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## 8. The Meaning of the Peremptory Challenge in the *Saiban-in* (Lay Judges) Selection System in Japan: Legal Interpretation and Game Theoretical Analysis\*

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### 1. The Meaning and Outline of the *Saiban-in* System

In Japan and Korea, the great changes in the criminal judicial system happened around the same time. Since January 2008, the participation of the general public in the criminal justice system has been implemented in Korea, and since May 2009, in Japan as well. These new systems in the criminal judicial system present various problems, and one common problem shared by Japan and Korea is how the lay judges or jurors should be selected.

In our Japan-Korea joint research project, I, one of the Japanese researchers, suggest the importance of considering how the jurors or lay judges should be selected from the standpoint of both the legal theory and the game theory.

In this paper, I examine the outline of the Japanese *saiban-in* (lay judges) system, and consider the rationale for this system, and what the legal interpretation and the game theory can say about the *saiban-in* selection system.

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I also describe the Korean lay participation system. I hope that many Korean researchers take interest in and respond to my proposal.

### 1.1. Background to the Japanese *Saiban-in* System

Since May 2009, the participation of the general public in the criminal justice system called *saiban-in seido* (trial system by lay judges)<sup>(1)</sup> has been implemented in Japan.

Prior to World War II, Japan had a jury system<sup>(2)</sup> for 15 years. The Jury Act (Act No. 50 of 1923) was introduced in 1923 and went into effect in 1928. Under this former Japanese jury system, high crimes were, in principle, handled by juries, and 12 jurors were chosen from among rich and intelligent Japanese males who were high-income taxpayers and were aged 30 or over.<sup>(3)</sup> They made advisory decisions about the guilt or innocence of the accused, although the judge was not obliged to obey the jury's verdict. However, under this system, the accused could opt for the court of professional judges instead of a jury court. Due to this, a jury trial was not very often used at that time, since trials by a court of professional judges were preferred to juries of lay people. As a consequence, the Jury Act has been suspended since 1943, meaning a de facto abolition of the jury.

In Japan, public participation in the criminal justice system had been nonexistent, except for the suspended jury system and the ongoing system of the Committees for the Inquest of Prosecution [*Kensatsu Shinsa Kai*]<sup>(4)</sup>. Most major countries in the world have a judicial system which involves participation by the general public; however, Japan did not have any such system.

In such a situation, the Judicial Reform Council (*Shihou-seido Kaikaku*

(1) In Japanese, "*saiban-in*" means (a) lay judge(s) and "*seido*" means a system.

(2) Korean new lay participation system resembles Japanese old jury system in that jurors make advisory decision about the guilt or innocence of the accused and that the accused is able to opt for the court of professional judges instead of a jury court.

(3) We can regard this former jury system as a limited participation of the general public in the judicial system because males who paid little tax or females, no matter how much tax they paid, were not able to be jurors.

(4) This is a system in which eleven lay people consider whether cases dropped by the prosecutor should be prosecuted or not.

*Shingikai*, hereinafter called JRC) which was set up in the Cabinet in 1999, submitted a report on the reform of judiciary systems to the Prime Minister. This report suggested various reforms such as changing the system which nurtures the legal profession (the Japanese version of law schools) and making the court system user-friendly. The introduction of the *saiban-in* system was one of these recommended reforms. In order to implement these JRC's recommendations, the Office for Promotion of Justice System Reform (*Shihou-seido Kaikaku Suishin Hombu*) was established in the Cabinet and formulated the bill according to the JRC's ideas about the *saiban-in* system. The bill was passed by the Diet in May 2004, and the Law for Implementation of the *Saiban-in* System in Criminal Court Procedures (hereinafter called the *saiban-in* Act) was promulgated as Act No. 63 of 2004.

### 1.2. Outline of the *Saiban-in* System

What is the *saiban-in* system?

It allows the general public to participate in criminal court trials and to deliberate and make decisions together with professional judges on the accused's guilt or innocence and on the sentence to be imposed. This system was commenced on May 21, 2009, and there have been 28 *saiban-in* trial cases as of October 9, 2009.

Under this system, high crimes, which are currently tried by three judges, are handled by a court composed of three judges and six *saiban-in* chosen from the general public. The accused cannot opt out of this type of trial. When the court thinks it necessary, spare *saiban-in* – fewer than seven in number – are appointed in the same way. It should be noted that this Japanese system is not a jury system consisting solely of lay citizens as is in the United States. Rather, it is similar to the French or German mixed court system called "trial by consultation," or *Schöffengerichtssystem*, where the professional judges and citizens work together.<sup>(5)</sup>

(5) However, in noting that *saiban-in* is chosen by random sampling, we may take the view that this system looks more like the American jury system than the European mixed court system.

In this study, we should pay attention to the way in which the *saiban-in* are chosen. It is usually explained that they are selected from the general public by lot. However, in fact, it is not only by lot but also by design. To be precise, some candidates of *saiban-in* are selected and rejected artificially<sup>(6)</sup>. We can find a game situation for this *saiban-in* selection system; however, before going on to the main subject, we need to verify the rationale for the *saiban-in* system.

### 1.3. Rationale for the *Saiban-in* System

Why was the participation of the general public in the judicial system implemented in Japan? We can answer this question in two ways.

Some people say that the *saiban-in* system should be legitimized based on the ideals of democracy. Many of the progressive lawyers, in particular, believe that the current criminal justice system in Japan is neither democratic nor reasonable. Of the total accused who are tried, 99.9 % are adjudicated guilty. They are of the opinion that several innocent people have been wrongly imprisoned – this problem is called *Enzai* (unjust accusation). *Enzai* results from investigation conducted on unreasonable grounds by police officers with iron hands, from prosecutions by prosecutors who fail to pay attention to do the given works, and from condemnation by judges who fail to listen carefully to the accused and the accused's defense and listen only to the prosecutor. Most professional judges are drawn from the elite, who grew up in affluent families, graduated from famous universities, and passed the bar examinations with excellent records. Their backgrounds often prevent them from having a clear insight into the lives of ordinary people and render them ignorant about civil society. Thus, if the power of the judges is reduced and the courts have access to the wisdom of lay people, the rate of acquittals will increase. Doing this will perhaps reduce *Enzai*.

Others say that the *saiban-in* system has little to do with democracy, and that it is introduced to acquaint lay people with the judicial system to a greater extent.

(6) For more information on the Japanese *saiban-in* system in English, see Anderson and Nolan (2004), Anderson and Saint (2005), Supreme Court of Japan (2005), Supreme Court of Japan et al. (n. d.).

People who hold this view also believe that the current criminal trial system is not bad and that many people have faith in the judiciary. The reason behind fewer acquittals is that the screening by the prosecutors functions efficiently. In spite of this, Japanese society has undergone change and the judiciary's outlook must reflect this change. Moreover, many people are beginning to want to take part in the governance of their society positively, and the judiciary has to be accountable to the people. The best way to satisfy people who hold progressive views is to make them participate in criminal trials. This is the thinking behind this development. The most drastic reform of bringing the general public into the trial processes and reflecting common sense in the results of the trials will help them to think "the judiciary is ours."

The Japan Federation of Bar Associations (hereinafter called JFBA), which promoted judicial participation for the former reason, advocated a pure jury system consisting only of lay people. In contrast, the Ministry of Justice and the Supreme Court of Japan, which favored the latter reason, thought a mixed court with lay people and professional judges to be better than the jury system. In designing the participation system, lawyers tried to justify it by referring the idea of democracy against prosecutors and judges; however, they lost the argument. As a result, Article 1 of the *Saiban-in* Act stipulates the purpose of this system as follows:

This law shall provide for special provisions to the Courts Act (Act No. 59 of 1947) and the Code of Criminal Procedure (Act No. 131 of 1948) and other necessary matters concerning the criminal trials in which *saiban-in* take part, in consideration that the commitment to criminal proceedings of *saiban-in*, who are selected from the general public, with judges contributes to increase of the understanding and trust of the general public toward the justice system (emphasis added).

Here, we find that this system is built not for the democratization of the judiciary but for the enhancement of the power and authority of the judiciary according to the formal explanation by the Japanese government. The purpose of the *saiban-in* system is only to increase the understanding and trust of the

general public toward the justice system<sup>(7)</sup>.

Note that most Japanese people do not want to participate in criminal trials as *saiban-in*, as shown by opinion polls. Figures 1 and 2 are the results of a public opinion poll by the Cabinet Office, and these show that the proportion of people who want to serve as *saiban-in* is very high and that this proportion increases as knowledge of the new system increases.

Figure 1. Public Opinion Survey on *Saiban-in* System, Feb. 2005

Do you want to participate in a criminal trial in the *saiban-in* system?

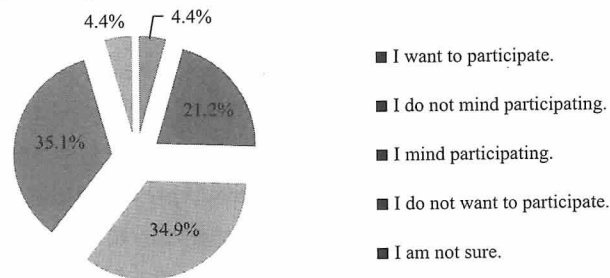
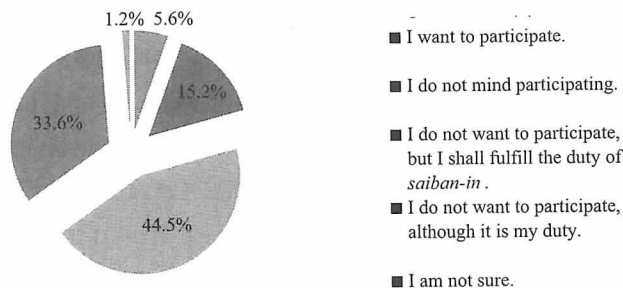


Figure 2. Public Opinion Survey on *Saiban-in* System, Dec. 2006

Do you want to participate in a criminal trial in the *saiban-in* system?



(7) I found that in Korea many people do not have faith in the judiciary and the new lay participation system aims to make the judiciary democratic.

Judge O. Ikeda, a member of the Expert Deliberation Group on the *Saiban-in* System and the Criminal Justice Reforms [*Saiban-in Seido / Keiji Kentou-kai*], the Office for Promotion of Justice System Reform, said in Ikeda (2009): “Under the discussion leading toward introducing it, some took the view that the present criminal trial system by professional judges was very bad and said that in order to renew this system, we should kick judges out of the court and introduce a system in which lay citizens participated as a sovereign. However, the *Saiban-in* Act has never been planned from such an ideological standpoint.”

#### 1.4. Suggestion for the *Saiban-in* Selection System from the Previous Paragraph

Why was the *saiban-in* system introduced? Increasing the understanding and trust of the general public toward the judicial system is the only formal answer. In short, the *saiban-in* system is built not for democracy but for the enhancement of the power of the court.

The fact that the *saiban-in* system is irrelevant to democracy suggests that *saiban-in* is never representatives of the Japanese people but are just six persons fortuitously chosen by lot. Therefore, it is not necessary to balance the *saiban-in* panel. We do not have to ensure that the panel reflects the state of the Japanese society. Sometimes, all of the six chosen *saiban-in* will be women or they will all be poor persons or elderly adults. The *Saiban-in* Act allows the panel to be composed in an unbalanced manner.

In addition, as described later, there is the possibility that the prosecutor and the defense may challenge the candidates of *saiban-in* so that the composition of the panel can be manipulated.

## 2. *Saiban-in* Selection: Legal Theoretical Approach vs. Game Theoretical Approach

### 2.1. *Saiban-in* Selection Process

How are the *saiban-in* selected?

The *saiban-in* selection process in the *Saiban-in* Act is as follows:

1) Every year, a district court makes a list of *saiban-in* candidates for the

following year by choosing collectively by lot from the list of voters of the House of Representatives election. In Japan, whoever is aged 20 or above is automatically registered on electoral rolls. A person selected as a candidate can be informed of his or her selection.

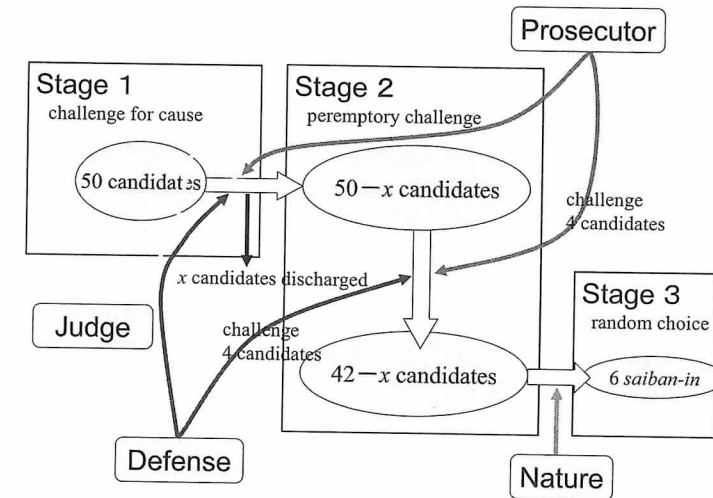
- 2) If a case for the *saiban-in* trial is filed on a district court, the court chooses 50 or 100 candidates by lot from the list prepared in the above process for each specific case, and summons them. In this paper, we assume that a court summons 50 candidates for a simple explanation.
- 3) Judges ask the candidates, who have presented themselves at the court, whether they have been disqualified from acting as *saiban-in*<sup>(8)</sup> or whether they have valid reasons<sup>(9)</sup> to be excused if they wish. The candidates who are regarded by the judges as being disqualified or having valid reasons for being excused will be discharged from the *saiban-in* duties. If the prosecutor and the defense for the accused consider that the candidates are disqualified for the *saiban-in*, they can seek to challenge them for cause. If the court accepts such a challenge, the challenged candidates will be discharged. [Stage 1]
- 4) The prosecutor and the defense each have the right to challenge peremptorily up to four of the candidates. No reason will be required for the peremptory challenge. When they exercise the rights, the challenged candidates will also be discharged. [Stage 2]
- 5) After excluding those candidates who have been discharged in the above process, six *saiban-in* will be finally chosen by lot and appointed (Figure 3).

(8) As a rule, whoever is age 20 or above and has the right to vote is considered as being qualified as a *saiban-in*, with the exception of persons whom the *Saiban-in* Act bars from carrying out the duties of a *saiban-in*. This includes, for instance, those who have serious difficulties in fulfilling the duties because of mental or physical disabilities, those who are engaged in judicial occupations, and those who are considered by the judges as likely to make an unfair judgment are discharged from the *saiban-in* duties.

(9) As a rule, all nominees must accept appointment as *saiban-in*, since the purpose of the *saiban-in* system is to involve all qualified citizens. However, those who have valid reasons may request to be excused from the duties, and they get off only when the requests filed by them are considered to be reasonable by the judges. For instance, valid reasons to be excused from appointment as *saiban-in* are being aged 70 years or above, students, or being former *saiban-in* or candidates in the recent past.

[Stage 3]

Figure 3. Outline of the *Saiban-in* Selection Process



The Supreme Court Rule for Implementation of the *Saiban-in* System in Criminal Court Procedures (Supreme Court Rule No. 7 of 2007, hereinafter called the *Saiban-in* Rule) stipulates details of the peremptory challenge. Article 32 of the *Saiban-in* Rule stipulates as follows:

- 1) When the prosecutor and the defense challenge candidates peremptorily, the Court shall provide the opportunity to challenge one candidate, alternately, to the prosecutor and the defense.
- 2) When the prosecutor or the defense has challenged some candidates peremptorily, the Court must inform the others who were challenged.
- 3) The Court gives the rights of peremptory challenge to the prosecutor first.

In addition, when the court thinks it necessary, spare *saiban-in* fewer than seven in numbers will be appointed in the same way.

It should be emphasized at this juncture that the prosecutor and the defense can challenge the candidates peremptorily. It has often been explained that the *saiban-in* are chosen at random by lot in the Japanese system. However, in fact, there is a chance of avoiding (a) certain candidate(s) if the prosecutor or the

defense wish, and in this way, the panel can be manipulated by them<sup>(10)</sup>.

## 2.2. The Desired Practice of the *Saiban-in* Selection under the Legal Theoretical Approach

Until the *saiban-in* system started the prosecutors and the defenses could not select umpires in the court during trial; however, under this system, they are able to select *saiban-in* or a part of the umpires. This is a big development in the Japanese judicial system.

As confirmed in the previous paragraph, in the *saiban-in* selection process, the prosecutor and the defense can indirectly change six *saiban-in* members of the panel by challenging the candidates whom they want to force out. Turning now to the legal question, how is it desirable that this right of peremptory challenge be exercised?

Here, it is necessary to consider the missions of the prosecutor and the attorney and the purpose of the criminal procedure.

On the one hand, the prosecutor is legally defined as “a representative of the public interest.” Article 4 of the Public Prosecutors Office Law (Act No. 61 of 1947) stipulates as follows:

The public prosecutor shall prosecute the criminal case, request the proper application of law by courts, supervise the execution of the trial, request notification from the court or give views on other matters falling within the scope of the court’s authority where there is a duty to do so, and do the given work by laws as a representative of the public interest.

Thus prosecutors do not always demand that the accused be punished. Sometimes prosecutors request a light punishment to reflect the accused’s deep remorse, and occasionally they request no punishment at all in their capacity as the guardian of the public interest, when the accused is really innocent.

(10) I find out that Korea lay participation system also has the process that the prosecutor and the defense challenge the candidates for cause and peremptorily. I think that Japan and Korea face the same problems in the selection of *saiban-in* or jurors. I wonder how the prosecutor and the defense challenge the candidates peremptorily in Korea.

On the other hand, defenses are not always on the side of the accused. Article 1 of the Practicing Attorney Law (Act No. 205 of 1949) stipulates the mission of an attorney as follows:

- 1) A practicing attorney is entrusted with a mission to protect fundamental human rights and to realize social justice.
- 2) A practicing attorney shall, in keeping with the mission specified in the preceding paragraph, sincerely perform his or her duties and endeavor to maintain the social order and to improve the legal system.

Given the implications that one of the attorney’s mission is to realize social justice, it is likely that defense of the accused, as a fighter for justice, is concerned with not only promoting the accused’s interests but also with achieving a fair trial.

It is appropriate to consider that professional prosecutors and attorneys are legally expected, in the light of their stated roles, to pursue not their own interests but public interests.

Additionally, one of the purposes of the criminal procedure in Japan is revealing the true facts. The Article 1 of the Code of Criminal Procedure (Act No.131 of 1948) stipulates as follows:

The purpose of this Code, with regard to criminal cases, is to reveal the true facts of cases and to apply and realize criminal laws and regulations quickly and appropriately, while ensuring the maintenance of public welfare and the guarantee of the fundamental human rights of individuals.

What is the best way to reveal the true facts of the case? It must be to make the panel constituted by the judges and *saiban-in* free from prejudices. To achieve a just court, the prosecutor and the defense, who want to find the true facts, will use their rights of peremptory challenges to unfair candidates who hold certain prejudices.

## 2.3. The Actions of the Prosecutor and the Defense in the Real World

However, do the prosecutors and the defenses really behave as the exemplary characters expected in the preceding paragraph?

We should focus attention on the facts of the real world. It is possible for a

prosecutor to lose a promotion when he or she fails in a proof of a crime of the accused, and it is certain that an attorney will obtain higher contingency fees when he or she has demonstrated the accused to be innocent.

Let us look at a trial from a different angle. Suppose that it is irrelevant to find the true facts of the case in a trial. A trial is just a game to test whether the proof collated by the prosecutor is sufficient to render the accused guilty.

If the prosecutor and the defense act in the interest of justice, they will challenge the candidates who have prejudices to ensure that a fair court is constituted, as mentioned in the preceding paragraph. In addition, if they act to further their own interests, the prosecutor will want to exclude from selection as *saiban-in* those candidates who start by thinking that the accused is innocent, and the defense will want to exclude candidates who start by thinking that the accused is guilty. It may be reasonable that the prosecutor will challenge the candidates who have a different opinion from his or hers, and the defense will do the same for candidates whom he or she does not want to be a *saiban-in*.

Here is a problem for political economists. How can a rational prosecutor and defense exercise their rights of peremptory challenge in this *saiban-in* selection system? The prosecutor wants to prove that the accused is guilty and the defense wants to win acquittal. There is a conflict between the interests of the prosecutor and those of the defense, and in the *saiban-in* selection proceedings with the possibility of influencing the result of the trial, the prosecutor and the defense want to exercise their rights to challenge effectively<sup>(11)</sup>. We can find a game situation here.

In the countries that have the jury trial system or other judicial participation systems, the jury selection process has been discussed from the approach of economics. For instance, in the latter half of the 70s through the 80s, discussions on how game theory could be put into practice in the quest for optimal jury

(11) When the court summons 50 candidates and the prosecutor and the defense exercise all the rights to challenge peremptorily, 42 candidates will go forward to Stage 3 and there is a one in seven chance that any given candidate will be chosen from the survivors. The likelihood of being selected will increase when some summoned candidates do not appear at the court or are discharged in Stage 1.

selection gained ground in the field of operation research. The work of Bram and Davis (1978), DeGroot and Kadane (1980), and Roth, Kadane and Degroot (1977) is very fruitful in this regard. However, following that period, discussions aimed at optimal jury selection have not been actively pursued. I cannot discover why these discussions have gone out of fashion (or maybe they have not gone out of fashion). Nevertheless, the findings derived from earlier discussions cannot be applied to the Japanese *saiban-in* selection system due to the obvious differences between the systems. No economic studies have yet been done which focus on Japanese *saiban-in* system, and none concerning the *saiban-in* selection system have been put forward.

Therefore, we will try to examine what can be said about the Japanese *saiban-in* selection process from an economic standpoint, even though this may be no more than a tentative assumption.

We are not concerned here with challenges for cause in Stage 1, because in this stage both players can challenge only if the candidates are legally disqualified by the *Saiban-in* Act and their challenges are not always accepted by the judges. In the same way, we are not concerned with Stage 3, because this stage is controlled by nature. What we are concerned with here is the way in which rights of peremptory challenge can be exercised by the prosecutor and the defense in Stage 2.

#### 2.4. The Prospective Practice of *Saiban-in* Selection under the Game Theoretical Approach

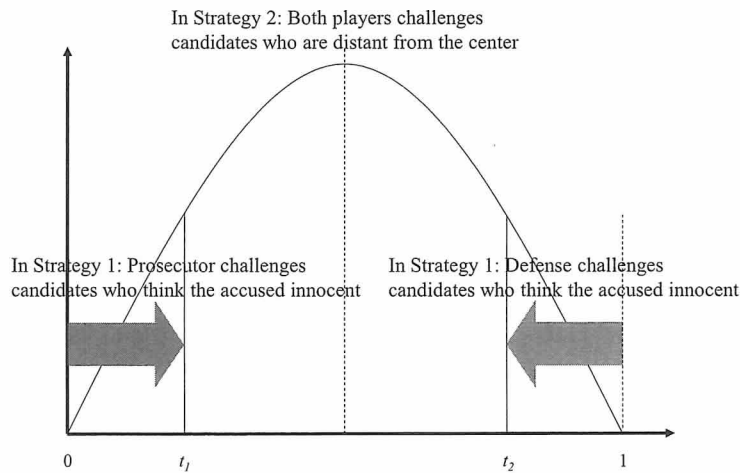
Which is it more reasonable for the players<sup>(12)</sup> to challenge – the candidates likely to cause unfairness in the trial or those likely to be disadvantageous to the interests represented by either player?

Here is a simple explanation, which assumes that no spare *saiban-in* are appointed and that both players have perfect information concerning candidates' thought about the accused.

(12) Henceforth the prosecutor and the defense are called "players" in the game of the trial.

Figure 4. Strategy of Each Player and Payoff Matrix in Case 1

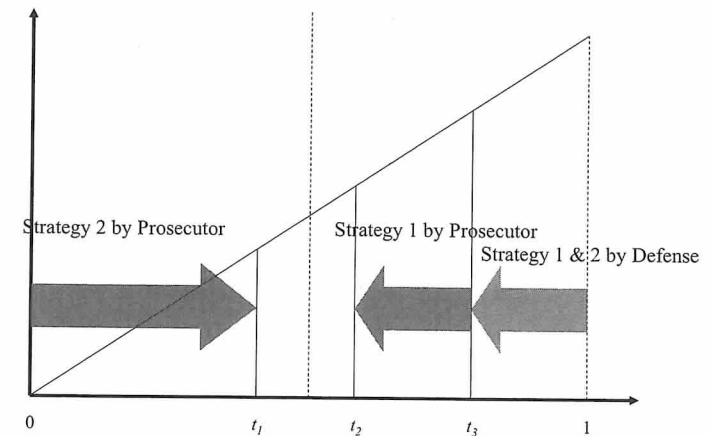
P \ D	Challenge Unfair Candidates	Challenge Disadvantageous Candidates
Challenge Unfair Candidates	(4, 4)	(4, 4)
Challenge Disadvantageous Candidates	(4, 4)	(4, 4)



An available strategy of each player is to challenge the candidates that are likely to cause injustice (Strategy 1) or to challenge candidates likely to be disadvantageous to the interests represented by either player (Strategy 2). In Strategy 1, the ethical players want to make the panel fair, and therefore challenge the candidates likely to make it unfair, even though their presence may create an advantage for the interests they are representing. In Strategy 2, rational players focus on the result of the trial and challenge those candidates likely to be disadvantageous to the interests they are representing. When a certain candidate thinks the accused is guilty at the probability of  $p$ , a candidate likely to cause injustice for both players means that the value  $|0.5 - p|$  is

Figure 5. Strategy of Each Player and Payoff Matrix in Case 2

P \ D	Challenge Unfair Candidates	Challenge Disadvantageous Candidates
Challenge Unfair Candidates	(0, 8)	(0, 8)
Challenge Disadvantageous Candidates	(4, 4)	(4, 4)



large, and candidates likely to cause disadvantage to the defense (prosecutor) means one that the value  $p$  is large (small). Here, the payoff is the number of discharged candidates who disagree with the assertion by each player.

A payoff matrix when the value  $p$  is normally-distributed (Case 1) is shown in Figure 4. In this case, when one player challenges the candidates likely to cause disadvantage to the interests being represented, this player will succeed in excluding four such candidates, and when another player does the same thing, that other will also succeed in excluding four candidates. When one player challenges the candidates likely to cause unfairness, this player will succeed in excluding four disagreeable candidates by challenging the candidates distant from the center, and then when another player does the same thing, another will



also succeed in excluding four. When one player pursues Strategy 1 and another player pursues Strategy 2, it will, after all, produce the same results.

However, in fact, it is easy for ordinary people to think that the accused is guilty when he or she has been arrested and prosecuted, in spite of the presumption of innocence. Moreover, the accused will be often criticized by the media on a daily basis. With the deck stacked against the accused in this way, the distribution of the value  $p$  will never be normal (Case 2). For instance, in Case 2, a different result about the payoff will be produced as shown in Figure 5; however, the result of the trial is apparent – the defense will always lose.

### 3. The Meaning of the Deliberations of the Court

#### 3.1. The Impossibility of Knowing the *Saiban-in*'s Preferences

The arguments in paragraph four of section two are made on the assumption that the prosecutor and the defense already have perfect knowledge of the prejudices of the candidates regarding the accused. However, nobody has the ability to read someone's mind perfectly. It is impossible for the players to know externally what the candidates think about the accused.

The players have little opportunity to enquire about the candidates; however, they can make indirect inquiries through the judges (Articles 32(2) and 34(2) of the *Saiban-in* Act). If the judges think that the questions posed by the players are not appropriate, they will not be asked. Moreover, the *Saiban-in* Act permits the players to only confirm with the candidates whether they do not make unfair judgments and whether they are not disqualified. According to the former Counsellor of the Criminal Affairs Bureau of the Supreme Court of Japan, the *Saiban-in* Act prohibits the players from asking them whether they are advantageous to either player (Nirei 2007, 82).

The players want to know how the candidates perceive the accused by asking questions in the court. However, the available questions are limited by the judges. It is very difficult for the players to deduce the candidates' thinking from their answers and reactions to these questions.

#### 3.2. The Possibility of Change in the *Saiban-in*'s Preferences

The arguments in paragraph four of section two are made on the assumption that the preferences of the *saiban-in* do not change through the trial. Candidates with some prejudices at first will keep their own minds through the court proceedings after being appointed as *saiban-in*, and when it comes to delivering a verdict, they will act in accordance with their original prejudices, as it has been assumed.

However, is it true that the *saiban-in* do not change their minds through offense and defense by the players and the deliberations with the judges in the court? Why would the prosecutor and the defense conduct the court proceedings, if the umpires' views were not going to be affected by whatever they say? Do the proceedings in the court make no sense? Is the selection of the umpires everything?

From the standpoint of jurisprudence, the answers to these questions are no. Prosecutors and defenses believe they have the power to persuade the judges (and *saiban-in*), and thus, they make assertions in order to persuade them. If the umpires' minds are not capable of being changed, the trial system cannot exist. Therefore, it is important for the players to make assertions in the court as well as to select the *saiban-in*.

#### 3.3. The Important Consideration for the Rational Players

The most reasonable way to use the right to challenge peremptorily for the players is to seek to exclude those candidates who have disadvantageous prejudices for each, when both players know how the candidates perceive the accused. However, in fact both players do not know the candidates' minds, and therefore, they cannot reject potential adversaries with any degree of precision. Moreover, the candidates' mind may change through the court proceedings after the appointments of the *saiban-in*. Thus, what is the most reasonable course for each player to adopt?

The factor to be considered is the plasticity of the preferences of the candidates when their preferences are not known and may not be fixed. If the chosen *saiban-in* is very obstinate and has a prejudice advantageous to each

player, it will be concluded that the player gets one vote in the verdict. Instead, if the one player unfortunately leaves in the obstinate *saiban-in* to his or her disadvantage, that player will fail in the argument and lose one vote. In short, when the obstinate *saiban-in* supports one player, he or she will be a powerful ally for that player; however, in the opposite case, he or she will be an absolute enemy.

As a consequence, the rational players will challenge the candidates perceived as obstinate, because they do not know whether the prejudice of a candidate is advantageous to themselves or not. Beyond that, they will exert efforts to make assertions and to persuade the judges and the *saiban-in*.

Thus far, we have considered the actions of the prosecutor and the defense in the court with *saiban-in*, and a natural but uninteresting conclusion is proposed: There is no royal road to a criminal trial.

#### 4. The Facts of the *Saiban-in* Selection and the Further Questions

The first *saiban-in* trial was held from August 3 to 6, 2009 in Tokyo District Court, and as of October 9, 2009, there have been 28 *saiban-in* trial cases including the *saiban-in* selection process. However, we cannot be sure how the *saiban-in* were selected in detail, because the courts did not reveal the practice of the selection process. Little is known about this process except that many summoned candidates went to the courts and few neglected their obligations. It also turned out that in the 18 *saiban-in* trial cases (64% of all the *saiban-in* trial cases) the defenses exercised the rights to challenge the *saiban-in* candidates peremptorily, according to the survey by JFBA. Because of non-disclosure of information, it is uncertain whether the prosecutors used their rights or not, and how the players used it actually. However, we can guess how the players exercise the rights of peremptory challenge, because the players' views on the *saiban-in* selection are obvious.

Before the enforcement of this trial system, it became clear that judges, prosecutors, and lawyers differently understand the meaning of the *saiban-in* selection bit by bit. Especially it has revealed that the way one player should

challenge the *saiban-in* candidates peremptorily is deeply different for the other player. The Criminal Affairs Bureau of the General Secretariat of the Supreme Court reported as follows:

The purpose of the peremptory challenge is to ensure fair trials and make the panels to be trusted by both players. Even if the player feels that a certain candidate is likely to make an unfair judgment, it is sometimes difficult to clarify showing it with enough evidence. Then, this peremptory challenge system lets the player purge the doubtful candidate of the panel without evidence. The *Saiban-in* Act does not assume that both players use this procedure strategically in order to sort out the advantage candidates for their own interests.

The Supreme Public Prosecutors' Office also showed how the prosecutors should use the rights of the peremptory challenge in "Prosecutors' Basic Policy in the *Saiban-in* Trials." It described the same meaning of peremptory challenge as the Supreme Court did, and said "When the prosecutors exercise the rights to challenge the candidates peremptorily, we must be on an impartial ground based on the understanding of the true meaning of these rights."

Though the views of judges and prosecutors become clear, lawyers do not officially reveal how they understand these rights and how they exercise them. There are no descriptions about the peremptory challenge in "Report on the Practice of the *Saiban-in* Trials" shown by JFBA. Instead, M. Ono, a lawyer and an acting chief of the *Saiban-in* Trial Task Force of JFBA, said "I insist that defenses must use the rights of the peremptory challenge to the certain candidates without any hesitation when he or she considers it advantageous after talking with the accused." According to a newspaper, candidates whose sexes or ages are same as the victims are sometimes challenged peremptorily in order to avoid a heavy penalty on the accused. In the case in Saitama District Court all of the six chosen *saiban-in* were men, and in Fukuoka's case all chosen were women. Is this caused by the players' strategic challenges? It is too much to be a coincidence.

Thus, we can guess that prosecutors opt for Strategy 1 and defenses for Strategy 2 in the real world. Prosecutors challenge the candidates peremptorily

in order to discharge unfair candidates; meanwhile the peremptory challenges by defense may be used for other purposes, not the original intent. Is this a fair game? I think that the prosecutor's choice is really right in the legal sense of the world, but it is not rational. The irrational self-control of each player should be abolished to make the game fair.

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