "[we already have] the established system of prosecutorial measures, so [there is] no need to change." Some questioned the effect of biases introduced by ordinary citizens, suggesting that "[people] should refrain from introducing their personal biases [into deliberations];" "specially-qualified people are needed [for the PRC]" because "[some people are] not intelligent enough to serve [in the PRC]"; and "many people are not interested [in citizen participation in legal decision-making]."

2. "SHOULD THE KOREAN PROSECUTION HAVE THE RIGHT TO EXERCISE JURISDICTION OVER ON-DUTY ACCIDENTS OR CRIMES?"

Similar to the Japan-U.S. SOFA, the Korea-U.S. SOFA demands the bifurcated system of jurisdiction over accidents or crimes committed by American military personnel in Korea. While the Korean government has the right to exercise jurisdiction over off-duty accidents or

crimes committed by American military personnel, the U.S. military has the right to exercise jurisdiction over on-duty accidents or crimes. Many respondents indicated that the Korean prosecutors should have the right to exercise jurisdiction over on-duty accidents or crimes, suggesting that "as long as they [American soldiers] continue to stay in Korea, they should abide by Korean law, regardless of whether or not [accidents or crimes took place] while on- or off-duty" and "crimes committed in Korea should be adjudicated in Korean court." One respondent stated that "the duty-status should have no bearing with crime, [as it should be adjudicated in Korean court]." Some expressed the need to create the optimum deterrence against military personnel, stating that "[the unilateral imposition of Korea's right to exercise jurisdiction over all military crime] imposes maximum deterrence to future military criminals" and "the gravity of offense should dictate who bears the right to exercise jurisdiction." One respondent criticized the U.S. military for failing to properly punish their personnel, stating "past incidents which received an extensive media coverage exposed the controversy over duty status and the U.S. military failed to exercise their responsibility over them. Thus the Korean government should have the right to exercise jurisdiction [over all crimes or incidents regardless of duty status]." One opponent of extending the jurisdictional right to on-duty accidents or crimes stated that "on-duty crimes or accidents should be tried in [US] military court."

3. WHO IS WORSE - KOREAN SOLDIERS OR AMERICAN MILITARY PERSONNEL?

College respondents were also asked to respond to the question: "Which military personnel are causing greater problems to Korean residents -- Korean or American? Both Korean and American soldiers currently share the military base in Pyeongtaek, Korea, for example. The huge military base in Pyeongtaek serves a home to a South Korean naval base and a large concentration of U.S. military troops, and it is possible that both Korean and American soldiers engaged in illegal activities or unethical conduct in adjacent areas. For instance, the first *Saiban-in* trial in Okinawa involved a sexual assault against an Okinawan woman by Japan's self-defense personnel, not a U.S. soldier, suggesting that residents of local communities have also been subjected to Japanese military crimes.[102] Similarly, Korean military personnel may thus have been seen as criminal predators in local communities.

The majority of respondents, however, felt that American soldiers are the ones who most likely victimize local residents (65.2%). A mere 8.7% indicated that Korean soldiers were

[102] *JMSDF Sailor Nabbed for Attempted Rape*, WEEKLY JAPAN UPDATE, June 18, 2009.

worse predators of local residents, while 25.4% said that neither of them were predators (0.7% said that both Korean and American soldiers equally victimize local residents). Respondents who viewed American soldiers as the major predator stated that "Korean soldiers were bound by Korean laws so their crime ratio is low" and "very light punishment by the U.S. military promotes the culture of impunity." The location of military bases is also seen as the major reason for the proliferation of military crimes, suggesting that "nearly all crimes by American soldiers were committed by those who stationed at the U.S. Army Yongsan Garrison in [the City of] Seoul and they remain the main culprits." Korean soldiers were less likely to commit crimes against Korean residents because "Korean soldiers' parents are Korean citizens and thus I believe they do not harm us. On the other hand, American soldiers are different, as indicated by many media reports, including the recent assault against a 60-year-old lady." Others expressed similar opinions, stating that "many Korean soldiers become patriotic once they wear Korean military uniforms, and they do not commit crimes [against Koreans]" and "ultimate consequences of crime will affect Korean soldiers more negatively than U.S. soldiers." Some pointed out ideological differences, stating that "[American soldiers likely engage in criminal activities due to] their cultural or ideological differences" and "American soldiers' educational level is lower than those of general population in the US, except those in administrative divisions. Thus, they are more likely to engage in criminal activities, some of which may reflect racism imbued in American culture."

These who felt that Korean soldiers are more culpable stated that "as a former Korean soldier, I feel that Korean soldiers are more culpable." Two respondents suggested that "recent media analysis revealed more crimes committed by Korean soldiers than American soldiers," and that "in terms of absolute numbers, Korean soldiers' crimes are much greater than U.S. soldiers'."

One respondent said that neither U.S. nor Korean soldiers were problems, suggesting that "I served as a military security guard in an American military base and had many contacts with American military personnel. My experience tells me no difference in actions between Korean and American soldiers. Therefore, I do not believe that American soldiers are more culpable than Korean soldiers." Two pointed out the effect of biased media reports, stating that "foreigners likely suffer from wrong impressions," and that "[The Korean] media likely focuses on American soldier crimes and offers no objective measures to truly evaluate the extent of criminal activities [in Korea]." While the opinion survey was the first of its kind to examine the attitudes and opinions about the possible introduction of the PRC in Korea, most respondents strongly supported the adoption of the PRC system in Korea. Many also

supported its effective oversight of both Korean prosecutors and U.S. military personnel. While some Korean respondents expressed their concerns about the lay adjudication of military crimes, most of them also saw the necessity of lay adjudication of military crimes in Korean courts, not in U.S. military tribunals. Many also supported the elimination of defendants' consent for jury trial in order to adjudicate military crimes in lay court. Both the lay adjudication of military crimes and the PRC's ability to challenge prosecutors' non-indictment decisions will then help create to a strong sense of political sovereignty and judicial independence in Korea.

B. AMERICAN MILITARY CRIMES IN EAST ASIA

The long history of American soldiers' heinous crimes, including sexual assaults against women and children in both Okinawa and South Korea, are indicative of continued sexual exploitation and predatory culture present at U.S. military bases. The South Korean government had introduced the all-citizen jury trial in 2008 for the first time in its legal history, but crimes committed by American soldiers are yet to be subject to the adjudicative process through Korea's jury system because of the required consent by the defendant for jury proceedings. In the future, the Korean court may thus consider requiring the mandatory adjudication of all military felons in its jury system, when their crimes are serious and violent.

Besides the jury trial, the PRC can also become another important legal institution of citizen participation in Korea. The PRC should also encourage the participation of the judiciary to evaluate PRC decisions because of lay participants' ability to inject civic sentiments into its deliberations and decisions, and, like in Japan, the PRC decision necessitates the judicial clarification over the application of bilateral treaties or relevant international laws on domestic affairs, including the ability of the Korea-U.S. Status of Forces Agreement (or SOFA) to shield American military felons from criminal prosecutions in South Korea. When foreign soldiers victimize Korean women, children, and local residents, the PRC may recommend the indictment of American soldiers despite extra-territorial rights guaranteed under the SOFA provision. The introduction of the PRC may thus serve to constitute as an effective deterrent against future military criminals, as they may be held legally responsible for the consequences of their illegal acts or unethical conduct in Korea.

Today, the U.S. government has established U.S. military bases in more than 130 countries, and deployed its military personnel in over 150 countries around the globe, well

beyond Okinawa and South Korean borders.[103] Military crimes that victimize local residents become part of realities in these countries, and the judicial system in these nations now must deal with the consequence of America's military strategies and policies within their own national borders. The possible establishment of the PRC system in these countries may assist in the creation of an effective judicial institution to combat military crimes. The civic oversight of military activities in these countries may also serve to function as the effective deterrent against sexual exploitation and predatory culture present at American military bases.

V. CONCLUSION

Dick Cheney, whom renowned political critic Norm Chomsky once called "the Administration,"[104] had been responsible for permitting the continuation of torture programs, running illegal wireless wiretap programs, and orchestrating extra-ordinary rendition, was never successfully implicated in charges of any crimes by congressional representatives or U.S. senators. It was a group of ordinary citizens in South Texas who decided to indict Cheney and his protégé Alberto Gonzalez for illegal and immoral business maneuvers. Nonetheless, the judge in local court, under the tremendous pressure from Washington, decided to dismiss the indictments rendered by the group of fair-minded citizens.

Japan also witnessed similar history of political predation and inequities. But since its implementation in 2009, the PRC has successfully indicted a police chief, a prominent political powerbroker, and economic elites, including three past presidents of the Japan-Railway (JR) West, one of the largest and most powerful private corporations. The PRC also successfully indicted military personnel stationed in Okinawa. The PRC has become an important channel through which ordinary people's moral sentiments – their sense of justice, fairness, and equity – were introduced in the deliberation of the criminal indictment against American military personnel in Okinawa.

Like many fair-minded citizens in Texas and their demand for equity and justice, people in Korea must also continue to mount external pressure in order for the government to institute and establish the more equitable lay adjudication system. Once adopted in South

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[103] CHALMERS JOHNSON, NEMESIS 5 (2008).

[104] *Noam Chomsky on Obama's Foreign Policy, His Own History of Activism, and the Importance of Speaking Out*, DEMOCRACYNOW!, Mar. 15, 2010 ("They (business world, corporate planners, and state planners) couldn't get rid of Cheney, because he was the administration, so can't dismantle it"), http://www.democracynow.org/2010/3/15/noam_chomsky_on_obamas_foreign_policy.

Korea, the PRC's decision is likely to create further legal debates because of its ability to check the prosecutors' discretionary powers in criminal matters. PRC decisions in Korea could lead to greater public debates about the adjudication of military felons, the legitimacy of American military bases in Korea, and possible revisions of the US-Korea SOFA. The adoption of the PRC in South Korea is thus expected to serve as an effective judicial institution with proper checks-and-balances against inequitable procedures of the Korean government, as well as the U.S. military establishment in Korea.

KEYWORDS
Lay Adjudication, Grand Juries, Prosecution Review Commissions, Military Crimes, American Military Bases

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A Presumption of Guilt Rather than a Presumption of Innocence? Forensic Linguistic Analysis of a Japanese Criminal Case of Complicity in the *Saiban-in* Trial

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Table of Contents

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ABSTRACT

This paper discusses a presumption of 'guilt' which was likely caused by a prosecutor's witness coaching and a judge's dual participation in a Japanese lay judge trial. We take up a criminal case of complicity, in which two men and two women were indicted for a crime of bodily injury resulting in death. Three of the defendants admitted to all of the criminal charges, whereas one defendant denied the charges. The same prosecutors sought conviction of all four of the defendants while two panels of professional judges were responsible for each examining one pair of defendants respectively. Lay judges and counsel for the defense, however, were appointed for each trial.

We analyze one witness's direct examination testimony from the perspective of the prosecution and investigate the influence of witness preparation by the prosecutor with the use of forensic linguistic analysis: the usage and frequency of words such as sono (the), ni taishite (towards), tame (for the sake of) and –te imashita (was doing). We also examine the judge's way of witness questioning and analyze university students' perceptions of the same judge's performance in the various trials of the same complicity case. We concluded that a defendant in a complicity case who pleads not guilty is more likely to be presumed guilty by both the prosecutors and the judges who had previously ruled on other defendants of the same complicity case.

I. Introduction

Article 60 of the Japanese Penal Code stipulates that when two or more persons jointly commit a criminal act, they shall be dealt with as principals.[1] These accomplices are each brought to trial to mete out punishment according to their respective involvement in the particular criminal act in question.

It is not unusual for the same prosecutors to be in charge of all the public trials of accomplices involved in the case. On the other hand, it is also common for totally different defense counsel to take on the case of each accomplice. It is interesting to note that the same panel of professional judges typically hears the cases of multiple defendants in a series of trials on complicity, though different lay judges are assigned to each public trial. While defense counsel and lay judges are newly assigned to each defendant, the same prosecutors and the same judges may be responsible for all the trials of defendants in a case on complicity.

In this paper we take up a criminal case of complicity in which two men and two women were indicted for a crime of bodily injury resulting in death. Three of the defendants admitted to all of the criminal charges, whereas one defendant denied the charges. The same prosecutors sought conviction of all four of the defendants while two panels of professional judges were responsible for each examining one pair of defendants respectively. Lay judges and counsel for the defense, however, were appointed for each trial. Both of the authors were present at the eight-day trial of the defendant who pleaded not guilty; the second author Higuchi acted as chief counsel for the same defendant. We analyze one witness's direct examination testimony from the perspective of the prosecution and investigate the influence of witness preparation by the prosecutor with the use of forensic linguistic analysis. We also examine the judge's way of witness questioning and analyze university students' perceptions of the same judge's performance in the various trials of the same complicity case. We concluded that a defendant in a complicity case who pleads not guilty is more likely to be presumed guilty by both the prosecutors and the judges who had previously ruled on other defendants of the same complicity case.

[1] Keihō [Pen. C.], art. 60.

II. JAPANESE LAY JUDGE SYSTEM

The Japanese lay judge system is a hybrid of the common law jury and Roman law lay judge systems. Like the Common law jury system, Japanese lay judges decide only a single case. However, unlike the jury system of common law countries, Japanese lay judges deliberate and decide the case together with professional judges. The deliberation body is composed of three professional and six lay judges. Not all cases are tried under this hybrid system. Only criminal cases of serious offences are subjected to this new system. Defendants indicted on serious offences have no option of being tried by the traditional bench trial system.

There are a number of distinctive features of the lay judge system. First, the entire system establishes a highly collaborative atmosphere between the professional and lay judges. Lay judges not only render a verdict after having engaged in deliberative discussions with professional judges; they also work together to sentence a guilty defendant. It is neither prohibited nor uncommon for lay judges to discuss the case with professional judges prior to the conclusion of trial. Furthermore, the presiding judge frequently declares fifteen-minute adjournments to facilitate and ensure that lay judges have an adequate understanding of what is being presented in the trial.

Second, Japanese prosecutors are not required to disclose all of the evidence that they have collected. A pre-trial conference procedure was introduced in order to facilitate the criminal process for the Saiban-in trial, where the defense counsel can request the prosecutors to disclose all of the evidence relevant to the defendant and his case. In the present case, however, the discovery procedure worked against the defendant, which will be explained in the subsequent section.

Third, the Code of Lay Judge Court prohibits both parties from presenting new evidence during a trial that has not been previously presented at a pre-trial conference. As a result, the defense tries to request as many pieces of evidence as possible for examination. On the other hand, the defense's disclosure request for particular types of evidence also likely reveals the defender's trial strategy in advance, so that prosecutors can easily anticipate and prepare countermeasures before the trial. As it will be shown in the following section, prosecutors' understanding of the defense strategy prior to the trial had an adverse effect on the equitable disposition of the current case at hand.

III. The Overview of the Case

The following is an overview of the criminal case being examined. A male F was found dead in a car that was submerged in an irrigation reservoir in Gunma Prefecture, Japan in July 2009.[2] Five acquaintances of the victim (A, B, C, D and E) were arrested on charges of causing bodily harm resulting in death and disposing of a dead body. Three of them (A, B and C), who admitted to carrying out the crime, were given sentences of eight, nine and ten years, respectively. The other two defendants (D and E), however, denied any involvement in the crime. Defendant D had his indictment suspended, but Defendant E was charged as a joint principal in the conspiracy. Although Defendant E pleaded not guilty to the crime, she was sentenced to nine years of imprisonment by the district court in November 2010. She appealed to the Tokyo High Court, which dismissed it in March 2011. The defendant then appealed to the Japanese Supreme Court but withdrew the appeal in October of 2011.

A. Before the Trial

The main issue in this case was whether or not Defendant E conspired with the three other defendants (A, B, and C who were previously convicted of murder) to assault the victim. At the pre-trial conference, the defense lawyer made a statement that questioned the credibility of the three witnesses' statements against the defendant. This provided the prosecutors with an opportunity to anticipate the defendant's main trial strategy, thus prompting a series of visits to all three witnesses who were serving their prison sentences whereby each was interviewed ten times before the trial's commencement. During the subsequent trial, all three witnesses A, B and C proceeded to give incriminating statements against Defendant E; yet, the content of their statements was different from that of the previous testimonies they gave in their own trials six months earlier. We will thus discuss possible witness preparation by the prosecutors in the following.

B. Witness Preparation for the Prosecution

We focused on one of three witnesses (Witness B) and examined his testimony using linguistic analysis. This witness previously had an intimate relationship with Defendant E. During an interview with the witness, the prosecutor disclosed to him that Defendant E tried

[2] Maebashi Chihō Saibansho [Maebashi Dist. Ct.] Nov. 19, 2010, Hei 21 (wa) no. 540.

to intoxicate him with a stimulant drug in the kitchen with the intent to arouse him to attack Victim F. Prior to his testimony in court, then, it was clear that this witness had probable motive for testifying against the defendant. At the trial, Witness B clearly showed his anger at the defendant when he came into the courtroom to take the witness stand. But before analyzing the content of his testimony and examining the signs and traces of possible witness preparation by the prosecutor, we briefly review the method of forensic linguistics and how this investigative technique can be useful in the analysis of witness testimony.

IV. FORENSIC LINGUISTICS

Forensic Linguistics is a relatively new field, and a term was first coined by Jan Svartvik when he wrote The Evans Statement in 1968.[3] The book examined a murder case that took place in November 1949, in which Timothy Evans was arrested for the murder of his wife and infant daughter. His trial began in January 1950. But because the prosecution was able to obtain his written confession during the initial investigation, Evans ended up receiving a death sentence and was put to death in March of the same year. Three years after Evans's execution, John Christine was arrested for the murder of four women including his wife. During his trial, Christine confessed that he murdered Evans's wife, which brought significant controversies and debates over Evans's wrongful conviction and eventual execution. Svartvik made a corpus analysis of the original written statement of Evans' confession and found two distinctly contrasted grammatical styles: (1) an educated style, possibly coached by an investigating officer, and (2) a casual writing style reflected by the defendant himself. He concluded that the authenticity of Evans' written confession was very questionable, suggesting that the content of the statement contained the sign of significant external influence, rather than his own.

In the following section, we likewise introduce several techniques of forensic linguistic analysis in the context of professional language features such as peculiar word usage, preciseness, repetition, and some other features of written language. These features were then later used in the analysis of a judge-witness interaction in our complicity case.

[3] *See* Jan Svartvik, *The Evans Statement: A Case for Forensic Linguistics* (1968).

A. USAGE OF WORDS

Another pioneering analysis in forensic linguistics comes from the Bentley case involving the attempted burglary and murder of a police officer in 1953, for which nineteen-year-old Derek Bentley was convicted and later executed. Although the actual murder was carried out by sixteen-year-old Chris Craig, he was not given the death penalty because of his age at the time of arrest. It was stated that Bentley's IQ was far below the average of his peers and he was also functionary illiterate. Recognizing that this case involved complicity in a burglary attempt, forensic linguist Malcolm Coulthard analyzed Bentley's confession statement and argued that Bentley personally did not make a confession as noted in the statement to the police. Rather, using a corpus analysis of the term 'then' in the confession statement, he found that large parts of Bentley's writings reflected, and were composed of, words and language used by investigating officers assigned to the case.[4]

B. FREQUENCY OF "THEN"

Coulthard discovered that one salient aspect of Bentley's written confession was a frequent use of the word "then." Coulthard thought it atypical for the word to occur ten times in Bentley's 582 word confession statement.[5] Coulthard collected two corpora of data: (1) first of three witnesses from different cases consisting of 930 words and (2) the other of three police officers involved in different cases consisting of 2,270 words. Coulthard contrasted the first witness's corpora against the police officer's corpora and discovered that there was only one occurrence of the word in the witness's corpora; on the other hand, it occurred as many as 29 times in the police officer's corpora. Coulthard further discovered that the word of "then" is seldom used in normal narrative or spoken language of ordinary people. For example, in the Corpus Spoken English, which is a subset of the COBUILD Birmingham Collection of English text (BCET), the word "then" occurred only [3],164 times in the entire volume of 1.5 million words.[6]

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[4] Malcolm Coulthard, *Powerful Evidence for the Defence: an Exercise in Forensic Discourse Analysis*, in LANGUGE AND THE LAW 424-27 (John Gibbons ed. 1994).
[5] Malcolm Coulthard, *Corpora in the Analysis of Forensic Linguistics*, 1 FORENSIC LINGUISTICS 27 (1994).
[6] *Id.* at 32.

C. POST-POSITIONING OF "THEN"

Another salient feature of Bentley's statement is identified with respect to the post-positioning of the same word "then." Post-positioning refers to the situation in which the word is placed after the subject, as shown in the following two examples from Bentley's statements:[7]

> Chris then jumped over and I followed.
> Chris then climbed up the drainpipe to the roof and I followed.

On the other hand, the positioning of 'then' in front of the subject, i.e., "Then, Chris jumped over and I followed," would be a more common usage than 'Chris then jumped over and I followed,' in an ordinary speech.

> Although Bentley post-positioned "then" seven times out of the 582 words, none of the three witnesses used any post-positioning in their own testimonies that consisted of 930 words. On the other hand, there were nine occurrences of post-positioning of the word in the 2,270 word corpora of the three police officers. In contrasting this with the nine occurrences in the BCET data which contains 165,000 words, Coulthard concluded that this idiosyncratic syntax placement reflected the policeman's unique register, suggesting that the confession was not Bentley's but that of the investigating officer.

D. ACCURACY

Another forensic linguist Gwyneth Fox has also demonstrated unique characteristics of written statements by examining the grammatical structure of police speak through a comparison of the respective corpora of ordinary individuals and police officers.[8] We would like to introduce some features relating to the conceptualization and utilization of time by police officers and ordinary people in the following.

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[7] *Id.*

[8] Gwyneth Fox, *A Comparison of 'Policespeak' and 'Normalspeak': A Preliminary Study*, *in* TECHNIQUES OF DESCRIPTION: SPOKEN AND WRITTEN DISCOURSE: A FESTSCHRIFT FOR MALCOLM COULTHARD 183 (John M. Sinclair & Gwyneth Fox eds., 1993).

1. TIME

Police officers usually offer precise information of time such as "at 5:12 p.m." or "at approximately 3:45 p.m." This is because police officers are trained to be incredibly meticulous to time, unlike ordinary persons in their daily activities.

2. ADVERBIALS OF TIME

Adverbials of time such as "later", later on," "later the same day," "at this time," and "after this" occur more frequently in a police officer's register than in a COBUILD corpus of ordinary people's text.[9] More interestingly, these adverbials of time are more likely to be placed at the beginning of a sentence in a police officer's register.

3. ADVERBIAL CLAUSES OF TIME

Adverbial clauses of time are frequently used and often precede the main clause, as shown in the following example.

When he had finished raping her he then threw her out of the van.

Investigating officers can effectively specify the sequence of events by using time-related expressions at the correct positions. The distinct use of adverbial clauses of time was more saliently observed in law enforcement officers' statements than in ordinary people's speeches.

E. REPETITION

Coulthard further examined the credibility of confession statements in a criminal case, in which a suspect named Power supposedly retold the same events, by using the same words in his confession statement, as shown below.[10] It is quite unusual for a suspect or defendant to recount the same events (and doing so with the exact same words) because memory of the events is normally not stored or recorded in the context of verbal formats. Each act of retelling also requires a decoding of the memory of the event which is then transcribed and translated into a verbal format, thereby creating a slightly different narrative each time.

[9] *Id.* at 188.
[10] Coulthard, *supra* note 4, at 420.

Retelling the same events with the exact same words would be nearly impossible, unless a constant presence of external personnel such as investigative police officers or those trained in note-taking leads them to form a collaborative relationship with a suspect in extracting and recording the statement. The following example shows the pattern of possible collaboration of investigative officers and the suspect.

> and then he told Richard to give me one as well (the original statement)
> and then told Richard to give me one as well (the retold statement)

The choice of words, the structure of the statement, and post-positioning of "then" are all identical in both recounted narratives. Coulthard thus suggested that these statements lacked credibility in their authenticity.

F. WRITTEN LANGUAGE

The following example also comes from Coulthard's analysis of a written statement taken from a criminal suspect, in which the statement was later presented in court by the police as a verbatim record of a dictated speech.[11] The suspect denied making the statement because it clearly showed his admission of guilt:

> I wish to make a further statement, explaining my complete involvement in the hijacking of the Ford Escort van from John Smith on Tuesday 28 March 1981 on behalf of the A.B.C. which was later used in the murder of three person (sic) in Avon that night.

Using lexical density (i.e., lexical terms per clause), Coulthard demonstrated that the above example could not have come from the suspect's verbatim record. Lexical density of ordinary spoken language is between 1.5 and 2, while that of ordinary written language is between 3 and 6. More formal language has a higher lexical density. The lexical density of the above statement is 8.3, which is much higher than that of ordinary written language, and even higher than that of ordinary spoken language.

Investigating officers often use their professional language in recording a statement from

[11] *Id.* at 35.

a suspect or defendant, and the unique feature of lexical density can be used to examine and assess the credibility and authenticity of recorded statements. Critical analysis of the recorded statement and the question of authenticity become crucial because the content of the statement serves to provide crime-specific information for the purpose of issuing an indictment against the suspect.

As shown in the above example, ordinary people's statements normally do not contain high lexical density or use specialized investigative languages. The analysis of these formalized statements becomes useful to trace potential sources of a specialized language used by the police and their investigative officers.

In the next section, we will dive into the first complicity case in Japan proper and examine the occurrence of prosecutor's language in the testimony of a prosecution witness. We will demonstrate the analysis of Witness B's statement in terms of both professional language features and written language features.

V. FORENSIC LINGUISTIC ANALYSIS OF WITNESS B'S STATEMENT

A. PROFESSIONAL LANGUAGE FEATURES

Japanese police officers and prosecutors also import similar features of their professional language into the official records of suspects' statements. They include the use of demonstrative pronouns (sono (its, the)), prepositions (ni taishite (towards) and tame (for)), and the past progressive form, all of which aid in giving statements greater precision. First, we wish to show how these syntactic features are reflected in a suspect's statement recorded by an investigating officer. We also cite examples from a commonly used handbook used by investigating officers (Shin Sōsa Shorui Zenshū [A New Complete Work of Investigating Documents: Interrogation])[12] to facilitate our discussion and analysis. This handbook is a standard textbook that teaches investigative officers about the techniques of suspect interrogation and the recording of verbal testimonies. We will then show that many traces of professional language used by the investigating officer appeared in Witness B's testimony.

B. INTERROGATION HANDBOOK EXAMPLES

[12] Hisashi Kajiki et al., *Shin Sōsa Shorui Zenshū* [*A New Complete Work of Investigating Documents: Interrogation*] (2006).

1. SONO (THE)

Constituents of a sentence are frequently omitted in the Japanese language, and such omissions are much more salient in spoken language, especially when the speaker believes that the hearer knows or can understand the context of a situation, as shown in the following examples.

> Anata wa ashita eiga ni ikimasu ka? Anata wa ashita eiga ni ikimasu ka?
> (Are you going to the movie tomorrow? Are you going to the movie tomorrow?)

The sentences below are taken from the handbook.[13] The words "my" of "my internet" and "her" are omitted because these demonstrative pronouns are easily recoverable from the context. On the contrary, the article "the" from "URL" or "picture" is not deleted because it clarifies 'the URL' and 'the picture' in question. This is how the handbook educates investigating officers not to omit the demonstrative pronouns relating to the key notions.

> As I would make Mayu's picture open to (my) internet homepage and send (her) the URL and cancel-key by mail, I was telling Mayu to delete the picture by herself…
> 、、、真由の画像をインターネットのホームページに公表し、後でその(sono)ＵＲＬと解除キーをメールで送るから、自分でその(sono)画像を削除しろと真由に伝えていた(-te ita)ので…[14]

2. NI TAISHITE (TOWARDS)

'Ni taishite (towards)' is a preposition that is commonly used in formal written Japanese. 'Ni taishite' is also used in investigative officers' handbook. One could simply say 'Mayu ni (to Mayu)' instead of 'Mayu ni taishite (towards Mayu)'.

> I kept sending mails towards Mayu.
> 真由に対して(ni taishite)メールを送り続けていました(-te imashita).[15]

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[13] *Id.* at 68.
[14] *Id.*
[15] *Id.* at 67.

3. Tame (for, for the sake of)

'Tame (for the sake of)' is a preposition that is mainly used in written language. In the handbook, 'tame' is frequently used as in the example sentence given below. Such usage is redundant and the sentence would be more natural without 'tame - (for the sake of -).'

…in reward for the sake of providing such a service for us
そのような働きをしてもらうため(tame)の謝礼として…[16]

4. -te Imashita (was doing): Past Progressive Form

The past progressive form frequently appears in a suspect's recorded statement. This is because investigative officers or prosecutors are required to describe the crime scene vividly enough so that the judges can use the descriptions to recreate an accurate depiction of the crime and thus make factually correct decisions on the case. Other examples of '-te imashita (was doing)' come from the example sentence above for 'ni taishite': 'okuri tsuzukete imashita' (kept sending). Its shortened form '-te ita,' and 'tsutaete ita (was telling)' is also found in the example sentence for 'sono.'

I was telling lies.
嘘をついていました(-te imashita).[17]

C. Witness B's Testimony

This section examines the different features of professional language and its usage that have appeared in Witness B's testimony. Witness B was originally convicted in the complicity case involving the same crime and was called to testify as a prosecution witness against Defendant E in her trial.

In Testimony (1) below, the prosecution witness's statement contains many of the same linguistic and syntactic features used by professional investigative officers, including the demonstrative noun 'sono (its)' and the pronoun "E," -- that is, the defendant's true name. The witness also used 'ni taishite (towards)' and 'yobi' (call or call out) (we will return to the

[16] *Id.* at 262.
[17] *Id.* at 101.

usage of 'yobi' in a later section to examine the issue of Repetition). If the witness had used ordinary spoken language, his testimony would cohere more with Example (2), in which both noun phrases (recoverable from the context) and formal expressions like "ni taishte" (towards) would be eliminated.

(1) E got angry in regard to (the fact that) son (her son) was beaten, called the other party's parent and (his) son, and called out to E's house to do the same to them.
Ｅが、その(sono)息子が殴られたことに対して(ni taishite)腹を立て、同じような目に遭わせようと相手の親と子を呼び(yobi)、Ｅの(E no)家に呼び出しました(yobidashimashita)。

(2) E got angry in regard to (the fact that) that son (her son) was beaten, called the other party's parent and (his) son, and called out to E's house to do the same to them.
Ｅが、息子が殴られたことに腹を立て、同じような目に遭わせようと相手の親と子を家に呼び出しました。

Similarly, in the next testimony (3), the usage of 'tame,' most commonly found in police written records, is also found in B's statement. In ordinary speech, "tame" in sentence (3) can be replaced with common subordinate conjunctions like 'node' (as) because it is more natural to use the latter. Likewise, "tame" is also used in sentence (4) which meant "for the purpose of." We note that the past progressive form of 'te-ita' is also used in sentence (3).

(3) As Z's car was parked in the parking lot of Seki drug store, we came to change the place to Hokuryo High School.
セキ薬局にＺの車が止まっていた(-te ita) ため(tame)、北陵高校に変更となりました。

(4) It is for the purpose of putting the blame on C.
Ｃのせいにするため(tame)です。

Now look at the past progressive form 'kuwaesasete-imashita' (was causing or inflicting) in the sentence (5). This usage of the past progressive form by the witness describes the crime scene where Defendant E ordered A to physically assault F. These examples reflect formal

linguistic phrases used by Japanese investigative officers.

(5) E who got angry by it was using A to inflict violence on F.
それに腹を立てたＥがＡを使ってＦに暴行を加えさせていました(-te imashita)。

D. Prosecutor's Examples

Many instances of professional language from the interrogation handbook were found in the testimony given by Prosecution Witness B. Similar instances (sono, ni taishite, tame, te-ita) can also be found in both the prosecutor's opening and closing statements.

1. Sono (the, its, her)

Examples (6) and (7) were taken from the prosecutor's opening and closing statements, respectively. The word "Sono" is used in both instances in order to make a specific reference to the defendant's daughter and the victim's body.

(6) the defendant's daughter G, her boyfriend H
被告人の娘のＧ、その(sono)交際相手のＨ

(7) I have nothing to do with the disposition of the corpse.
その(sono)死体を捨てたことに何ら関与していない。

2. Ni Taishite (towards)

Testimony (8) is taken from the prosecutor's opening statement and (9) comes from the closing statement. 'Ni taishite' is also found in (10).

(8) The defendant who heard about this was enraged against (towards) Mr. F.
これを聞いた被告人もＦさんに対して(ni taishite)激怒しました。

(9) A and B inflicted serious violence on (towards) Mr. F.
ＡやＢがＦさんに対して(ni taishite)激しい暴行を加えた。

3. TAME (FOR, OR FOR THE PURPOSE OF)

Sentence (10) is taken from the prosecutor's opening statement, and (11) comes from the closing statement. The usage of "tame" in (10) is more natural than that of (11) because the inclusion of "tame no" (for the purpose of) in (11) is more or less redundant. Nonetheless, both words reflect the use of professional language preferred by investigative officers.

(10) … recruit accomplices in order to assault Mr. F
Ｆさんに激しい暴行を加えるために(tame ni)、共犯者を集め・・・

(11) The defendant called accomplices to her house and gave them weapons for the purpose of assaulting Mr. F …
被告人は共犯者らを自宅に呼び出してＦさんに暴行を加えるための(tame no)凶器を渡し・・・

4. -TE IMASHITA (WAS DOING): PAST PROGRESSIVE FORM

The past progressive form is also found in both (12) in the prosecutor's opening statement and (13) in the final statement. Both examples refer to a description of on-going events.

(12) A was watching the condition of Mr. F.
Ａは、・・・Ｆさんの様子を見ていました(te imashita)。

(13) was talking with ~.
~と話していました(te imashita)。

It is clear that these four features are usually found in the professional language of the prosecutors and/or investigative officers. Now we demonstrate that they are in fact not a register of the witness himself but that of the prosecutors or investigating officers. We show this by first tallying the number of occurrences of these features in five pieces of discourse: (1) a witness's letter to the defendant's daughter's boyfriend about this case; (2) the testimony of the prosecution witness in court; (3) eleven samples of the suspect's statement taken from the

handbook; (4) the prosecutor's opening statement, and (5) the prosecutor's closing statement.

None of these features (sono, ni taishite, tame, and te-imashita) were found in the witness's personal letter. On the other hand, these linguistic features are found in the suspect's testimony in court, as well as sample written statements from the handbook. The high frequency of these features in the suspect's testimony and sample written statements suggests possible witness preparation or prosecution coaching prior to his testimony in court. The witness's use of particular language patterns also parallels the language use of the prosecutor in his testimony.

	sono	ni taishite	tame	te imashita
Personal letter (4,379 words)	0	0	0	0
Testimony (4,087 words)	5	10	12	36
Sample written statements (33,489 words)	201	14	50	104
Opening statement (6,983 words)	24	3	17	14
Closing Statement (7,894 words)	40	15	21	3

E. WRITTEN LANGUAGE FEATURES

Written language is more complex than spoken language.[18] Academic writing, which usually focuses on a specific theme contributing to the main line of argument without digressions, includes linguistic characteristics of noun-based phrases, subordinate clauses or embeddings, complement clauses, sequences of prepositional phrases, participles, passive verbs, lexical density, lexical complexity, nominalization, and attributive adjectives.[19] Among them, we discuss noun-based phrases below.

1. LOCATION OF MODIFIERS

One example that was found in the examination of written language is a modification of a noun phrase: a relative clause (noun + post modifier). A relative clause is used to provide

[18]Michael Alexander Kirkwood Halliday, SPOKEN AND WRITTEN LANGUGAGE (1989).
[19] Gillett A. Hammond & M. Martrala-Lockett, INSIDE TRACK TO SUCCESSFUL ACADEMIC WRITING (2009).

additional information without the inclusion of another sentence. Nonetheless, unlike English, Japanese does not require the use of relative pronouns.

For example, the relative clause in witness testimony (14) directly modifies the noun phrase. The clause, (Sore ni hara wo tateta), comes before noun phrase (E) and is predominantly used in written language. In order to fully understand the true meaning of this sentence, nonetheless, one may require the process of reading back the whole sentence. Thus the use of the relative clause in a normal conversation is extremely rare. In examining Witness B's testimony, the use of this relative clause in his speech is very unusual and may imply the possibility of witness preparation conducted by a prosecutor during the ten pre-trial interviews in prison. In a normal spoken expression, it is more common and natural to express this with the use of a compound sentence as shown in (15).

(14) E who got angry with it was using A to inflict serious violence on F.
それに腹を立てたＥ(sore ni hara wo tateta E)がＡを使ってＦに暴行を加えさせていました。

(15) E got angry with it, and he was using A to inflict serious violence on F.
Ｅはそれに腹を立てて、Ａを使ってＦに暴行を加えさせていました。

F. REPETITION

Coulthard suggested that it is rare for individuals to remember verbatim in its exact form or words in terms of what they themselves said, as well as what other people stated with respect to some past event. It is also a misconception that what people remember is the gist of what was in fact said and expressed.[20] This means that slightly different accounts are usually given at each retelling.

The witness recounted in court on 10 November 2010 about what had occurred from the Third to the Fourth of July in 2009. The witness, however, retold the same event using exactly same words and phrases, as shown in testimonies (16) to (18). Also, please note that Testimony (1) had two usages of 'yobi' (call). Not only did Witness B use the word "yobi"," but he also used the phrase "boukou wo kuwaeru" (cause violence) very frequently, as shown in (5) and (14). The same phrase "boukou wo kuwaeru" was also frequently used by the

[20] Coulthard, *supra* note 4, at 414-15.

prosecutor when he read the opening and closing statements, as shown in (9), (10), and (11). This indicates that the witness retold the same event using the same words used by the prosecutor who also interviewed the witness in prison on repeated occasions prior to the trial.

(16) It was because I was called out by E.
Eから呼ばれた(yobareta)からです。

(17) I was called out by telephone from E.
Eから電話があって呼ばれました(yobaremashita)。

(18) I was called out by Ms. E.
Eさんに呼ばれました(yobaremashita)。

G. The Characteristics of Witness B's Testimony

Prosecution witness B gave his response to a direct question, using the prosecutors' or investigating officers' register, including the frequent use of sono, ni taishite, tame, te-imashita, as well as written language features and repetitive expressions, all of which are not normally found in ordinary people's verbal expressions. The witness's personal letter also had shown no indication of these characteristics or linguistic traits. Hence, it is possible that the prosecutor's repeated contacts and detailed interviews with the witness influenced the way he responded to the question about the case.

The Japanese criminal justice system does not have a comparable process of discovery procedure like the one in the U.S., and the prosecutors are not required to disclose the list of all of the evidence that they have collected. As a result, the defense lawyers must compile a specific list of documents or evidence needed to prepare for their defense strategies. During the course of a pre-trial conference, the defense lawyer makes a request for the disclosure of specific information, including material or forensic evidence, depositions, statements made during interrogation, or any other documents pertaining to the case. The defense's specific request for materials or evidence often gives prosecutors a fairly good understanding of the defense's likely strategy. The prosecution is then in a privileged position to formulate its own counter-defense plan prior to trial.

In the present complicity case, since the defense raised the question of the credibility of accomplices' statements on Defendant E and requested relevant documents or evidence, the

prosecutors then may have decided to conduct comprehensive interviews of the former accomplices in order to prepare them for their upcoming testimony in court. Indeed, the prosecution conducted a total of ten interviews with all of the accomplices in a prison facility prior to the trial. If this was in fact the case, then the prosecutors' trial strategy raises serious ethical questions regarding excessive witness preparation and possible witness coaching.

VI. IMPARTIAL TRIAL

Article 37 of the Japanese Constitution stipulates that in all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal; the defendant has a legal right to a fair trial in Japan.[21] Article 21 of the Criminal Procedure Code also stipulates that a public prosecutor or the accused may challenge a judge from the execution of his/her duties, if there is a possibility that he/she may render a partial judgment.[22]

We need to examine whether the defendant can obtain a fair and impartial trial when his or her case is presided over by a judge who has previously ruled on other accomplices involved in the same complicity case. The Japanese Supreme Court stated in a previous decision that judges cannot be challenged simply because they have convicted other defendants on the same complicity case.[23] In that case, two defendants, X and Y, were indicted on a charge of buying votes. Each of them appealed their original conviction to a higher court. The Japanese Supreme Court examined the circumstances, in which two judges who were assigned to the case of Defendant Y also presided on the judicial panel of Defendant X's trial, which had already convicted the latter individual. Defendant Y's counsel requested the exclusion of the two judges from the judicial panel, based on Article 20 (7) of the Criminal Procedure Code, which disqualifies a judge from the execution of his/her duty if he/she participated in the original judgment of the case.[24] The counsel claimed that these two trials relied on identical evidence to indict and try both defendants. The Supreme Court, however, ruled that these two cases were in fact non-identical, maintaining that the judges should not be disqualified unless their partiality could be substantiated with concrete

[21] NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 37.
[22] KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.], art. 21, para. 1 [hereinafter Soshoho].
[23] Saikō Saibansho [Sup. Ct.], June 14, 1961, Mei 36 (shi) no. 21, 15 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [SAIBANSHŪ KEIJI] 6, 974.
[24] Soshoho, *supra* note 22, art. 20, para. 7.

evidence.[25]

Little research has been conducted to examine the extent to which a judge's prior involvement in a previous trial affects his or her decision regarding another defendant who is involved in the same case. Some research has focused on how inadmissible information such as prior criminal-record information might affect the judge's subsequent decision. Landsman & Rakos suggested that jurors and professional judges might be similarly influenced by potentially biased information in civil litigation.[26] And this is despite the fact that American judges are assumed to possess a special capacity to disregard their subjective reactions to inadmissible information.[27] Wistrich, Guthrie & Rachlinski found in their experiments with real judges that while they were generally unable to disregard prior sexual history of an alleged rape victim or prior criminal convictions of a plaintiff, they were in fact able to ignore inadmissible information obtained in violation of proper legal procedures.[28] Blanck et al. also pointed out that jurors might be similarly influenced by judges' views through subtle verbal and non-verbal cues.[29] From these studies, it becomes apparent that judges are not truly equipped with a special ability to disregard their subjective reactions to inadmissible information. Furthermore, their verbal and non-verbal behavior also tends to influence the nature and quality of jury deliberations and final verdicts.

Before we examine a judge's verbal behavior in the case of Defendant E, we wish to note the high conviction rate in Japan and its ramifications. Ramseyer and Rasmusen have pointed out that the conviction rate of criminal trials is particularly high in Japan.[30] In 1994, Japanese prosecutors were able to secure a conviction in 99.9% of all criminal cases tried at a Japanese district court level.[31] Compare this figure with the U.S. in 1995, where professional judges convicted 85% of all criminal cases at the federal level, and 87% or 88% of the criminal cases at the state level.[32] The 2010 Hanzai Hakusho (White Paper on Crime) found that the number of persons found not guilty in 2010 was only 80 out of a total of 61,816

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[25] Saikō Saibansho, *supra* note 23.
[26] Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994).
[27] *Id.*
[28] Andrew Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1306-08 (2005).
[29] Peter David Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).
[30] J. Mark Ramseyer & Eric Rasmusen, *Why is the Japanese Conviction Rate So High*?, 30 J. LEGAL STUD. 53, 54-55 (2001).
[31] *Id.* at 55.
[32] *Id.*

defendants, accounting for 0.0013% of all criminal cases.[33] Even with the introduction of the new lay judge system in 2009, the near-perfect conviction rate has not changed at all.[34]

Japan's extremely high conviction rate is not necessarily a reflection of competency and skill on the part of Japanese prosecutors to win nearly all of their cases. Rather, the Japanese prosecutors have been known to bring forth only the strongest cases to trial and have been reluctant to put weak cases or dubious suspects on trial, citing lack of sufficient budget or shortage of personnel or resources for the trial. As a result, Japanese judges have been asked to rule on the most obviously guilty defendants. Furthermore, many judges may not have a sufficient time to diligently process each and every criminal case. The average number of criminal cases handled by a Japanese district court judge in 2004 was 105; 771 judges examined the total of 81,251 criminal cases in the three month period, suggesting that on average, a single judge only has time to spend six days per case.[35] In other words, Japanese judges are overwhelmed and overburdened with the responsibility to make decisions and routinely convict defendants on cases pre-selected by prosecutors. This type of judicial practice hinders the full enjoyment of the presumption of innocence on the part of the defendants.

We now take up an examination of a judge's questions to a defense witness (formally Witness D) in this complicity case. The panel of the judges stated in the judgment of Defendant B (currently Witness B) that Defendant B caused bodily harm resulting in death in conspiracy with (Defendant) A, (Defendant) C and (Defendant) E. The following section examines the verbal exchange between the judge and the witness to see whether or not 'there is the fear that he/she [a judge] may make a prejudicial decision."[36]

VII. LINGUISTIC ANALYSIS OF JUDGE'S COMMENTS

In the current complicity case in discussion, Witness D's indictment was suspended. In the following excerpt from (1) to (20), the judge accused Witness D of his impudent behavior for staying late at night at Defendant E's place. The judge first mentioned "normal people's sensibility" and asked Witness D to respond why he did not behave in such a way in (5). In (7)

[33] *Id.* at 14.
[34] Hanzai Hakusho 2010 [White Paper on Crime 2010] (2011), http://hakusyo1.moj.go.jp/jp/nendo_nfm.html.
[35] Saikō Saibansho [Sub. Ct.], *Saiban no Jinsokuka ni kakawaru Kensho ni kansuru Houkokusho* [Report on Speedy Trials] (2005).
[36] Soshoho, *supra* note 22, art. 21, para. 1.

and (9), the judge placed emphasis on "late at night" and implicitly criticized D for staying at E's place at such a late hour. In (11), the judge hinted that there was a romantic relationship between Witness D and Defendant E. But because Witness D denied such relations (in (12)), the judge thus showed his own disapproval of D staying at E's residence, stating to him in (15) that "you are quite impudent." Witness D accepted the judge's critical characterization of his misbehavior in (16). The judge, during the conversation, continuously highlighted Witness D's ostensible moral failings, claiming that "ordinary people [given the time and circumstance] would leave her place" in (17). Likewise, in (19), the judge accused Witness D of his deviance with respect to his decision to stay with Witness E. It is clear that in (5), (7), (11), (13), (15), (17) and (19), the judge did not hide the explicit showing of his negative attitudes toward D. These critical reactions and negative responses might suggest that the judge has already deemed Witness D as an accomplice simply because of his overnight stay at Witness E's residence.

(1) J: After that, C and the other two went out, didn't they?
Ｊ：では、Ｃたち３人が出掛けるということになりましたよね。

(2) D: Yes.
Ｄ：はい。

(3) J: Before that, they were talking about wanting to borrow your car, weren't they?
Ｊ：その前に、あなたの車、貸してくれって話があったわけですね。

(4) D: Yes.
Ｄ：はい。

(5) J: I think that using common sense, it was time for you to say good-bye because you came to see her for nothing. Why did you lend your car key to others and decided to stay at her place?
Ｊ：普通の感覚であれば、特に用事もなく来てるんであれば、もうそろそろいとまごいをする機会かなという感じもしますけれども、なぜ車のキー貸して、あなたは居残ったんですか。

(6) D: I was staying there without thinking at all.
Ｄ：何も考えずに、普通に残ってましたね。

(7) J: But, it was 10 o'clock [at night].
Ｊ：だって、時間は１０時ですよ。

(8) D: Yes.

Ｄ：はい。

(9) J: Late at night.

Ｊ：遅い時間帯。

(10) D: Yes.

Ｄ：はい。

(11) J: The relationship between you and her was so intimate that you could stay late, though you met her only once before, right?

Ｊ：１回会っただけで来て、そんなにずっといられるような間柄だったんですか。

(12) D: No, it was not like that.

Ｄ：いや、そうでもないですけど。

(13) J: C already knew that you know [her], correct?

Ｊ：あなたが知ってるのは、Ｃとかは知ってるわけですね。

(14) D: Yes, he did.

Ｄ：知ってます。

(15) J: That was your second time meeting her, wasn't it?. I think you are quite audacious.

Ｊ：被告人とは２回目でしょ。厚かまし過ぎるんじゃないのかなという感じがしますけど。

(16) D: Kind of.

Ｄ：そうですね。

(17) J: When they were going out, why didn't you say that you could drive them somewhere along the way? I think ordinary people would leave her place and return home. But, you stayed there until around 10 o'clock [in the evening]. Those who you know well were not staying there, were they?

Ｊ：どうして一緒に出掛けるときに、おれが途中まで送って行くわっていうことで、普通の感覚だったら、家出て帰るというふうになるんじゃないかと思いますけど、１０時ぐらいの時間帯で居残ったんですかね。あなたの知ってる人というのは、余り親しい人って残ってないわけでしょ。

(18) D: Because I wanted to talk with her. G (E's daughter) and H (G's boyfriend) were there, too.

Ｄ：ええ。まだしゃべりたいなっていうのあったから、ＧもＨもいました。

(19) J: Do you realize that your way of thinking is different from that of ordinary people? Do

you understand your way of thinking is quite different from the rest of the world?

Ｊ：世間の感覚とずれてるという意識はありますか。世間の感覚とずれてるなというのは分かりますか。

(20) D: I know I'm different.

Ｄ：ずれてます。

In the next excerpt from (21) to (57), the judge asked Witness D a variety of coercive questions. The judge tried to confirm some fragments of the assault scene in (21) and (23). Based on this confirmation, the judge then tried to extract an admission in (25) from the witness that he was in fact aware that Accomplices A, B and C were violently assaulting the victim. It was obvious in (26), however, that Witness D did not give the answer that the judge wanted. The judge then paraphrased the expression such as "carrying an ice pick" and "beating the victim" in (25), and used a more technical term "doing (or imposing) violence" in (27). With Witness D's confirmation of the paraphrase in (28), the judge once again appealed to the moral standard of "an ordinary person" when confronted with violence in order to rebuke the witness's own inability to think with common sense in (29). Because the judge could not obtain a response he wanted from the witness in (30), he followed up with a question of "why was that?" in (31). The witness, however, simply repeated the judge's question in (32). The judge then once again criticized the defendant's inconsiderate behavior in (33) and was able to obtain a compromised response in (34), with a re-visitation of the common standard of behavior of persons in (35), followed up accusatory questions in (37), (39) and (41).

When the witness expressed his feeling of not wanting any further association with the victim in (42) and (44), the judge labeled him as "a rather cold-hearted person" in (43) for his failure to take the victim to a hospital as an ordinary person usually would in (45), criticizing his having "indifference" to the victim in (47) and (53), and further calling on the defendant to justify his failure to help the victim in (55). A series of accusatory questions continued until one of the defense counsel requested that the judge stop his series of coercive and intrusive questions against the defendant in (56). The judge, however, took offense at the attorney's complaint and continued his previous pattern of critical questioning.

(21) J: When you went there, it was C who was excited. She was telling a story about when she beat the victim in retaliation for being beaten by him, wasn't she?

J：行ってみると、Cの方が興奮して、被害者に殴られたから、殴り返したっていうようなことを言ってたわけですね。

(22) D: Yes.

D：そうですね。

(23) J: When you went to the park, H got out of the car, and came to tell you how they were beating him, didn't he?

J：公園に行ったときにも、車から降りたH君、どう、殴っているという話をあなたにしてきたんですか。

(24) D: Yes.

D：そうですね。

(25) J: They were carrying an ice pick or a weapon that is pointed at the end. C was saying how she was beating him [the victim] herself, or that H was the one beating him. After hearing these stories, didn't you want to know what was truly happening?

J：アイスピック、あるいは先のとがったものを持っていったり、あるいはC自身が殴り返したと言ってみたり、あるいはH君が殴ってるっていうようなを言ったという、このような話をずっと聞いてみて、一体何が起こってるんだろうなとか思いませんでしたか。

(26) D: I thought they were just making him apologize. Because I didn't know what they were using the ice pick for.

D：謝らせるのかなって。アイスピックも何も使うか分かんなかったですから。

(27) J: They brought it and used it to beat him. That means that they were doing violence to him with it.

J：持っていって、殴ってるというのは、暴行を加えてるということですよね。

(28) D: Yes, that's right.

D：ええ、そうですね。

(29) J: Ordinary people would think that they were using it as a lethal weapon. Didn't you think that way also?

J：凶器に使ってると、普通考えると思いますけど、そういう思いには至らなかったですか。

(30) D: Not really.

D：そうですね。

(31) J: Why was that?

J：どうしてでしょうかね。

(32) D: Not sure.

D：どうしてなんですかね。

(33) J: Then, they moved to a rice field. After that, the defendant said that they would return home. Did she really say on the way back home that they should take the victim to a hospital?

J：それで、田んぼの方に場所を変えて、その後で、被告人が帰るよと言って家に向かう中で、被害者を病院に連れていった方がいいよということは言ってたんですか。

(34) D: Yes, I'm absolutely sure that she said so.

D：はい、間違いなく言ってましたね。

(35) J: Ordinary people would think that they [the other defendants] have seriously injured him from witnessing this chain of events.

J：かなりのけがをさせてるんじゃないかと、この一連の流れを聞けば普通思いますけど。

(36) D: Yes.

D：そうですね。

(37) J: Didn't you say anything when the defendant said this?

J：あなたも、被告人がそう言ったときに、何か言わなかったですか。

(38) D: I said something like: yeah.

D：うんみたいな、そんな感じ。

(39) J: But, you didn't think you should check the condition of his injury?

J：あるいは、どんなけがの状態だろうと確認しようとか思わなかった。

(40) D: I didn't think so.

D：思わなかったですね。

(41) J: Why was that?

J：どうしてですか。

(42) D: If our eyes met, F (the victim) might have told me something. I don't want to get involved at all.

D：顔が会ったら、Fさんに、後で何か言われるから、自分は一切。

(43) J: But, the relationship between you and the victim was a cordial one. You and he were going out often together, right? From your reaction at the scene, however, you looked

like a rather cold-hearted person. If you were told that, how would you feel?

J：あなたと被害者の関係だって、遊びに行ったりする関係だったわけでしょ。かなり冷酷な感じにも見受けられますけど、そう言われたら、どうですか。

(44) D: But, he became crazy while I was still on good terms with him. So, I was thinking I should dissociate myself a little from him. After all Mr. F is Mr. F.

D：でも、途中でおかしくなったから、やっぱりあの人は、Fさんっていうのは。ちょっと距離を置こうかなとは思ってましたね。

(45) J: Even if you managed to distance yourself from him, you still heard them beating him with an ice pick, or they continued to beat him, the defendant herself said they had better take him to the hospital. If your relationship with him was not that estranged, I think it would be normal to take a different course of action in such a case. What do you think of this?

J：距離を置いたとしたって、アイスピック持っていって殴ったとか、殴っているよという話聞いて、被告人自身も病院連れていった方がいいんじゃないかという話を聞いていて、あなたとそんなに疎遠な関係じゃないというんであれば、もうちょっと違う対応をするのが普通じゃないかと思いますけど、どうなんでしょうね。

(46) D: Nothing special.

D：普通に。

(47) J: Are you able to be indifferent?

J：無関心でいられるんですか。

(48) D: I'm not that indifferent.

D：無関心じゃないですけど。

(49) J: But, you didn't do anything for him, did you?

J：だって、何もやってないじゃないですか。

(50) D: Who didn't?

D：だれですか。

(51) J: You didn't.

J：あなたが。

(52) D: Yes.

D：はい。

(53) J: That is called indifference, isn't it?

J：そういうの、無関心って言うでしょ。

(54) D: Yes, that is indifference.

Ｄ：無関心ですね。

(55) J: Why was that?

Ｊ：それはどうしてか。

(56) L (Defense Attorney): (To the judge who is asking questions) Your Honor, whose trial is it? What is the relevance of your interrogation and this trial? (To the Chief Judge) Your Honor, is this a proper way to preside over the trial? I do not understand what the judge wants to hear.

弁護人：裁判官、だれの法廷かというところなんですけど、何の関係のある尋問なのか、裁判長、訴訟指揮としてよろしいでしょうか。何がお聞きになりたいのか、主旨が分からないんですが。

(57) J: I am asking [the defendant] about how he dealt with the matter. Please keep quiet!

Ｊ：どういうふうな対応したのかということを聞いています。ちょっと黙っててください。

The judge, in the above exchanges with Witness D, posed a series of similarly worded questions in order to obtain what he wanted to hear from the witness. Since the same panel of the judges previously participated in the trial of other defendants in the same complicity case, it could be that this particular judge may have already formed an opinion implicating in his mind all five of the individuals (A, B, C, D and E). The judge then may have tried to confirm his preconception through the witness's responses to his coercive style of questioning. The exchange between the judge and the witness casts some serious doubts on whether or not he indeed presided over this trial with an open and impartial mind. Rather, the series of the judge's critical questions and negative remarks to both the witness and his defense lawyer seems to suggest the powerful presence of his bias and prejudice toward the defendant because of his failure to disregard information obtained from previous trials in the same complicity case.

VIII. Survey of Opinions about Judge Reappointment

To further examine perceptions of the appropriateness of using the same panel of judges for the trials of individuals involved in the same complicity case, we conducted an opinion

survey and analyzed the subsequent responses. We asked a total of 407 university students at the School of Regional Policy of Takasaki City University of Economics, in Gunma, Japan and distributed the questionnaire on two separate occasions on April 12 and 18, in 2011. The questionnaire consisted of simple legal explanations (i.e. a brief explanation of the legal concept of presumed innocence and co-principals of complicity), an overview of this specific complicity case, and two closed-ended and open-ended questions, including the following.

(A) The professional judges who examined Defendant E had already given a 10-year prison sentence to Defendant B in the same complicity case.

Do you think that the reappointment of the same professional judges from a previous trial involving the same case for Defendant E's trial is in line with the legal principle of presumed innocence [of the defendant]?

(1) Yes (2) No (3) Don't Know

If 'yes', please explain why. Choose all that apply.
(1) The victim is the same victim in these trials.
(2) Judges are only bound by the Japanese Constitution and the law.
(3) Judges are not to make a judgment on this case because they had previously ruled on Defendant B's case.
(4) Others
Please explain. ( )

If 'no', please explain why. Choose all that apply.
(1) Defendant E pleaded not guilty.
(2) The judges declared Defendant B guilty.
(3) The judges already acknowledged that Defendant E was one of the associates in the crime in the trial of Defendant B.
(4) Others.
Please explain. ( )

Figure 1 shows that the majority of the survey participants (224 students or 55%) felt that the reappointment of the same judges interferes with the principle of the presumption of

innocence. Ninety-five students answered 'yes' to the reappointment, which accounts for 22 % of the sample.

Figure 1. Perceptions of Whether Professional Judges Should be Reappointed in Complicity Cases

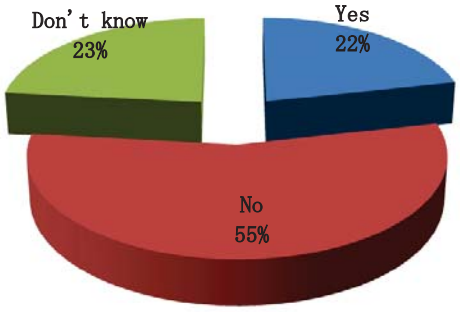


Figure 2 indicates that among those who answered "yes" to the question, the number one reason is that "Judges are only bound by the Japanese Constitution and the law," suggesting that judges are capable of the strict application of legal principles without prejudice toward defendants (39% or 48 individuals). The second reason was that "judges are not to make a judgment on this case because they previously ruled [on Defendant B's case]" at 34% (42 subjects). The third reason is that "the victim is the same person in these trials" (23% or 29 subjects). Some open-ended answers indicate that some respondents felt that these cases are related to each other but the same judges do not necessarily give the same sentence. In short, the main reason for supporting judge reappointment is mainly because respondents believed that judges are more likely to act professionally and make decisions on the basis of legal principles without undue prejudice toward the defendant.

Figure 2. Reasons for Favoring Reappointment of Judges in Complicity Cases

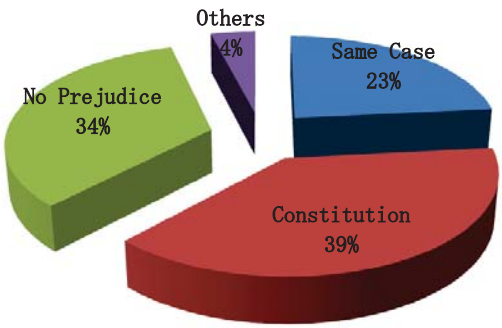


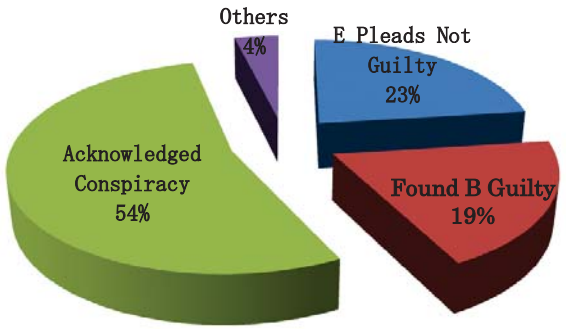
Figure 3 shows the percentage breakdown of respondents' reasons for believing that the reappointment of the same jurists violates the legal principle of presumed innocence. A majority of them indicated that judges' previous admission that Defendant E was one of the associates who were found guilty in other trials violates the legal principle of presumed innocence (54% or 140 subjects). "Defendant E pleaded not guilty" accounts for 23% (60 subjects), followed by "the judges already declared Defendant B guilty" (20% or 51 subjects). Some participant responses to the open-ended question included the following:

a. I cannot think that the same judges are able to prepare themselves psychologically when they try a new defendant involved in the same crime.
b. I believe that the recognition of E as an associate in the trial of B, prior to E's trial, violates the principle of presumed innocence.
c. It is very strange that the judges mentioned E's complicity issue in the trial of B.
d. At the time of B's trial, E was yet to be found guilty or not guilty.
e. The judges already assumed, without examining evidence, that E was guilty.
f. The judges already determined that E was an accomplice prior to E's trial.
g. It is possible that E would be examined based on the judgment given to B.

Figure 3 shows the breakdown of reasons why participants opposed the reappointment of judges. The figure indicates that individuals who answered "no" to the reappointment of

the same judges had more specific opinions than those who supported the reassignment. It could be that respondents who opposed the reappointment are bothered by the fact that the judges who recognized E as an accomplice in another trial were also assigned to E's trial. Many respondents are skeptical that the same judges can start afresh with a clean slate in the trial of another alleged accomplice in the same complicity case.

Figure 3. Reasons for Opposing Reappointment of Judges in Complicity Cases



IX. CONCLUSION

It may be unreasonable to expect that a judge has the innate capacity to disregard prejudicial information obtained from other trials or suppress their subjective views on individual accomplices in the same complicity case. It is thus important to establish a legal procedure, in which the same judges will be disallowed to participate in the ruling of accomplices in the same complicity case.

Since May 2009, lay judge trials began and judicial panels consisting of both lay and professional judges were asked to make decisions in criminal trials. If professional judges are not barred from reappointment, lay judges will then need to be educated about the potential biases introduced by judges who have served in multiple trials of a complicity case. Lay judge trials are held in the head courtroom of each district court, as well as ten branch courthouses in Japan. Most district courts have one or two panels of judges in their criminal

division assigned for the lay adjudication trial, and a complicity case that has more than three alleged accomplices is tried by the same panel of professional judges. When criminal suspects or defendants admit guilt to a criminal charge, there is little issue at stake. However, when some co-defendants in the same complicity case insist on their innocence, a new panel of judges should ideally be assigned to each separate trial in order to examine the case with a clean slate. Given that most district courts have four or five branch courts, it is possible to reappoint a new panel of judges in a complicity case to each trial that takes place, in order that the principle of presumed innocence of defendants may be guaranteed in a Japanese criminal trial.

Unlike professional judges, however, it is difficult to expect to see changes in the assignment of prosecutors for each new defendant. In light of this, the important lesson may be that lay judges be informed of these procedural features as well as the process by which the custody of criminal defendants is handled and managed. The lay judges also need to be informed that public prosecutors have easy access to the accused as well as prisoners, but defense attorneys do not. Since most criminal suspects and defendants are detained before their trial, the accused are placed under the authority of the detention officers. Through this arrangement, investigating officers are allowed to make contact with the accused and can, if they so wish, form personal relationships with the accused who often serve as prosecution witnesses in other trials for the same case. Lay judges should be warned about the possibility of close collaborative relationships between the prosecutors and prosecution witnesses before their testimony so that they can be educated to pay closer attention to the unnatural usage of words or expressions in their testimonies.

The Japanese criminal procedure is firmly established on the legal principle that the accused are presumed innocent until proven guilty in a court of law. If this legal principle is to be taken seriously, judges should not be allowed to participate in multiple trials of different defendants from the same complicity case, while lay judges should be informed of the prosecutor's pre-trial access to suspects, defendants and/or prisoners and be made aware of the danger of excessive witness preparation or improper witness coaching by the prosecutors.

KEYWORDS

Forensic Linguistics, Complicity Case, Saiban-in (Lay Judge) Trial, Witness Coaching, Reappointment of Same Judges, Sono (The), Ni Taishite (Towards), Tame (For the Sake of), Te Imashita (Was Doing)

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

Mari Hirayama[*]

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ABSTRACT

The one of the strongest and clearest impact of the Lay Judge System in Japan has been seen in sex crime lay judge trials. Since the introduction of the system, sentencing for sex crime has been rising up. It seems that there has been a great "Gap" between what lay people think proper sentence for sex offenders and that of professional judges. Also, there are new issues for victims of sex crime as they now have to be faced with lay people who might be their neighbors. In this paper, I analyze various issues in sex crime lay judge trials. Also, I discuss that the possible impacts of lay judge trials on the criminal justice policy for sex crime in the future, such as amendment of penal code, registration and community notification of sex offenders, improving protection for victims of sex crime and so on.

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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.[1]

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 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.[2] 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* trials.[3]

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.[4]

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[1] *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.

[2] *Id.*

[3] *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).

[4] *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.

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 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 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.[5] 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

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

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.[6]

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.[7] 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 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.[8]

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[6] *Id.*

[7] 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).

[8] *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

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 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.[9] 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."[10] Of these three, the task force suggested that criminal categories of Plan B and Plan C be applicable to lay adjudication.[11] 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

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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).

[9] 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.

[10] 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.

[11] 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.

strong interest and that they have a strong impact on society."[12]

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.[13] Of course, the Supreme Court, when faced with this question, may claim that the limited category of triable 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.[14] 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.[15] Also, while the most severe punishment for cases involving indecent assault causing injury was "less than a year" in professional bench trials, it was

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[12] Justice System Reform Council, *supra* note 9, at Chapter IV (3).

[13] 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.

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

[15] *Id.*

"over 5 years to less than 7 years" in *Saiban-in* trials.[16]

I also analyzed the impact on sentencing using a different approach. In total, there were 208 cases [17]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 214 defendants (some cases had more than one defendant). A total of 180 out of 214 defendants received a prison sentence without a stay of suspension, and 2 of those 180 defendants received a 30 year sentence, in which indefinite sentence was demanded by prosecution.

In the following, the sentencing ratio was computed for 178 defendants, i.e., an actual sentence divided by a demanded sentence in years. The average sentencing ratio (actual sentence of lay judges divided by the demanded or recommended sentence by the prosecution prior to deliberations) in all cases is 78.35% (until the end of January 2010).[18] On the other hand, the sentencing ratio for all sex crimes for the same period is 88.77%, and 83.12 % for t he two years which are quite higher than the average. If we focus only on "rape causing injury" cases, which are severer sex crimes. that ratio goes up even higher to 84.23%.

Additionally, there had been six *Saiban-in* trials where sentencing exceeded the demanded sentence for two years. Two cases came from sex crime trials (see Case No. 84 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).

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[16] *Id.*

[17] Most public prosecution offices in Japan announce schedules for Saiban-in trials in their homepages one month ealier or so. Sex crimes, however, are exceptional in order to respect privacy of victims. I collected the data of these 208 trials according to articles in newspaper or observing trials by myself. There may be some calculation omissions in total number.

[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 8.

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. 104).

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 as above (Case No. 49).
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 perceptive 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

[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").

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 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, all male or all female lay judge panel occurred in 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.

I 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 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

[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.
[21] *Seihanzai wa Josei Koho Kihi? 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.*

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]

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.

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[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).

[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 Injruy" to "Rape," Changing the Charge in order to Avoid a Saiban-in Trial. The Ohita Prefectural Police sent the Case to the Prosecuotor's Office. They Cared the Victim*], NISHINIHON SHIMBUN, Apr. 19, 2010 [hereinafter *Gokan*].

The prosecutors, however, did not agree with the police's classification of the offense and reclassified it as a "rape causing injury" case. This case was eventually adjudicated in a *Saiban-in* trial (Case No. 144 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.

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

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[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.

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 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

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[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.

[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.*

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.

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.

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[35] The Council had discussed the possibility of the selection system; however, it was not introduced.
[36] *Gokan*, *supra* note 26.

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 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 information of sexual predators after their being released 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 in November 2004, in Nara prefecture. The nature of thi s 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

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[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).

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 organizations other than the MOJ for preventing recidivism. At the same time, nearly half of them (44.2%) supported the installation of the tracking system by the police for sex offenders and sharing the information on their whereabouts, including their current residence, suggesting that they did not object to the police having exclusive access to sexual predators (and they composed the largest group in respondents).

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 of major impacts 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

[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.

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 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

[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.

[42] *Id.*

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 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 ostensively 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.

KEYWORDS

The Lay Judge System (or Saiban-in System?), Sex Crime, Sex Offenders, Sentencing, Victims, Megan's Law

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[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.
[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.*

Table 1: A List of Crimes to be Adjudicated by the Saiban-in System Prior to Its Introduction in 2009[1]

CRIMINAL CATEGORIES	2004	2005	2006	2007	2008
Robbery Causing Injury	1,146	1,111	939	695	590
Homicide	761	690	642	557	543
Arson of Inhabited Building	357	322	331	287	234
Rape Causing Death (A)	316	274	240	218	189
Injury Causing Death	229	205	181	171	173
Indecent Assault causing Death or Injury (B)	167	132	161	168	136
Rape in the scene of Rubbery (C)	197	165	153	129	125
Violation of the Stimulants Control Act	145	118	125	94	106
Robbery Causing Death	136	123	72	66	86
Uttering Counterfeit Currency	151	244	40	62	36
Counterfeiting Currency	53	76	30	17	23
Gang Rape Causing Injury or Death (D)	N/A	14	16	23	18
Reckless Driving Causing Death	38	43	56	51	17
Violation of the Concerning Special Provisions for the Narcotics and Psychotropics Control Act,	20	19	14	13	10
Death Through Aggravated Abandonment	8	8	14	10	8
Violation of Explosives Control Act	6	3	1	4	8
Violation of Firearms and Swords Control Act	23	37	40	29	6
Others	47	49	56	51	16
Total	3,800	3,633	3,111	2,645	2,324
% of Sexual Crimes (A)+(B)+(C)+(D)/Total	18%	16%	18%	20%	20%

[1] These shows number of each crime. Mari Hirayama, *Saiban-in Saiban to Seihanzai [Saiban-in Trials and Sex Crime]*, 327/328 RITSUMEIKAN L. REV. 668 674 (2009), referring to Ayako Uchida, Saiban-in Saiban no Taisyo Jiken ni Kansuru Ichi Kosatsu- Fukuzatsu Konnan Jiken, Syounen Gkauso Jiken, Seihanzai Jiken no Giron wo Shushin ni [A Study on Crime Category tried by Saiban-in Trials - Focusing Mainly on Complicated Cases, Juvenile Tried as Adults Cases, and Sex Crime Cases], Rippo to Chosa . 298 Sex crimes were highlighted in the table.

Table 2: Sex Crime Lay Judge Trials From May 21, 2009 to May 20, 2011

Y=Year(s), M=Month, S=Suspended Sentence, P=Probation.

Ex. "3Y5YS(P) : 3Y" means that a defendant is sentenced to 3 years, with suspended sentence of 5 years, probation, with prosecutors' recommended sentence of 3 years.

Case Number	Date of Sentence	Court Location	Type of Crime	Case Summary	Sentencing: Demanded/Actual Sentence (Ratio)	Gender Composition of Lay Judges
	2009					
1	September 4th	Aomori	Rape at the scene of Robbery	22 year old defendant broke into the victim's apartment, robbed and raped the victim. He also was prosecuted for another rape and robbery case, along with 4 other theft cases. All cases were tried together. The two rape victims gave the Victim Impact Statements (VIS) via Video-Link-Protection System. VPS applied.	15Y : 15Y (100%)	F 1 : M 5
2	October 2nd	Tokyo	Indecent Assault causing Injury	23 year old defendant committed an act of indecent assault against the victim. The court took into consideration the "Ji-Da-N" (a settlement out of court) between the victim and the defendant; he was given a suspended sentence.	3Y, 5YS (P) : 3Y	F 3 : M 3
3	23rd	Fukuoka	Indecent Assault causing Injury	25 year old defendant committed an act of indecent assault against a victim in her 20's on a street.	2Y6M : 4Y	F 1 : M 5
4	29th	Tachikawa (Tokyo)	Indecent Assault causing Injury	41 year old defendant committed an indecent assault against a 33 year old victim on a walk, causing bodily injuries.	3Y, 5YS : 3Y	F 2 : M 4
5	〃	Tottori	Rape at the scene of Robbery, Attempted Robbery causing Death	35 year old defendant broke into the victim's home, robbed and raped then eventually killing her.	21Y : 22Y (95.5%)	F 1 : M 5
6	November 13th	Ohtsu	Rape causing Injury	35 year old defendant attempted to rape the victim at a hotel, causing a bodily injury.	3Y, 5YS (P) : 6Y	F 4 : M 2
7	20th	Sapporo	Indecent Assault causing Injury	28 year old defendant pushed the victim, resulting in bodily injury.	8Y : 13Y (61.5%)	F 1 : M 5
8	〃	Nagasaki	Indecent Assault causing Injury	24 year old defendant attempted to commit an indecent assault against a junior high school student, causing a bodily injury.。	3Y, 4YS (P) : 4Y	F 3 : M 3
* 9	〃	Sendai	Rape causing Injury	39 year old defendant raped a high school student, while threatening her with a knife. The victim was injured. One of the lay judges said "You piss me off" to the defendant. The defendant appealed the conviction. The Sendai High Court denied the defendant's appeal by stating that "the purpose of the lay judge system is to reflect and incorporate opinions of lay people in sentencing. When we consider the purpose [of the new system], it is clear that we cannot simply compare the verdict with precedents"	9Y10M : 10Y (98.3%)	F 2 : M 4
10	〃	Tokyo	Rape causing Injury	The defendant gave the victim sleeping pills and raped her.	8Y : 8Y (100%)	F 2 : M 4
11	26th	Mito	Indecent Assault causing Injury	45 year old defendant indecently assaulted a high school girl, injuring her. "Jidan" (settlement out of court) was established between the victim and the defendant.	3Y, 5YS (P) : 3Y	F 3 : M 3

12	27th	Sapporo	Rape causing Injury	22 years old defendant tried to rape the victim who was in her twenties and injured her.	5Y : 6Y (83.3%)	F 4 : M 2
★ 13	30th *	Nara	Gang Rape causing Injury	Four defendants, all in their twenties, forced the 20 year old victim into their car and attempted to rape her. She was injured.	A3Y,B,C,D3Y5YS (P) : A,B,C,D,E 6Y	F 0 : M 6
14	December 4th	Nagoya	Rape causing Injury	19 year old defendant raped 4 women age ranging from 17 to 26. This was the first case involving a juvenile tried by a lay judge panel.	5-10Y : 5-10Y (100%)	F 3 : M 3
15	〃	Kumamoto	Rape causing Injury	28 year old defendant raped and indecently assaulted 4 victims on separate occasions. The 4 cases were tried all together. VIS applied. Jidan (settlement out of court) was established among some of the victims and the defendant.	10Y : 10Y (100%)	F 2: M 4
16	〃	Hiroshima	Indecent Assault causing Injury	41year old defendant tried to indecently assault the victim. One of female lay judges was dismissed, but reasons for dismissal were not disclosed	3Y, 5YS : 3Y	F 3 : M 3
17	9th	Tokyo	Indecent Assault causing Injury	32 year old defendant committed an indecent assault on the bus, causing injury to the victim.	3Y4YS : 3Y	F 2 : M 4
18	10th	Gifu	Indecent Assault causing Injury	27 year old defendant, who was a carpenter, threatened the victim with a knife and indecently assaulted her. The victim was a high school student.	3Y : 4Y (75%)	F 3 : M 3
19	11th	Chiba	Indecent Assault causing Injury	40 year old defendant, who was the president of a company, indecently assaulted one of his employees. The victim made VIS while screens were used for her protection.	3Y, 5YS : 4Y	F 1 : M 5
20	〃	Tachikawa (Tokyo)	Gang Rape causing Injury	Rape of a woman whom one of the defendants met through the internet. The victim made VIS	13Y : 15Y (86.7%)	F 2 : M 4
21	17th	Kagoshima	Rape causing Injury	54 year old defendant raped a 32 year old woman whom he had known for a short time.	6Y : 7Y (85.7%)	F 3 : M 3
22	18th	Kobe	Rape causing Injury	49 year old defendant attempted to rape one of his acquaintances, The victim was injured.	6Y6M : 7Y (92.9%)	F 2 : M 4
	2010					
23	January 15th	Kobe	Rape causing Injury	45 year old defendant attempted to rape a woman who was in her 20's. She was injured	5Y : 6 Y (83.3%)	F 2 : M 4
24	〃	Naha (Okinawa)	Rape causing Injury	24 year old defendant attempted to rape woman in her 20's. She was injured.	3Y, 5YS : 4Y	F 3 : M 3
25	21st	Kobe	Rape causing Injury	28 year old defendant raped an elementary school girl .Girl's mother, using screens protection, made VIS In her statement, she wanted the defendant to be "locked-up forever,"	9Y : 12Y (75%)	F 2 : M 4
26	〃	Kochi	Indecent Assault causing Injury	34 year old defendant attempted to indecently assault a 50 year old woman in a parking lot. She was injured. During the sentencing, the chief judge ordered the defendant to stay away from alcohol, and to attend "sex offender treatment program" during the probation period.	3Y, 5YS (P) : 4Y	F 3 : M 3
27	〃	Tachikawa	Indecent Assault causing Injury	21year old defendant pushed a victim on a street and then indecently assaulted her.	3Y, 4YS (P) : 3Y6M	F 1 : M 5
28	22nd	Osaka	Indecent Assault causing Injury	28 year old defendant indecently assaulted the victim and the victim was injured. The defendant had a mental disability, and the court found that he had been acting under diminished capacity.	3Y, 5YS (P) : 4Y	F 2 : M 4

29	〃	Chiba	Indecent Assault causing Injury	35 year old defendant knocked the victim down on the road and indecently assaulted her.	3Y, 5YS (P) : 3Y	F 2 : M 4
30	〃	Shizuoka	Rape causing Injury	24 year old defendant raped a teenage girl and robbed her. He committed three other acts of rape and those cases were tried together. At the appeals court, the sentence was reduced to 12 Y because of the settlement reached with one of the victims AFTER the first trial.	13Y : 16Y (81.3%)	F 2 : M 4
31	〃	Chiba	Indecent Assault causing Injury	35 year old defendant pushed a victim down on a street, in order to indecently assault her.	3Y , 5YS : 3Y	F 2 : M 4
32	25th	Shizuoka	Rape at the scene of Robbery	24 year old defendant raped a teenage girl. He also committed a total of three other sex crimes including this case, ranging from rape to attempted rape.	13Y : 16Y (81.3%)	F 1 : M 5
33	〃	Maebashi	Rape resulting causing Injury	26 year old defendant trespassed into the home of the 19 year old victim and attempted to rape her. He also confessed to two other rape cases. VPS applied.. One of the victims made closing statements while using a protection method with screens.	12Y : 13Y (92.3%)	F 3 : M 3
34	27th	Kobe	Rape causing Injury	27 year old defendant raped a woman who was in her 20's. She was injured.	6Y6M : 7Y (92.6%)	F 1 : M 5
35	28th	Tokyo	Indecent Assault causing Injury	22 year old defendant groped a woman on the street. She was injured.	3Y, 5YS : 3Y	F 1 : M 5
36	29th	Shizuoka	Rape causing Injury	31year old defendant trespassed into a teenage victim's house and raped her. He also coerced the victim to write a note stating her alleged consent.	9Y : 12Y (75%)	F 2 : M 4
37	Feb. 4th	Shizuoka	Indecent Assault causing murder	43 year old defendant indecently assaulted a victim who was taking a walk with her dog and then killed her by cutting her throat. VPS applied.	Indefinite : Indefinite (100%)	F 2 : M 4
☆ 38	5th	Himeji (Kobe)	Rape causing Injury and Violation of Firearms and Swords Control Act	32 year defendant threatened the victim with a knife and raped her. One lay judge commented that the "gender ratio [of lay judges] should not matter."	6Y : 7Y (85.7%)	F 1: M 5
39	〃	Okayama	Indecent Assault causing Injury	33 year old defendant touched breasts of a high school girl and injured her.	3Y5 (P) : 5Y	F 3 : M 3
40	10th	Tachikawa	Rape at the scene of Robbery	27 years old defendant trespassed into the victim's house and then raped and robbed her.VPS applied.	13Y : 15Y (86.7%)	F 2 : M 4
41	〃	Saitama	Indecent Assault causing Injury	30 year old defendant sexually assaulted 5 women and injured them.	8Y6M : 10Y (86%)	F 1: M 5
42	12th	Tachikawa	Indecent Assault causing Injury	27 years old defendant indecently assaulted a victim, both injuring and robbing her. One lay judge commented that "I recognize him as a criminal when I first saw him in the courtroom."	4Y : 6Y (66.7%)	F 2 : M 4
43	18th	Tachikawa	Rape at the scene of Robbery	47 year old defendant raped the victim twice and robbed her.	15Y : 18Y (83.3%)	F 2 : M 4
44	〃	Matsumoto (Nagano)	Rape at the scene of Robbery	40 year old defendant threatened a victim with a knife then raped and robbed her.	12Y : 15Y (80%)	F 1: M 5

* 45	〃	Tokushima	Rape causing Injury and attempted rape.	25 year old defendant raped/attempted to rape 4 victims. At the sentencing, the chief judge commented that "the sentences for sexual crimes have been too lenient according to the general sense of the people."	10Y : 12Y (83.5%)	F 4 : M 2
46	19th	Saitama	Rape causing Injury	30 year old defendant tried to rape the victim and injured her. VPS applied.	5Y : 6Y (83%)	F ? : M 1 (?)
47	〃	Hakodate (Hokkaido)	Rape causing Injury	37 year old defendant threatened 3 high school girls with a knife and raped them. He black mailed the mother of one of the victims.	18Y : 20Y (90%)	F 2 : M 4
48	24th	Tachikawa	Attempted Rape at the scene of Robbery	47 year old defendant robbed a victim and then attempted to rape her.	10Y : 12Y (83.5%)	F 1 : M 2 (?)
* 49	26th	Nagoya	Rape causing Injury	36 year old defendant dragged a high school girl into his car and raped her. At the sentencing, the chief judge commented "the sentences for sexual crimes so far have been too lenient according to the general sense of the people."	9Y : 10Y (90%)	F1 (?) : M?
* 50	March 2nd	Tokyo	Indecent Assault causing Injury	62 year old defendant molested a 6 year old girl and injured her. Victim Participation System applied. The girl's father said that "the lay judge system will be an [excellent] opportunity to create a new sentencing guideline for sex crime cases." Chief Justice also " concluded that we need harsher punishment than what previous sentencing patterns indicated."	6Y : 7Y (86%)	F? : M?
51	4th	Mito	Rape causing Injury	22 year old defendant assaulted his acquaintance and raped her.	10Y : 6Y (60%)	F1 (?) : M1 (?)
* 52	5th	Osaka	Rape at the scene of Robbery	41 year old defendant raped a 17 year old girl when she was sleeping in her house. During the sentencing, the chief judge commented that "the sentences for sexual crimes so far have been too lenient. The Lay Judge trials should become opportunities to reconsider sentencing for sexual crimes from viewpoints of healthy common sense of the general populace." Also, after the trial, a female lay judge commented "If it weren't [a] lay judge trial, this sentence would not been possible."	7Y : 7Y (100%)	F 2 : M 4
☆ 53	10th	Nara	Indecent Assault causing Injury	48 year old defendant pinioned the victim from her back and indecently assaulted her. He was also prosecuted for 3 other sexual crimes. Female lay judge commented that "as I was the only female lay judge, I felt pressured to articulate women's viewpoints during the deliberation."	5Y6M : 6Y (91.7%)	F 1 : M 5
54	12th	Tokyo	Rape causing Injury	24 year old defendant threatened a high school girl and raped her on a street.	6Y : 7Y (85.7%)	F ? : M 1 (?)
55	〃	Fukushima	Rape causing Injury	34 year old defendant tried to rape a high school girl at an internet café, injuring her.	12Y : 12Y (100%)	F ? : M ?

☆ 56	17th	Osaka	Rape causing Injury	27 year old defendant trespassed into the victim's apartment and raped her. *Female lay judge commented that "men and women sometimes have different opinions on sexual crimes. Therefore, the equal gender ratio of lay judges in this case was good."	8Y : 10Y (80%)	F 3 : M 3
57	〃	Wakayama	Indecent Assault causing Injury	27 year old defendant indecently assaulted a woman on the street.	3Y : 5Y (60%)	F 2 : M 4
58	〃	Fukuoka	Rape causing Injury	57 year old defendant tried to rape his girlfriend's daughter and injured her.	4Y : 5Y (80%)	F ? : M 1 (?)
★ 59	18th	Tokyo	Rape at the scene of Robbery	47 year old defendant trespassed into a victim's house. He raped and robbed her. One lay judge commented that "[the panel] needed women's points of view."	8Y : 9Y (88.9%)	**F 0 : M 6**
* 60	〃	Tachikawa	Gang Rape causing Injury	45 year old defendant, with his 4 co-offenders, committed 6 instances of rape. He met the victims through the internet. VPS applied. At the appeal court, the defense lawyer claimed that "[one] could not expect fair judgments when sexual crimes are tried in lay judge trials."	Indefinite : Indefinite (100%)	F 2 : M 4
61	〃	Chiba	Rape causing Injury	43 year old defendant threatened the victim with a knife and attempted to rape her. He was also prosecuted for another sexual crime.	15Y : 15Y (100%)	F ? : M 1 (?)
62	〃	Chiba	Rape causing Injury	24 year old defendant attempted to rape a victim, injuring her.	4Y : 6Y (66.7%)	F ? : M ?
63	〃	Matsuyama	Indecent Assault causing Injury	29 year old defendant indecently assaulted a victim and injured her.	5Y : 6Y (83.3%)	F 3 : M 3
* 64	19th	Nagasaki	Indecent Assault causing Injury	39 year old defendant clinched a victim and indecently assaulted her. One female lay judge commented that "In sex crime cases, lay people's wisdom should be incorporated."	2Y : 4Y (50%)	F 2 (?) : M 1 (?)
65	〃	Sapporo	Rape at the scene of Robbery	The defendant raped and robbed the victim. There were three other victims. No lay judges attended the press conference.	16Y : 22Y （72.7%）	F ? : M ?
66	〃	Osaka	Indecent Assault causing Injury	37 year old defendant attacked the victim and indecently assaulted her.	3Y, 5YS : 4Y	F ? : M 1 (?)
67	〃	Nagoya	Rape at the scene of Robbery and Theft	19 year old defendant raped 4 women. He also committed a number of robberies.	5-10Y : 5-10Y (100%)	F 3 : M 3
68	〃	Nagoya	Indecent Assault causing Injury and Theft	68 year old defendant indecently assaulted his acquaintance. VPS applied.	7Y : 8Y (87.5%)	F 1 (?) : M ?
★ 69	25th	Osaka	Rape at the scene of Robbery	23 year old defendant robbed and raped the victim on the street at midnight.	7Y6M : 13Y (57.7%)	**F 6 : M 0**
70	29th	Saitama	Rape at the scene of Robbery	25 year old defendant raped and robbed 4 women. VPS Applied.	21Y : 25Y (84%)	F ? : M ?
71	April 16th	Osaka	Rape causing Injury	33 year old defendant attacked a victim at her apartment.	9Y : 10Y (90%)	F ? : M ?
72	22nd	Tokyo	Rape causing Injury	62 year old defendant raped two women. (He was already sentenced to 25 years for his attempted robbery that resulted in death).	7Y : 10Y (70%)	F 1 (?) : M ? (?)

73	〃	Hamamatsu	Indecent causing Injury	25 year old defendant clinched a victim and injured her.	3Y3YS (P) : 4Y	F 1 (?) : M 1 (?)
74	23rd	Chiba	Rape causing Injury	25 year old defendant trespassed into a victim's house and raped her.	6Y : 8Y (75%)	F ? : M ?
* 75	〃	Osaka	Indecent Assault causing Injury	53 year old defendant assaulted a victim and injured her. At the sentencing, the chief judge commented that "Judging from recent legislations and tough- on-crime trends, we should well reflect what lay citizens want for punishment. We have explored a new approach for sentencing sexual crimes."	8Y : 12Y (67%)	F ? : M ?
76	28th	Nagoya	Indecent Assault causing Injury	37 year old defendant indecently assaulted the victim whom he met on the internet.	3Y4YS : 3Y	F ? : M ?
* 77	〃	Kagoshima	Rape causing Injury	43 year old threatened 7 women with his knife and raped them. One of victims was high school student. VPS applied. "When we deliberated the sentence I was thinking from a viewpoint of woman. However, the chief judge told us not to stand on one-side and instead be neutral, which made me to see a different view" (comment by a female lay judge). A female alternate lay judge commented "I was against to try sex crimes in lay judge trials before, but being a lay judge made me think such horrible crime should not be happened."	14Y : 15Y (93%)	F 4 (?) : M ? (?)
78	30th	Nagoya	Rape at the scene of Robbery	32 year old defendant (A) and 31 year old defendant (B) raped a victim and robbed her.	A: 16Y : 23Y (69.6%) B: 14Y : 20Y (70%)	F ? : M ?
79	May 13th	Nagasaki	Indecent Assault causing Injury	20 year old defendant attacked 6 victims.	3Y : 5Y (60%)	F 1 (?) : M 1 (?)
80	14th	Tachikawa	Rape causing Injury	26 year old defendant raped 4 victims.	14Y : 15Y (93%)	F ? : M ?
○ 81	〃	Yokohama	Rape causing Injury	35 year old defendant raped a victim. He also took her picture and threatened that "If she reports to the police, the case will be tried by lay judges who will also see this photo."	23Y : 25Y (92%)	F 2 : M 4
82	〃	Miyazaki	Indecent Assault causing Injury	24 year old defendant dragged a high school girl from her bicycle and assaulted her. At sentencing, the chief judge commented that the defendant should go through sex offenders' treatment program during probation.	3Y4YS (P) : 5Y	F 3 : M 3
★ 83	〃	Naha (Okinawa)	Indecent Assault causing Injury	40 year old defendant indecently assaulted the victim. One female lay judge commented "We also needed male lay judges."	6Y : 8Y (75%)	**F 6 : M 0**
◎ 84	19th	Saitama	Indecent Assault causing Injury	34 year old defendant dragged a high school girl from her bicycle and indecently assaulted her. The first lay judge trial where the demanded sentence exceeded the recommended sentence.	**8Y : 7Y (114.3%)**	F 1 : M 5
85	20th	Tokyo	Rape causing Injury	20 year old defendant (he was a minor when he committed the offense) raped and injured a high school girl. VPS applied.	6Y6M : 8Y (81.3%)	F 1 (?) : M ? (?)
* 86	〃	Hamamatsu	Indecent Assault causing Injury	30 year old defendant choked 4 victims and indecently assaulted them. At sentencing, the chief judge commented that the defendant needed to take a sex offenders treatment program while in prison and also receive counseling after being released. 5 lay judges who attended the press conference commented that sex crimes should be tried by lay judge trials.	5Y : 5Y (100%)	F 1 (?) : M 1 (?)

☆ 87	〃	Nara	Rape causing Injury	23 year old defendant raped and injured a teenage girl. "The gender ration of the lay judges in this case is great" (comment by a male lay judge). VPS applied.	8Y : 9Y (89%)	F 3 : M 3
88	26th	Tokyo	Rape causing Injury	Nepalese defendant trespassed into the house of the victim and tried to rape her. VPS applied. A female judge commented "As most of professional judges are male, it is significant to introduce viewpoints of women."	5Y6M : 7Y (78.6%)	F 1 (?) : M 2 (?)
89	28th	Himeji (Kobe)	Rape causing Injury	35 year old Brazilian defendant raped and injured the victim.	7Y : 8Y (87.5%)	F ? : M ?
90	28th	Iwate	Indecent Assault causing Injury	30 year old defendant injured a high school student while trying to touch her. A female lay judge commented "It is good to try sex crimes in lay judge trials as viewpoints from both women and men can be applied" VIS was made through video-link.	3Y5YS : 4Y	F 2 : M 4
91	June 2nd	Takamatsu	Rape causing Injury	46 year old defendant trespassed into one of his coworker's house and injured her while attempting to rape her.	6Y : 7Y (85.7%)	F 2 : M 4
☆ 92	4th	Matsuyama	Indecent Assault causing Injury	32 year old defendant clinched two victims from their back and injured them. A female lay judge commented "As the way of thinking by women and men are different. When a victim is a female, majority of lay judges should be female."	4Y : 8Y (50%)	F 1 (?) : M ?
○ 93	〃	Ohita	Gang Rape causing Injury	24 year old and 21 year old brothers raped a victim. A male judge commented "When I put myself in a victim's shoes, I doubt sex crimes should be tried in lay judge trials."	7Y6M : 10Y (75%) 5Y6M : 9Y (61.1%)	F 2 (?) : M 2 (?)
94	〃	Nagasaki	Indecent Assault causing Injury	23 year old defendant trespassed into 5 houses, and indecently assaulted minors.	4Y6M : 6Y (75%)	F 3 : M 3
95	10th	Tsu	Indecent Assault causing Injury	23 year old defendant indecently assaulted t a high school girl, injuring her. A male alternate lay judge commented that "lay people's opinions are needed to try sex crime cases."	3Y4YS : 3Y	F 3 : M 3
☆ 96	11th	Kyoto	Rape causing Injury and Robbery	62 year old defendant assaulted and raped the owner of a snack bar. A female lay judge in 20 commented that "If the lay judges had been all male, it would not be fair. They need new criteria to select female lay judges for sex crime cases" The other female lay judge commented that "she did not want to concede the sentence time to be lower than she thought it should be when considering the victim. However, the judges showed us the data of average sentencing for similar cases, and I could not hold to my opinion. I am regretful now."	6Y : 7Y (85.7%)	F 2 : M 4
97	14th	Ohtsu	Rape causing Injury	28 year old defendant broke into the victim's car then robbed and raped her.	5Y : 8Y (62.5%)	F ? : M 1 (?)
98	15th	Osaka	Rape at the scene of Robbery, and attempted Rape at the scene of Robbery	44 year old defendant committed 11 counts of (attempted) rape during robberies. Victims testified through video-link. Jidan was established between some victims and the defendant.	30Y : Indefinite	F 1 (?) : M ?
99	〃	Hiroshima	Indecent Assault causing Injury	39 year old defendant injured two victims while attempting to indecently assault them. Court did not find that the defendant had intended to rape them.	8Y : 10Y (80%)	F 1 (?) : M ?
100	17th	Aomori	Indecent Assault causing Injury	50 year old defendant tried to have sex with his coworker, and when he was denied he injured her. VPS applied. Victim recommended 8 years of incarceration.	3Y6M : 5Y (70%)	F 4 : M 2

101	〃	Yokohama	Indecent Assault causing Injury	21 year old defendant strangled the victim on the street. He also knocked the sister of the victim down at the scene.	5Y : 7Y (71.4%)	F 1 (?) : M ?
102	〃	Tsu	Rape causing Injury	23 year old defendant trespassed into the house of the victim then raped and robbed her.	9Y : 10Y (90%)	F ? : M 1 (?)
103★	18th	Sapporo	Indecent Assault causing Injury	40 year old defendant injured the victim while indecently assaulting her. A female judge in her 20's commented that "[she] tried not to consider that the victim was lady who is of the same age as [her]"while deliberating.	3Y5YS (P) : 3Y	**F 6 : M 0**
* 104	〃	Kobe	Rape causing Injury	38 year old defendant raped two women. At the time of the trial, he was serving his time in prison for committing a previous rape case. A male lay judge commented "From the viewpoint of the lay people, much longer sentence should be given."	8Y4M : 10Y (83.3%)	F 1 (?) : M 1 (?)
105	〃	Kokura (Fukuoka)	Attempted Rape at the scene of Robbery	26 year old defendant tried to rob and rape the victim by threatening her with scissors.	9Y : 12Y (75%)	F 1 (?) : M 1 (?)
106	23rd	Takamatsu	Rape at the scene of Robbery	48 year old defendant trespassed into the victim's house then raped and robbed her.	9Y : 12Y (75%)	F 2 : M 4
○ 107	〃	Kochi	Rape causing Injury	29 year old defendant tried to rape two victims, both were 15 years old. A victim testified with the video-link system. Sentencing for two cases was added up. A female lay judge commented "I agree that sex crimes should be tried by Saiban-in trials."	7Y : 7Y (100%) 4Y : 5Y (80%)	F 4 : M 2
108		Saga	Rape causing Injury	23 year old defendant injured a high school girl while trying to rape her. A male lay judge commented that "It was difficult to judge from the standpoint of female victim."	7Y6M : 10Y (75%)	F 2 : M 4
109	24th	Tokyo	Rape causing Injury	37 year old defendant raped and injured a high school girl. He was also prosecuted for 7 other sex crimes. He also had previously served time in prison for rape.	15Y : 18Y (83.3%)	F ? : M 2 (?)
110	〃	Gifu	Indecent Assault causing Injury	30 year old defendant injured a victim while touching her. He was also prosecuted with 7 other incidents of indecent assault that resulted in injury. A female judge said that she "thought demanded sentence was too high."	4Y : 7Y (57.1%)	F 1 (?) : M 2 (?)
111	25th	Yokohama	Indecent Assault causing Injury	26 year old defendant randomly attacked a victim on the street, and he injured her by assaulting her.	3Y5YS : 3Y6M	F ? : M ?
112	〃	Ohtsu	Rape causing Injury	19 year old defendant (minor) pushed a victim into a car and raped her.	6Y6M : 9Y (72.2%)	F ? : M ?
113	July 5th	Chiba	Indecent Assault causing Injury	29 year old defendant knocked a victim down on the street and injured her by committing an indecent assault, and then he took her to another place and raped her. Voluntariness of the statement was denied. A male judge commented "The way prosecutors made the defendant make a statement was fabricated. Common people would never think of such strategy."	8Y : 8Y (100%)	F ? : M 1 (?)
114		Maebashi	Rape at the scene of Robbery	39 year old defendant raped a victim who was involved in the sex industry and then robbed her.	8Y : 10Y (80%)	F 2 : M 4
115	7th	Fukuoka	Rape causing Injury	39 year old defendant injured a victim while trying to rape her. The chief judge criticized prosecutors for not showing clear reason for their demanded sentence.	8Y : 9Y (88.9%)	F ? : M ?

116	15th	Wakayama	Indecent Assault causing Injury	40 year old defendant injured a victim while trying to assault her in a car. Jidan was settled between them. The victim asked for a suspended sentence.	3Y4YS : 5Y	F ? : M 1 (?)
☆ * 117	16th	Kofu (Yamanashi)	Attempted Rape at the scene of Robbery	44 year old defendant abducted a victim with his car, and injured her when he tried to rape her. A female lay judge commented that she "put more focus on attempted rape rather than on robbery." A male lay judge commented that "lay judges' input may change sentencing for sex crime cases."	12Y : 13Y (92.3%)	F 3 : M 3
118		Sendai	Rape causing Injury	36 year old defendant raped his ex-girlfriend. He pled not-guilty. No lay judges agreed to attend the press-conference.	8Y6M : 10Y (85%)	F ? : M ?
119		Mito	Rape causing Injury	37 year old defendant abducted a 4th grade girl and raped her. No lay judges agreed to attend the press-conference.	9Y : 10Y (90%)	F ? : M ?
120		Saga	Indecent Assault causing Injury	38 year old defendant threatened a victim with a knife and indecently assaulted her.	5Y : 6Y (83.3%)	F 3 : M 3
121	23rd	Yokohama	Rape at the scene of Robbery	26 year old defendant attacked three victims and robbed them. Some of victims agreed to settle (Jidan). A victim testified through video-link.	16Y : 18Y (88.9%)	F 1 (?) : M 1 ?
☆ * 122		Niigata	Indecent Assault causing Injury	29 year old, former fire fighter injured a high school girl by indecently assaulting her. A male lay judge commented that "3 female, 3 male lay judges would be more appropriate", another male judge commented that he "tried as hard as possible to think from a female viewpoint." And also the other male judge commented that "it is significant to try sex crime by a lay judge trial because it may change opinions and attitude toward sex crimes within a society."	4Y : 5Y (80%)	F 1: M 5
123		Takamatsu	Indecent Assault causing Injury	33 year old defendant knocked a victim down from her bicycle.	4Y : 5Y (80%)	F 3 : M 3
124	28th	Wakayama	Indecent Assault causing Injury	50 year old defendant knocked a victim down in a hotel room. Jidan was settled.	3Y5YS : 4Y	F 3 : M 3
125	30th	Nagoya	Indecent Assault causing Injury	40 year old defendant indecently assaulted and robbed a female victim.	13Y : 15Y (86.7%)	F ? : M ?
126		Nagoya	Rape causing Injury	36 year old defendant raped and robbed an 18 year old victim. He was also prosecuted for three other rape cases.	18Y : 18Y (100%)	F ? : M 1 (?)
127	August 2nd	Okayama	Rape causing Injury	39 year old defendant raped teenager victim. The victim testified through a video-link.	5Y : 6Y (83.3%)	F 1 (?) : M 1 (?)
128	4th	Saitama	Rape at the scene of Robbery	55 year old defendant tried to rob a high school girl and raped her.	12Y : 15Y (80%)	F ? : M ?
129	6th	Kanazawa	Indecent Assault causing Injury	33 year old defendant took a high school girl away with his car, and indecently assaulted her. She testified through a video-link.	5Y : 6Y (83.3%)	F 5 : M 1
130	19th	Mito	Rape causing Injury	28 year old defendant injured his acquaintance, and raped her.	6Y : 7Y (85.7%)	F ? : M 1 (?)
131	27th	Aomori	Rape causing Injury	60 year old defendant injured a victim by trying to rape her.	4Y6M : 6Y (75%)	F 1 (?) : M 2 (?)
* 132		Akita	Rape causing Injury	45 year old defendant raped a victim and she was injured. All 6 lay judges commented that sex crimes should not be excluded from lay judge trials.	7Y : 8Y (87.5%)	F 2 : M 4

133	30th	Chiba	Rape causing Injury	29 year old defendant, a former rescue officer, trespassed into the houses of 9 victims, raping or assaulting them.	18Y : 25Y (72%)	F ? : M ?
134	September 2nd	Aomori	Rape causing Injury	29 year old defendant attempted to rape a victim. The victim was injured badly. The defendant had a history of committing sex crimes.	10Y : 10Y (100%)	F ? : M ?
135		Nagoya	Rape causing Injury	33 year old defendant knocked a victim down in a parking lot and tried to rape her.	5Y : 6Y (83.3%)	F ? : M ?
136	8th	Yamagata	Rape causing Death	57 year old defendant trespassed into a victim's house and murdered her in order to rape.	30Y : Indefinite	F ? : M ?
137		Fukuoka	Rape at the scene of Robbery	22 year old defendant raped a victim and robbed her. A female lay judge commented that "she was surprised to know that sentencing for sex crimes is lenient." She also stated that she thinks the law should be changed."	7Y : 10Y (70%)	F 1 (?) : M ?
138		Kagoshima	Rape causing Injury	51 year old defendant tried to rape one of his employees. Jidan was settled.	7Y : 10Y (70%)	F ? : M ?
139	15th	Yamaguchi	Indecent Assault causing Injury	26 year old defendant injured a high school girl when trying to indecently assault her.	3Y5YS (P) : 3Y	F ? : M ?
140	17th	Sakai (Osaka)	Rape causing Injury	21 year defendant strangled four women and raped three of them. He also robbed one of them.	12Y : 20Y (60%)	F ? : M ?
141	24th	Fukuoka	Rape at the scene of Robbery	22 year old defendant trespassed into a victim's house. He raped and robbed her.	8Y : 10Y (80%)	F ? : M ?
142	October 1st	Chiba	Rape causing Injury	20 year old defendant, who was college student, raped a 17 year old girl. He also indecently assaulted two other girls.	9Y : 12Y (75%)	F ? : M ?
143	6th	Gifu	Indecent Assault causing Injury	65 year old defendant indecently assaulted a 6 year old girl.	3Y6M : 6Y (58.3%)	F 1 (?) : M ?
○ 144		Ohita	Rape causing Injury	37 year old defendant raped and injured. The victim asked the police to treat the case as just "Rape" as she did not want to go through the lay judge trial, and the police agreed. The case, however, was still prosecuted for a crime of "rape resulting in injury."	12Y : 12Y (100%)	F 2 : M 4
145		Kumamoto	Rape causing Injury	47 year old defendant took a victim away to an underground passage and raped her. 4 days later, he trespassed into the women's bathroom at the train station and raped another victim there.	12Y : 12Y (100%)	F 1 (?) : M 1 (?)
146	8th	Yokohama	Rape at the scene of Robbery	40 year old defendant trespassed into several houses, and committed 9 crimes including rape, robbery, and larceny.	23Y : 23Y (100%)	F ? : M ?
147	12th	Maebashi	Rape at the scene of Robbery	48 year old defendant raped and robbed a victim in the sex industry.	8Y6M : 10Y (85%)	F ? : M ?
148	19th	Saitama	Rape causing Injury	55 year old defendant abducted his own daughter and raped her. The defense argued that the defendant was acting under diminished capacity.	10Y : 12Y (83.5%)	F 1 (?) : M ?
149		Utsunomiya	Rape at the scene of Robbery	27 year old defendant raped four women and robbed them. VPS applied. A female lay judge commented that "[the lay judges] did not consider the feelings of defendant's family from the demanded sentence."	25Y : 27Y (92.6%)	F 1 (?) : M ?

150	21st	Chiba	Attempted Rape at the scene of Robbery	31 year old Peruvian defendant attacked and robbed a victim on the street and indecently assaulted her. Then the defendant attempted to rape her.	6Y6M : 10Y (65%)	F ? : M ?
151	29th	Yokohama	Indecent Assault causing Injury	19 year old defendant tried to sexually attack a victim in the women's room at the police station. The court did not admit his intention to rape her.	4-6Y : 5-7Y (83.3%)	F ? : M ?
152		Wakayama	Indecent Assault causing Injury	25 year old defendant knocked down a victim and tried to touch her. The victim testified through a video-link.	2Y and 10 days misdemeanor imprisonment : 4Y and 20 days (50%)	F ? : M ?
153	November 1st	Odawara (Kanagawa)	Rape causing Injury	35 year old defendant, a former care house worker, strangled a victim and indecently assaulted her. He pled not guilty.	7Y : 8Y (87.5%)	F ? : M ?
154	12th	Sapporo	Indecent Assault causing Injury	35 year old defendant knocked down a victim in a parking lot, trespassed into her house and attempted to rape her.	4Y : 5Y (80%)	F ? : M ?
155		Kobe	Indecent Assault causing Injury	40 year old defendant, a former bank worker, indecently assaulted 7 victims.	12Y6M : 13Y (96.2%)	F ? : M ?
156	17th	Kyoto	Attempted Rape at the scene of Robbery	27 year old defendant made his two ex-coworkers take sleeping pills and robbed them of their money. He then attempted to rape them. The court considered that the defendant had regretted his actions very much, and that Jidan was settled between him and the victim.	5Y : 8Y (62.5%)	F ? : M ?
157	18th	Okayama	Indecent Assault causing Injury	32 year old defendant attacked a high school girl and indecently assaulted her. Jidan was settled between the victim and him.	3Y5YS : 4Y	F ? : M ?
158		Kumamoto	Rape causing Injury	45 year old defendant raped his acquaintance and injured her.	7Y : 8Y (87.5%)	F ? : M ?
159	19th	Asahikawa	Rape at the scene of Robbery	25 year old defendant, a former court officer, trespassed into victims' houses and raped 8 women while robbing some of them. Appeal by the defendant was denied (5/17/11).	Indefinite : Indefinite (100%)	F ? : M ?
160		Yokohama	Rape at the scene of Robbery	42 year old Nigerian defendant threatened a victim at his apartment then robbed and raped her.	12Y : 13Y (92.3%)	F ? : M ?
161		Yokohama	Indecent Assault causing Injury	46 year old defendant committed an indecent assault against a 6 year old girl. He then abducted her and assaulted her again.	11Y : 12Y (91.7%)	F ? : M ?
☆ 162		Hamamatsu	Rape at the scene of Robbery	40 year old defendant trespassed into 7 victims' houses. He raped and robbed them. A female lay judge commented "We had better have more female lay judges."	29Y : 30Y (96.7%)	F 2 : M 4
163	26th	Nagasaki	Rape causing Injury	24 year old defendant injured a victim and then tried to rape her.	6Y : 7Y (85.7%)	F ? : M ?
164	December 2nd	Naha	Indecent Assault causing Injury	28 year old US soldier indecently assaulted the victim.	3Y6M : 5Y (58.3%)	F ? : M ?
165	7th	Chiba	Indecent Assault causing Injury	37 year old defendant indecently assaulted the victim and injured her.	3Y4YS : 4Y	F ? : M ?
166	9th	Kobe	Rape causing Injury	32 year old defendant raped 6 teenagers and injured them.	27Y : 30Y (90%)	F ? : M ?

167	10th	Fukushima	Rape causing Injury	21 year old defendant trespassed into a victim's house and then Injured her while attempting to rape her.	4Y : 5Y (80%)	F 2 : M 4
168		Matsuyama	Rape causing Injury	54 year old defendant raped his acquaintance. She was injured.	6Y : 7Y (85.7%)	F ? : M ?
169		Okayama	Attempted Rape at the scene of Robbery	29 year old defendant trespassed into a victim's house and attempted to rape her. He was also prosecuted for other sex crimes.	16Y : 16Y (100%)	F ? : M ?
170	11th	Hiroshima	Rape at the scene of Robbery	48 years old defendant trespassed into a victim's house and raped her. The defendant appealed but the Hiroshima High Court denied the request later.	11Y : 13 Y (84.6%)	F ? : M ?
171	18th	Hamamatsu	Attempted Rape at the scene of Robbery	24 years old defendant trespassed into a victims's house and attempted to rape and rob her. He injured her with a knife.	7Y6M : 8Y (93.8%)	F 1 : M 5
172	24th	Nagoya	Rape causing Injury	57 year old defendant tried to rape the victim who was taking a walk. She was injured.	7Y : 7Y (100%)	F ? : M ?
173		Okayama	Rape at the scene of Robbery	36 year old defendant raped and robbed 9 women.	25Y : 30Y (83.8%)	F ? : M ?
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174	January 14th	Chiba	Indecent Assault causing Injury	20 year old defendant, who was a minor at the time of crime, indecently assaulted two women.	4Y : 5Y (80%)	F ? : M ?
☆ 175		Toyama	Rape causing Injury	29 year old defendant raped and injured a teenager. A male lay judge commented "Our gender ratio did not affect the sentencing at all."	6Y6M : 8Y (81.2%)	F 1 : M 5
176	19th	Nagoya	Indecent Assault causing Injury	32 year old defendant threatened a victim with a knife and attempted to indecently assault her.	3Y6M : 6Y (58.3%)	F ? : M ?
177	21st	Miyazaki	Rape causing Injury	23 year old PSW defendant raped and in injured two women.	10Y : 14Y (71.4%)	F 3 : M 3
178	27th	Nagoya	Rape causing Injury	25 year old defendant threatened two girls, who were 13 and 14, with a knife and raped them. The 14 year old victim was injured.	9Y : 10Y (90%)	F ? : M ?
179	27th	Okazaki (Nagoya)	Indecent Assault causing Injury	33 year old Nepali defendant clinched a victim and injured her. He claimed that he was mistakenly arrested.	2Y6M : 3Y6M (71.4%)	F 3 : M 3
180	February 3rd	Numazu	Rape causing Injury	41 year old defendant, a fisherman, attacked a teenager and a victim in her 50s and tried to rape them.	10Y : 12Y (83.3%)	F ? : M ?
◎ ☆ 181		Utsunomiya	Rape causing Injury	26 year old defendant, a fire fighter, attacked a 15 year old high school student and injured her. A male alternate lay judge commented that "the gender ratio did not have an impact on sentencing. [The] decision is significant enough to deter future sex criminals." Defense lawyers commented "Lay judges were so affected by statements of victim's family that the punishment exceeded the sentence recommended [by the prosecution]." VPS applied.	**9Y : 8Y (112.5%)**	F 5 : M 1
182		Miyazaki	Indecent Assault causing Injury	36 year old defendant assaulted and touched a high school girl. 3 months later, he bit the face of a woman.	3Y10M : 4Y (95.8%)	F ? : M ?
★ 183	8th	Kanazawa	Rape at the scene of Robbery	41 year old defendant raped 8 victims. All 6 lay judges and 3 alternate lay judges were all female.	29Y : 30Y (96.7%)	**F 6 : M 0**

184	10th	Chiba	Indecent Assault causing Injury	26 year old defendant knocked down and punched a victim in the face in order to indecently assault the victim.	3Y : 4Y (75%)	F ? : M ?
185		Hamamatsu	Rape at the scene of Robbery	26 year old defendant broke into a fast food store, robbing the store and raping an employee there.	13Y : 15Y (86.7%)	F ? : M 1 (?)
186	14th	Osaka	Indecent Assault causing Injury	36 year old defendant inappropriately touched 32 women. 29 cases were tried by bench trials. 3 cases were tried by the lay judge trial.	6Y : 6Y (100%)	F ? : M ?
187	16th	Kyoto	Indecent Assault causing Injury	24 year old defendant injured a high school girl while indecently assaulting her. Jidan was settled out of court.	3Y4YS : 3Y	F ? : M 1 (?)
188		Takamatsu	Indecent Assault causing Injury	31 year old defendant trespassed into a victim's house and tried to indecently assault her.	3Y5YS : 5Y	F ? : M ?
189	17th	Chiba	Rape causing Injury	20 year old defendant (minor at the time of crime) and his brother raped a minor girl.	6Y : 9Y (66.7%)	F ? : M ?
190	18th	Matsumoto	Indecent Assault causing Injury and Rape	24 year old defendant committed an indecent assault against a 13 year old girl and raped her.	11Y : 15Y (73.3%)	F ? : M ?
191		Okayama	Rape causing Injury	37 year old defendant abducted two women and tried to rape them. He also raped another woman in his car.	12Y : 15Y (80%)	F ? : M ?
192		Hiroshima	Rape at the scene of Robbery	20 years old defendant raped a victim with other offenders and robbed her.	15Y : 20Y (75%)	F ? : M ?
193	21st	Chiba	Gang Rape	Two defendants, both 22 years old, pushed 5 women into their car and raped them.	24Y : 30Y (80%) 24Y : 30Y (80%)	F ? : M 1 (?)
194	25th	Kohfu (Yamanashi)	Attempted Rape at the scene of Robbery, Robbery causing Death	62 year old defendant murdered an owner of the restaurant and stole money.	Indefinite : Indefinite (100%)	F ? : M 2 (?)
195		Kokura	Indecent Assault causing Injury	33 year old defendant touched a victim and knocked her down on the street. He also touched an elementary school child.	4Y : 5Y (80%)	F ? : M ?
196	March 3rd	Chiba	Rape causing Injury	22 year old defendant trespassed into a victim's house then raped her and robbed her underwear. He came back again and raped a sister of the victim and injured her.	13Y : 15Y (86.7%)	F ? : M ?
197		Wakayama	Rape causing Injury	22 years old defendant threatened a victim with a knife nad raped her in the cemetery. He was also prosecuted for 4 other indecent assaults causing injury.	13Y : 16Y (81.3%)	F ? : M ?
198	10th	Wakayama	Indecent Assault causing Injury	36 year old defendant clinched a victim on the road, knocking her down.	6Y : 7Y (85.7%)	F ? : M ?
☆ * 199	11th	Kanazawa	Rape causing Injury and Indecent Assault causing Injury	37 year old defendant trespassed into victims' house, injured 4 women including minors, and raped them. A female lay judge commented "As I am also a woman I often found it difficult to be objective". A male lay judge commented "I cannot understand a woman's feeling 100%. If there were only male lay judges, we would find it more difficult to decide the punishment" Defense attorneys commented "It has been tougher to sentence for sex crimes. I think lay judges could make a rational judgment."	20Y : 28Y (71.4%)	F 3 : M 3
200	24th	Sakai (Osaka)	Rape at the scene of Robbery	43 year old defendant drugged 13 victims, raping, and robbing them of their money.	Indefinite : Indefinite (100%)	F 2 : M 4

201	30th	Takamatsu	Rape causing Injury	26 year old Chinese student trespassed into victims' houses and raped 6 women. He appealed to the High Court.	24Y : 25Y (96%)	F 3 : M 3
★ 202	April 23rd	Tottori	Indecent Assault causing Injury	27 year old defendant, former high school staff, committed indecent assault against 4 women. 2 of the victims were injured.	6Y : 10Y (60%)	**F 0 : M 6**
203	26th	Ohita	Rape at the scene of Robbery	42 year old defendant trespassed into a victim's house and robbed her of her money. Then he abducted and raped her.	14Y : 16Y (87.5%)	F ? : M 3 (?)
★ 204	27th	Nagano	Rape causing Injury	40 year old defendant, an owner of the restaurant, tried to rape a customer. A male lay judge in his thirties commented "I was wondering whether it was OK to try the case with an all male lay judge panel. But I wanted to ask women's opinions on this case" Another male lay judge commented that "If we had had a female judge, there is a possibility that our decision would have changed."	3Y5YS : 5Y	**F 0 : M 6**
205	28th	Tokushima	Rape causing Injury	39 year old defendant made his ex-girlfriend ingest a sleeping pill and then raped her. She was injured.	7Y : 10Y (70%)	F 1 (?) : M ?
206	May 13th	Fukuoka	Rape at the scene of Robbery	35 year old defendant raped a victim and robbed her purse. He had 6 prior sex crime convictions.	18Y : 20Y (90%)	F ? : M ?
207	18th	Sapporo	Rape causing Injury	35 year old defendant, who was on parole for sex offense he committed previously, attempted to rape a teenager and injured her.	8Y : 12Y (75%)	F ? : M ?
208		Fukuoka	Indecent Assault causing Injury	37 year old defendant confined a victim in his car and committed an indecent assault against her. She was injured while trying to escape.	4Y6M : 5Y6M (81.8%)	F ? : M ?

★: trials where "No male" or "No female" lay judges were selected.

☆: gender issues of lay judges were somehow discussed.

*: any comments on sentencing were discussed.

○: problems of trying sex crimes by lay judge trials were discussed.

◎: sentence exceed the recommended sentence by the prosecution.

VPS = Victims Participation System VIS- = Victim Impact Statements.

Jidan = Settlement out of court.

Indefinite = Life in Prison with a possibility of Parole.

As for gender composition of lay judges, ? stands for the exact number was not found and (?) stands for there were male/female lay judges at least that number.