Articles

The *Saiban-in* (Lay Judge) Trial System and Its Democratic Impact on Japanese Society

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1. Introduction

1.1. The Need for Data-based Research on the *Saiban-in* System

In May 2009 Japan introduced *saiban-in* (lay judge) trials, a system in which ordinary Japanese citizens are randomly selected and appointed as *saiban-ins* to preside over trials for serious criminal cases in district courts[1)]. A panel of six *saiban-ins* and three professional judges is formed to determine the facts and sentence the accused. According to Article 1 of the Act on Criminal Trials with the Participation of *Saiban-in* (hereafter, the "*Saiban-in* Act"), the purpose of involving the public in criminal procedures together with judges is to contribute promote and enhance citizens' understanding of and trust in the judiciary.

Lay people and professional judges have been collaborating in criminal trials for more than 10 years and the practice has become well established in Japanese society. Analyses completely refuting the importance of the

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This paper is a revised and enlarged version (with new data and a different perspective) of the author's article in Japanese, "Has the Purpose of Article 1 of the *Saiban-in* Act Not Been Accomplished? Findings from a Survey Published after a Decade of Enforcement of the System" [*Saiban-in-hou 1-jou no Shushi ha Jitsugen-shite-inai no ka: Seido Shikou 10-nen no Jiten de no Kohyo-sareta Chosa-Kekka kara Yomitoreru-koto*] 61 Journal of the Law Institute [*Hogaku Kiyo*], Nihon University, 95–137 (2020). An earlier version of this paper was partly presented at the Law and Society Association 2020 Annual Meeting in San Juan, Puerto Rico, on June 3, 2023. The author would like to thank Valerie Hans for her encouraging comments and constructive suggestions. The author is also grateful to Andrés Harfuc for chairing the session in which the presentation took place.

1) *Saiban-ins* participate only in criminal cases in district courts and never in civil cases or in trials in high courts or in the Supreme Court. Among the criminal trials held in the district courts, *saiban-ins* only participate in those involving offenses punishable with the death penalty or life imprisonment, such as murder or robbery causing death or injury (Article 2, Paragraph 1 of the *Saiban-in* Act). In 2022, the number of cases subject to trials with the participation of *saiban-ins* was 839, or merely 1.4% of the total number of criminal trials in the district courts (58,664 cases).

system in Japanese society have rarely been seen, though some analyses have pointed out problems to be improved. In citing the results of a public opinion survey on the *saiban-in* system and the Ten-Year Summary Report of the system (described below), for example, Toshihiro Kawaide, one of the leading Japanese scholars on criminal procedure, has stated, "These results suggest that the *saiban-in* system has been favorably received by citizens and that their understanding of criminal trials has improved" (Kawaide 2019: 49). Regarding the implementation of the system as stipulated in Article 1 of the *Saiban-in* Act, Kawaide adds, "The *saiban-in* system has, to a certain extent, accomplished its intended purpose of enhancing the people's understanding of and trust in criminal trials" (ibid).

Fujita (2017: 256) points out the lack of quantitative research examining whether or not the original purpose of introducing the *saiban-in* system, such as its democratic foundation, has actually been accomplished. "The Goals and Realities of the Saiban-in Act" [*Saiban-in-Hou no Shushi to Jitsuzo*], a paper published by Takayuki Ii in 2015, is one of the few significant works that responds to Fujita's point. Ii analyzes the results of a series of statistical and questionnaire surveys conducted by the Supreme Court of Japan up to 2014 and insists that there is a doubt that the purpose of Article 1 of the *Saiban-in* Act has been accomplished (Ii 2015: 147).

Is it possible to conclude, based on the results of the statistics and questionnaires, that the purpose of Article 1 of the *Saiban-in* Act has not been accomplished? This paper examines whether or not the purpose stipulated in Article 1 of the *Saiban-in* Act has been accomplished by analyzing the statistics and results of a recurring survey that has been conducted since the enactment of the system more than ten years ago.

Before analyzing the data, we need to accurately interpret Article 1 of the *Saiban-in* Act, which stipulates the purpose of this system as follows:

> This Act sets forth special provisions to the Court Act (Act No. 59 of 1947) and the Code of Criminal Procedure (Act No. 131 of 1948) and other necessary items for criminal trials with the participation of *saiban-ins*, with the view that the involvement of *saiban-ins* appointed from among the citizenry in criminal procedures alongside judges contributes to promote the people's understanding of and enhance their trust in the judiciary.

The first point to understand regarding this provision is that Article 1 of the Act precisely stipulates that the object in which *saiban-ins* participate (specific criminal procedures) is not the same as the object of and in which they promote understanding and trust of the judiciary (the judiciary

itself). After a careful analysis of the structure of this provision, there is a built-in expectation that the legitimacy of the judicial power as a whole will be broadly ensured by the participation of citizens in a specific part of criminal procedures. In other words, the purpose of citizen participation in criminal trials is to understand not only a specific case or a trial in which *saiban-ins* participate, but also the trial as a system and the judiciary as a governmental power.

Second, the Act stipulates that an actor who participates in criminal trials (the concrete individual *saiban-in*) differs from an actor whose understanding of and trust in the judiciary are promoted and enhanced (the conceptual general public, including others apart from the *saiban-in*). Simply put, the Act assumes that the understanding and trust of the general public as a non-substantive entity will be enhanced through the specific participation of individual *saiban-ins*.[2)]

Therefore, an analysis of a public opinion survey, and not a questionnaire survey of ex-*saiban-ins* (citizens who previously served as *saiban-ins*), is appropriate to measure whether or not the purpose of Article 1 of the *Saiban-in* Act has been accomplished, given that the system is intended to enhance the understanding (of not only the persons who have served as *saiban-ins* but also) of the people and their trust (in not only specific *saiban-in* trial cases[3)] but also) in the judiciary.[4)]

1.2. Data Sources

This paper analyzes data from three surveys that the Supreme Court of Japan has conducted annually since 2009, when the *saiban-in* system was started. More than 10 years of accumulated data from the surveys are avail-

2) The probability of a Japanese citizen being appointed as a *saiban-in* is 0.01% per year. At this rate, only 1 in 220 citizens (0.45%) will be appointed as a *saiban-in* at least once in their lifetime. Despite the implementation of the *saiban-in* system, most Japanese citizens do not, in fact, participate in criminal trials as *saiban-ins*. Therefore, the policy implications of the *saiban-in* system lie not in the fact that a person has participated in the trial but in the recognition that ordinary citizens participate in the trial and the recognition that the judiciary is legitimated by the participation of one's fellow citizens.

3) In this paper, a *saiban-in* trial pertains to trials conducted by a panel consisting of six *saiban-ins* appointed from among the citizenry alongside three professional judges. This setup contrasts with "a trial by a professional judge or judges" without the participation of citizens.

4) Ii (2015: 150-1) criticizes the Ex-*Saiban-in* Questionnaire for omitting questions regarding changes in *their* understanding of and trust in the judiciary. Yet according to Article 1 of the *Saiban-in* Act, the *saiban-in* system is intended to enhance the understanding of and trust in the judiciary not only among those who have served as *saiban-ins* but among the Japanese people as a whole. As such, data on changes in the understanding and trust of ex-*saiban-ins* are not required for the evaluation of the accomplishment of the purpose of Article 1 of the Act.

able on the website of the Supreme Court.[5)]

(1) Implementation Status of the System ("Data on the Implementation Status of the *Saiban-in* System" [*Saiban-in-Seido no Jisshi-Jokyo ni kansuru Shiryo*])

The General Secretariat of the Supreme Court compiles statistical data on cases subject to *saiban-in* trials and the appointment of *saiban-ins*, and publishes them annually as "Data on the Implementation Status of the *Saiban-in* System (the Year of XX)" (hereafter, the "Implementation Status"). These data include the number of cases subject to a *saiban-in* trial, the number of persons registered on the list of candidates to be appointed as *saiban-ins*, the number of candidates who were permitted to decline, the number of *saiban-ins* appointed, the average duration and number of *saiban-in* trial court sessions, and the number of *saiban-in* trial results, among other figures.

(2) Ex-Saiban-in Questionnaire ("Report on the Results of the Questionnaire Survey of Ex-*Saiban-ins*, etc." [*Saiban-in-tou Keiken-sha ni taisuru Anketo-Chousa Kekka Houkoku-sho*])

The Supreme Court conducts a questionnaire survey of *saiban-ins* (including their substitutes) who participated in *saiban-in* trials and *saiban-in* candidates who attended the *saiban-in* selection procedure but were not appointed. The results are annually published as the "Report on the Results of the Questionnaire Survey of Ex-*Saiban-ins*, etc. (fiscal year [FY] XX)" (hereafter, the "Ex-*Saiban-in* Questionnaire"). The questionnaire collects quantitative data on the respondents' impressions of the appointment procedures, hearings, deliberations, and duties served, as well as their opinions and impressions expressed through free writing.

(3) Public Opinion Survey ("Survey of the Public's Opinion on the Implementation of the *Saiban-in* System" [*Saiban-in Seido no Unyo ni kansuru Ishiki-Chousa*])

The Supreme Court conducts a nationwide random sampling survey on 2,000 individuals aged 18 years[6)] or older to collect data on the public's perceptions and evaluations of the implementation of the *saiban-in* system.

5) https://www.saibanin.courts.go.jp/shiryo/index.html.

6) The survey subjects up to the 2020 survey were individuals aged 20 years or older, as *saiban-ins* were selected from among citizens aged 20 years or older. *Saiban-ins* have been selected from among citizens aged 18 years or older since 2023, pursuant to the revision of the Juvenile Act in May 2021.

The result is annually published in the "January, XX Year Survey of the Public's Opinion on the Implementation of the *Saiban-in* System" (hereafter, the "Public Opinion Survey"). This survey collects data from citizens on their awareness about the *saiban-in* system, the level of interest in trials and the judiciary, their impressions of criminal trials before the *saiban-in* system started (up to FY 2019), the reasons for their impressions of criminal trials before the *saiban-in* system started (up to FY 2019), what they expect of *saiban-in* trials, their impressions of the currently implemented *saiban-in* trials, the concerns and obstacles likely to be encountered by participants in trials as *saiban-ins*, their impressions of the trends in *saiban-in* trials, their willingness to participate in criminal trials as *saiban-ins*, information necessary to motivate persons to participate in criminal trials as *saiban-ins*, and their views on the need for citizen involvement in public affairs such as criminal trials and the judiciary.

In addition to these data, the Supreme Court publishes the "Report on the Verification of the Implementation of the *Saiban-in* Trials" [*Saiban-in Saiban Jisshi-Jokyo no Kensho Houkoku-sho*] (hereafter, the "Three-Year Verification Report"), a report based on data from the enactment of the *saiban-in* system to the end of May 2012. It also publishes the "Ten-Year Summary Report of the *Saiban-in* System" [*Saiban-in Seido 10-nen no Soukatsu Houkoku-sho*] (hereafter, the "10-Year Summary Report"), a report based on data from the enactment of the system up to the end of December 2018.

2. Willingness and Refusal of Citizens to Participate in Trials as *Saiban-ins*

2.1. Willingness of Citizens to Participate in Trials as *Saiban-ins*

2.1.1. Willingness of Citizens to Participate in Trials as *Saiban-ins*: Data from the Public Opinion Survey

The willingness of citizens to participate in *saiban-in* trials is included in the data collected in the Public Opinion Survey conducted each year. When asked "Do you want to participate in criminal trials as a *saiban-in*?" in the Public Opinion Survey conducted in FY2018, 3.8% of the respondents answered, "Want to participate." This rate represented a decrease by nearly one-half compared with the rate in FY 2009 (7.2%), when the survey was first conducted and the *saiban-in* trials were started. This decline, however, took place soon after FY 2009, when an extremely high percentage of re-

spondents expressed the desire to participate in the trials. Since FY 2010 (4.6%), the percentage has fluctuated between 3.6% (FY 2014) and 5.2% (FY 2017). For this reason, the study cannot assume that the willingness of citizens to participate has trended downward across the years. In the latest survey (FY 2022), for example, 4.1% answered, "Want to participate" to this question, and the second lowest percentage of responses on record (34.3%) answered, "Do not want to participate even if it is a duty."

Figure 1 : Do you want to participate in criminal trials as a *saiban-in*?

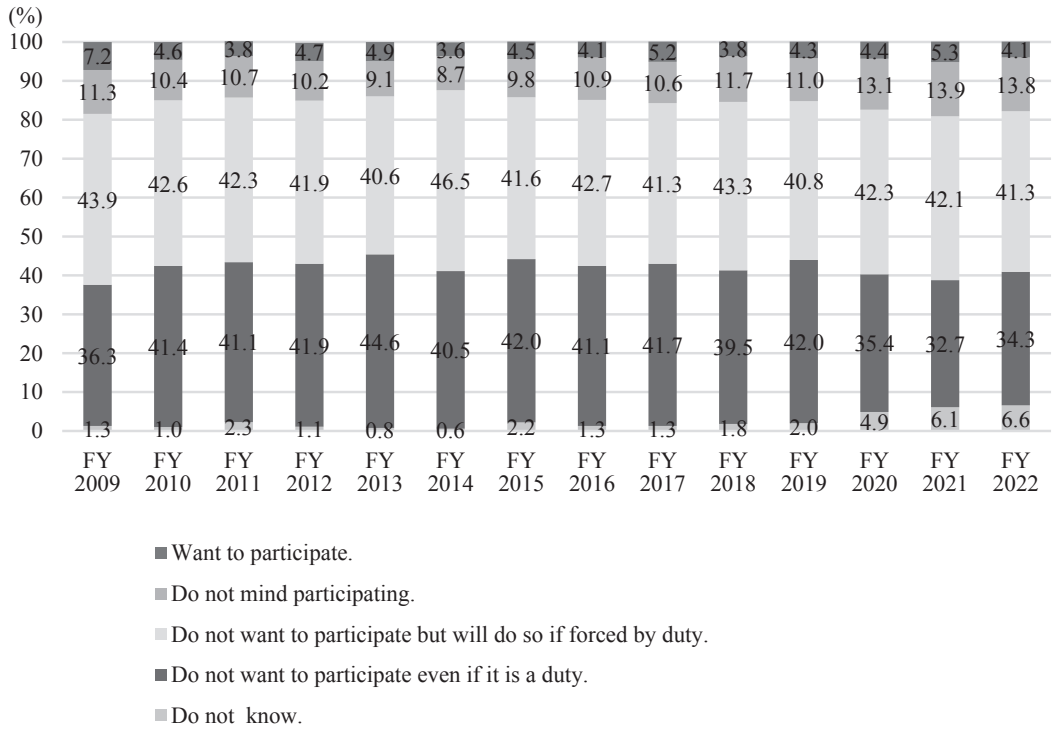


Figure 1 illustrates the 14-year trend in the willingness of citizens to participate as *saiban-ins*. Over the past 14 years a 4:6 ratio between the responses of those who are extremely reluctant to participate as *saiban-ins* and the other responses has been consistently observed, with no dominant majority on one side or the other. In other words, the analyses conducted over those 14 years showed no downward trend in the intention of citizens to participate.

Figure 2 : Do you want to participate in criminal trials as a *saiban-in*? FY2022

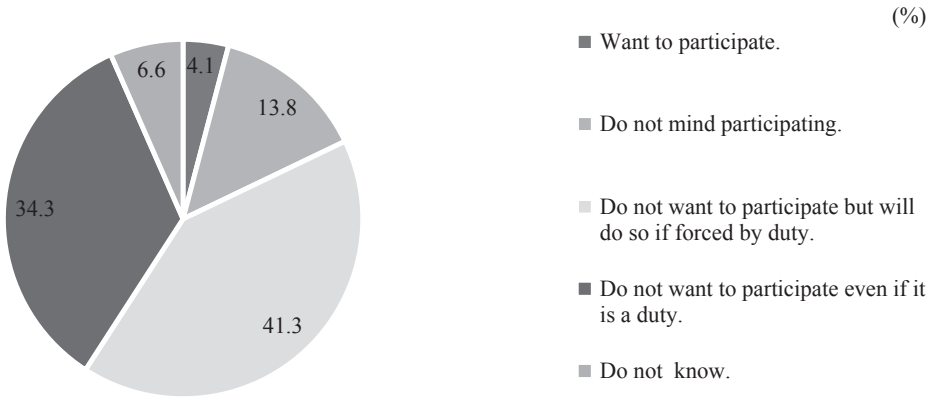


Figure 2 depicts the willingness of citizens to participate according to the FY 2022 Public Opinion Survey. Overall, 17.9% of the respondents were willing to participate (the sum of those who either "Want to participate" or "Do not mind participating"), and 75.6% were reluctant to participate (the sum of those who "Do not want to participate but will do so if forced to by duty" and "Do not want to participate even if it is a duty." In other words, more than seven out of ten respondents did not want to participate in trials as *saiban-ins*.

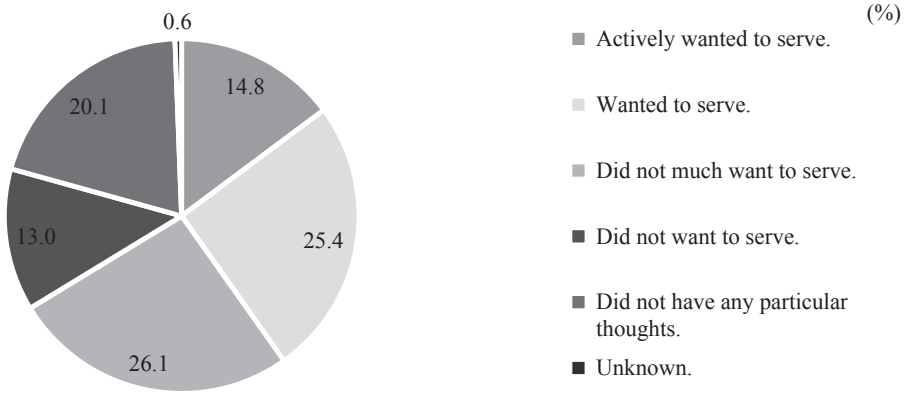
The total percentage of citizens who answered, "Want to participate," "Do not mind participating," or "Do not want to participate but will do so if forced to by duty" was 59.2%. This rate considerably exceeded the rate of respondents who expressed an unwillingness to participate even if it was a duty (34.3%).

Evidently, relatively few respondents had a strong desire to participate, and a large majority expressed a wish not to participate when asked. If, on the other hand, they were notified that participation as a *saiban-in* was a civil duty, nearly 60% of the respondents answered that they would participate (outnumbering those who expressed an unwillingness to participate even if it was a duty). In other words, ordinary citizens will participate when the participation requested is a legal duty. It thus appears to be effective, when requesting citizens to participate as *saiban-ins*, to inform them

that participation is a legal obligation.[7)]

2.1.2. Willingness of Ex-*Saiban-ins* to Participate in Trials as *Saiban-ins*: Data from the Ex-*Saiban-in* Questionnaire

Figure 3 : How did you feel about appointment as a *saiban-in* before you were appointed? FY 2022



The Ex-*Saiban-in* Questionnaire also surveys the willingness of citizens to participate in trials as *saiban-ins*, but retroactively. Specifically, citizens who served as *saiban-ins* are asked about how they felt about participation before they themselves were appointed as *saiban-ins*. As seen in Figure 3, 14.8% and 25.4% of the respondents answered that they "Actively wanted to serve" and "Wanted to serve," respectively, in response to the question, "How did you feel about appointment as a *saiban-in* before you were appointed?" In total, 40.2% of the ex-*saiban-in* respondents expressed a desire to participate (the sum of those who "Actively wanted to serve" (14.8%) and those who "Wanted to serve" (25.4%)) and 39.1% expressed unwillingness (the sum of those who "Did not much want to serve" (26.1%) and those who "Did not want to serve" (20.1%)).

The responses to the Ex-*Saiban-in* Questionnaire regarding willingness to participate in *saiban-in* trials are evidently more positive than those in the Public Opinion Survey. While the different questions and targets cov-

7) Neither the Supreme Court nor the Ministry of Justice proactively informs citizens that serving as *saiban-ins* is a legal duty if they are appointed. For example, the websites managed by the court and ministry to introduce the *saiban-in* system fail to clearly state that the duty serve as a *saiban-in* is obligatory for citizens. In addition, when the Supreme Court ruled on the constitutionality of the *saiban-in* system (November 16, 2011, 65(8) Keishu 1285), the Court simply stated that one's duties as a *saiban-in* were "powers similar to the right to participate in politics" (p. 1300) and did not inform citizens that participation was a legal obligation.

ered preclude a direct comparison between the results of the two surveys,[8] citizens who served as *saiban-ins* are apparently more positive toward *saiban-in* duty than ordinary citizens.

In speculating on the gap in the results of the two surveys, some may conclude that it points to a difference in mindset between average citizens and citizens who have served as *saiban-ins*.[9] If there is such a difference in mindset, the *saiban-in* purpose of involving *ordinary* citizens in trials would not be accomplished. This gap is only natural, however, when one considers the following notions. First, the respondents to the Ex-*Saiban-in* Questionnaire were naturally positive about their participation, because the *saiban-in* candidates who initially wanted to decline or who planned to be absent in the selection procedure for *saiban-ins* were excluded. Second, the responses to the Ex-*Saiban-in* Questionnaire are a retrospective view of the feelings of the individuals who actually experienced serving as *saiban-ins*; thus, their experience as *saiban-ins* may have overridden any initial reluctance they had about participating in the trials at the beginning.[10]

The ratio of negative attitudes toward participation in the responses to the Public Opinion Survey was almost double that in the responses to the Ex-*Saiban-in* Questionnaire in FY 2022 (75.6% vs 39.1%). This gap can be interpreted as natural, given that the respondents to the Ex-*Saiban-in* Questionnaire had the option of responding, "Did not have any particu-

8) The Public Opinion Survey is a sampling survey of public opinion, whereas the Ex-*Saiban-in* Questionnaire is a complete enumeration of the views of citizens who have served as *saiban-ins*. The Public Opinion Survey asks respondents, "Do you want to participate in criminal trials as a *saiban-in*" (up to FY 2019) or "Do you want to participate in a *saiban-in* trial" (after FY 2019). The respondents have their choice of the following responses: "Want to participate," "Do not mind participating," who "Do not want to participate but will do so if forced to by duty," "Do not want to participate even if it is a duty," and "Do not know." Meanwhile, the Ex-*Saiban-in* Questionnaire asks, "Before being appointed as a *saiban-in*, how did you feel about being appointed as a *saiban-in*?" The response options are "Actively wanted to serve," "Wanted to serve," "Did not much want to serve," "Did not want to serve," and "Did not have any particular thoughts."

9) Judge Minukino, the person in charge of data collection with regard to criminal trials in the General Secretariat of the Supreme Court of Japan, summarizes as follows: "Comparing the appointed *saiban-ins* with the results of the national census in terms of job, age, and gender, the composition of the *saiban-ins* can be said to be approximately a 'microcosm of the citizenry' because the demographic composition of the *saiban-ins* is not significantly different from that of the national census as a whole" (Minukino 2019: 42). However, when generalizing on the traits of *saiban-ins* among the people, the author of this paper believes that the mindset of the people is more important than their job, age, and gender.

10) According to the result of the FY 2022 Ex-*Saiban-in* Questionnaire, 62.2% of the respondents (all of them are ex-*saiban-ins*) answered that serving as *saiban-ins* was "A very good experience" and 34.1% said that it was "A good experience." Some of respondents who were, in fact, initially reluctant to serve as *saiban-ins* before going on to serve may have responded, "Want to participate" in order to hide their true feelings and remain consistent with their positive responses on the experience.

lar thoughts." The respondents who expressed reluctance to participate as *saiban-ins* in the Ex-*Saiban-in* Questionnaire may have opted to avoid the stronger negative opinion in favor of the more neutral option.

2.2. Declination Rate of *Saiban-in* Candidates and Attendance Rate of Summoned S*aiban-in* Candidates in Court

2.2.1. Appointment Procedures for S*aiban-ins*

The procedures for appointing *saiban-ins* are carried out in the following steps:
(1) Every year, each municipal election board makes a list of candidates to become *saiban-ins* by randomly selecting them from among citizens eligible for election to the House of Representatives.
(2) The district courts notify candidates that they have been registered on the list of candidates. When the candidates receive the notification, they are required to reply to the court if they have causes prohibiting them from serving as *saiban-ins*. The candidates may also inform the court if they satisfy any of the grounds for declining to serve as *saiban-ins* and wish to withdraw from the list for the duration of the year.
(3) When a case for a *saiban-in* trial is filed in the district court, the court selects the candidates to be summoned from the list by lot. For cases expected to be completed within five days, approximately 70 candidates per case are summoned. The district court sends a subpoena and questionnaires to the candidates to be summoned, and the candidates answer and return them. Candidates who meet any of the grounds for declining are excused from the summons.
4) The summoned candidates (except those who have been permitted to decline in advance) must appear in court on the date of the selection procedure for *saiban-ins*. In a closed room, the presiding judge asks the candidates whether or not there are causes making them ineligible in relation to the case or any risk that they would make an unjust decision, and whether or not they wish to withdraw in the event they meet the grounds for declining. Those who fall under this category are then excluded. The prosecutors and the defense counsels may respectively request a ruling of non-appointment for up to four *saiban-in* candidates without stating any grounds (quasi-peremptory challenge). From the remaining candidates, six *saiban-ins* and several alternate *saiban-ins* are appointed.

Article 112, item (1) of the *Saiban-in* Act stipulates that if a summoned *saiban-in* candidate fails to appear in court and there are no justifiable grounds for his or her absence, then the court may punish the candidate by

imposing a non-criminal fine of up to 100,000 yen by a ruling. However, this provision has never been executed.

2.2.2. Declination Rate of S*aiban-in* Candidates and Attendance Rate of Summoned S*aiban-in* Candidates in Court

Concerns regarding the *saiban-in* system have been emerging, as the declination rate of *saiban-in* candidates has been increasing and the attendance rate of summoned *saiban-in* candidates on the date of the selection procedure has been decreasing.[11)]

Soon after the enactment of the *saiban-in* system, the Supreme Court recognized the need to promptly address these issues. The Supreme Court acknowledged, in its Three-Year Verification Report, that "although this period has been relatively short, tendencies toward an increasing declination rate and decreasing attendance rate have already emerged." Regarding the latter problem, the report goes on to state that, "although not so serious at present, it can be seen as a straightforward reflection of public awareness toward this system, hence it will be necessary to carefully watch future trends and take countermeasures" (Supreme Court General Secretariat 2012: 8).

The Supreme Court then commissioned NTT Data Institute of Management Consulting, Inc. to conduct an analysis based on the statistical data and surveys. The analysis focuses on the causes behind the increase seen in the declination rate of *saiban-in* candidates and the decrease seen in the attendance rate in court on the date of the selection procedure, from 2016 to 2017.

According to a statistical analysis reported in NTT Data's "Report on an Analysis of the Causes Behind the Increasing Declination Rates and Decreasing Attendance Rates Among *Saiban-in* Candidates" [*Saiban-in-Kouhosha no Jitai-ritsu Jousho / Shusseki-ritsu Teika no Gen'in Bunseki Gyoumu Houkoku-sho*] (hereafter, the "Declination/Attendance Analysis Report"), factors such as the prolonged hours of the scheduled trial days, changes in employment circumstances (e.g., labor shortage and increase in part-time employees), population aging, and declining public interest in *saiban-in* trials may have caused the increase seen in the declination rate of *saiban-in* candidates and the decrease seen in their attendance rate (NTT

11) Editorials published in the Yomiuri Shimbun and Asahi Shimbun (the newspapers with the largest and second-largest circulations in Japan, respectively) in May 2019 identified the negative attitude of *saiban-in* candidates toward participation as a serious problem with the *saiban-in* system.

Data Institute of Management Consulting 2017: 77-9).

Figure 4 : Declination rate of *saiban-in* candidates and attendance rate of summoned *saiban-in* candidates in court

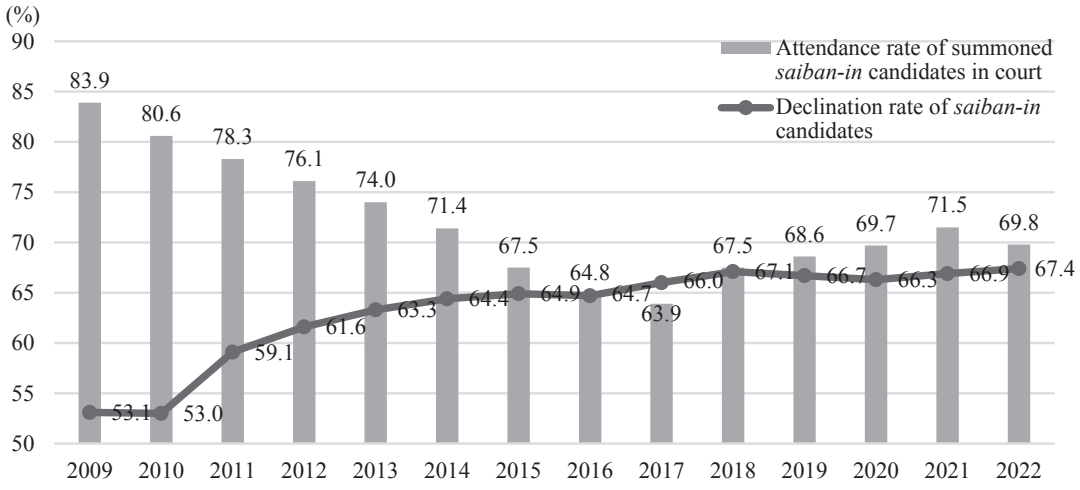


Figure 4 illustrates the declination rate of *saiban-in* candidates and the attendance rate of summoned *saiban-in* candidates in court.

The declination rate of *saiban-in* candidates stood at approximately 50% in 2009 (when the system was started) and 2010, jumped to approximately 60% in 2011, gradually rose over the ensuing years to a peak of 67.1% in 2018, and hovered around the 67% level thereafter. The declination rate in this study is the percentage of individuals whose declinations were approved by the court out of the total number of *saiban-in* candidates summoned. As the author is most concerned with the *saiban-ins'* sense of citizenship as participants in a democratic society (whether or not they voluntarily participate), the study does not examine the percentage of individuals whose declinations were approved by the court out of the total number of citizens registered on the list of candidates.

The significantly lower declination rate in the first two years compared with the later years might be attributable to the impact of the start of the new trial system on Japanese society. Likewise, the higher declination rate in the third year and thereafter might be explained by the fading novelty of the system.

Some may negatively evaluate the increase in the declination rate as an indicator of the increased reluctance of citizens to participate as *saiban-ins*. The current study, however, eschews this interpretation. Under the *saiban-in* system, a candidate may withdraw only when the court finds that he or

she meets any of the grounds for declining stipulated by the Act. Moreover, there are no pathways to withdrawal for those who do not meet any of the grounds for declining under the Act.[12] In contrast to cases of disqualification or prohibition of service as a *saiban-in*,[13] a candidate who meets one of the grounds for declining can still serve as a *saiban-in* if he or she does not offer to decline. Accordingly, they may insist that the candidate must serve even if he or she can decline. The right to offer to decline, however, is a legitimate right provided by the *Saiban-in* Act, and accordingly should not be evaluated negatively if the candidate offers to decline.[14]

Second, a decrease in the attendance rate of summoned *saiban-in* candidates in court, as follows, is a serious problem from the viewpoint of accomplishing the purpose of Article 1 of the *Saiban-in* Act. The attendance rate in this paper pertains to the percentage of individuals who actually attended the selection procedure among the *summoned saiban-in* candidates and not the percentage of those who actually attended among the number of *listed saiban-in* candidates (including candidates whose declination was approved by the court before the date of the *saiban-in* selection). The offer to decline is a due claim of exemption from the duty of *saiban-in* candidates; therefore, the candidate who attempts to offer to decline is acting on the assumption that the *saiban-in* system (including the decision of the court on whether or not to accept the offer) will be properly administered by the court (in this case, a certain degree of trust in the judiciary exists).

12) Article 16 of the *Saiban-in* Act stipulates the following as grounds for declining service as *saiban-in:* any person who is 70 years of age or older, a student or pupil of a school, any person who has served as a *saiban-in* or as an alternate *saiban-in* within the past five years, or any person who would have difficulty in serving as a *saiban-in* because of severe illness or injury, nursing care or childcare obligations, or important business.

13) Article 14 of the *Saiban-in* Act stipulates the following as causes for disqualification from *saiban-in* service: any person who is disqualified from serving as a national public employee, any person who has not completed compulsory education, any person who has been punished with imprisonment without work or a heavier penalty, or any person who would have serious difficulty in performing the duties of a *saiban-in* because of a mental or physical disability. Article 15 of the same Act stipulates the following as causes for prohibition of *saiban-in* service: any person who is a Member of the Diet, a Minister of the State, an executive official of an administrative agency of the State; any person who is or has been a judge, public prosecutor, or attorney-at-law; any person who carries out duties as a judicial police official, a court official, an official of the Ministry of Justice, a police official, a law professor, a legal apprentice, a governor of a prefecture or a mayor of a municipality, or a self-defense official; any person who is being prosecuted for an offence in a case that has yet to be concluded; or any person who is under arrest or in detention.

14) The Supreme Court states, in its Ten-Year Summary Report, that, "Unlike in the case of absence from the selection procedure on the scheduled date, declination was originally established in order not to impose an excessive burden on citizens, and is accepted only when the court determines that there are grounds for declining that are justified by the Act" (General Secretariat of the Supreme Court of Japan 2019: 3).

Conversely, the *saiban-in* candidate who receives a subpoena but does not appear in court without due reason for absence either fails to understand that the attendance of the summoned *saiban-in* candidates in court is a legal obligation, or acts on the assumption that the sanction for violation of this obligation is, in fact, never enforced (in this case, no trust in the judiciary exists).

To address the main question of interest of this paper, whether or not the purpose of Article 1 of the Act has been accomplished, this study focuses on those who are obliged by duty to appear in court on the date of the selection procedure, and not on those who are exempted from appearing because of declination or other reasons. Therefore, the denominator of the attendance rate is the number of *summoned saiban-in* candidates and not the number of *listed saiban-in* candidates.[15)]

The highest attendance rate was recorded in 2009, the year when the *saiban-in* system was started, with more than 80% of the summoned *saiban-in* candidates appearing in court. This high attendance rate stemmed from the high level of public interest in the system generated by the system's launch in the same year. The attendance rate gradually declined in the ensuing years, however, falling to below 65% in 2016. Within this period in which the lowest attendance rates were recorded, the Supreme Court commissioned NTT Data to analyze the attendance rates through to the end of 2015.[16)] NTT Data's Declination/Attendance Analysis Report pointed out that a number of courts resent the subpoenas in instances where they were not initially received and requested the return of completed questionnaires in instances where they were not returned by the deadline. This Report indicated that these practices of resending the subpoenas and sending follow-up questionnaire requests were effective in increasing the attendance rate of the *saiban-in* candidates (NTT Data Institute of Management Consulting 2017: 79). According to the Ten-Year Summary Report, other courts began

15) Obtaining a stable supply of *saiban-ins* is important for courts. In appointing *saiban-ins*, therefore the court practice of basing the attendance rate on the total number of listed *saiban-in* candidates as the denominator is necessary.

16) In reporting the increase in the declination rate of *saiban-in* candidates and decrease in the attendance rate of *saiban-in* candidates in court based on data collected up to 2015, Ii (2015) attributes the phenomena to a decrease in the willingness of *saiban-in* candidates to serve as *saiban-ins* (p. 148). One of the reasons for the low willingness of citizens to serve as *saiban-ins,* Ii (2015) insists, is the vagueness of Article 1 of the *Saiban-in* Act in its stipulation of the purpose of the participation of citizens in trials (p. 154). The author of this paper believes that Article 1 is never vague and does not directly contribute to the decrease in the attendance rate. Moreover, if Ii's argument is true, then the recovery of the attendance rate from 2015 onward would prove that the purpose of Article 1 of the *Saiban-in* Act is clear and is being accomplished.

to implement the same practices in the summer of 2017, which resulted in an upward shift in the attendance rate to 67.5% by 2018 (Supreme Court General Secretariat 2019: 3).

An external factor that may have negatively influenced the participation of citizens as *saiban-ins* was the novel coronavirus pandemic (COVID-19; the pandemic had significant impacts in Japan from February 2020 to March 2023). The Japanese government declared a state of emergency in all regions and major cities of Japan from April to May 2020, from January to March 2021, and from April to September 2021. Under the state of emergency, the government encouraged people to stay home and refrain from going outside for nonessential reasons. The ongoing *saiban-in* trials were continued over those periods, but new *saiban-in* trials were suspended from March 2020 up to June of the same year, when they were resumed on the condition that countermeasures such as mask-wearing and social distancing be taken. As diseases are spread through contact with infected persons, avoiding one's duty as a *saiban-in* is rational for the purposes of protecting oneself from risks to one's life and health. In the leadup to this study, therefore, the author anticipated that the data for 2020 and 2021 would exhibit an increase in the declination rate of *saiban-in* candidates and a decrease in the attendance rate of *saiban-in* candidates in court. Nevertheless, and surprisingly, people voluntarily served as *saiban-ins* and took the inherent risks to their health and lives under the extraordinary circumstances.[17)]

The author remains unable to explain the increase in the attendance rate. The Supreme Court believes that the district court practices of resending subpoenas and requesting the return of completed questionnaires may be successful.[18)] The Supreme Court provides, however, no detailed information on the district court practices; hence this aspect cannot be proven.

17) In reporting at the 34th Expert Council on the Operation of the *Saiban-in* System (October 26, 2021), a proceeding established by the Supreme Court, the Director-General of the Criminal Affairs Bureau of the Supreme Court proposed two potential reasons for the increase in the attendance rate of *saiban-in* candidates. First, the anxieties of the *saiban-in* candidates and general public regarding COVID-19 infection may have been allayed by the advance notification sent out to the candidates (and to people in general via the Internet and mass media) regarding the measures put in place to prevent infection in courts. Second, the prevalence of telework and changes in the current employment situation made it easier for citizens to participate in trials.

18) Statement by the Director-General of the Criminal Affairs Bureau of the Supreme Court in the 31st Expert Council on the Operation of the *Saiban-in* System (December 10, 2018). Later, in the 33rd Expert Council (September 25, 2020), the Director-General also proposed that the active public relations activities in commemoration of the 10th anniversary of the enactment of the *saiban-in* system may also have contributed to the increase from 2019 onward.

3. Citizens' Understanding of and Trust in the Judiciary and Sense of Ownership in Public Affairs

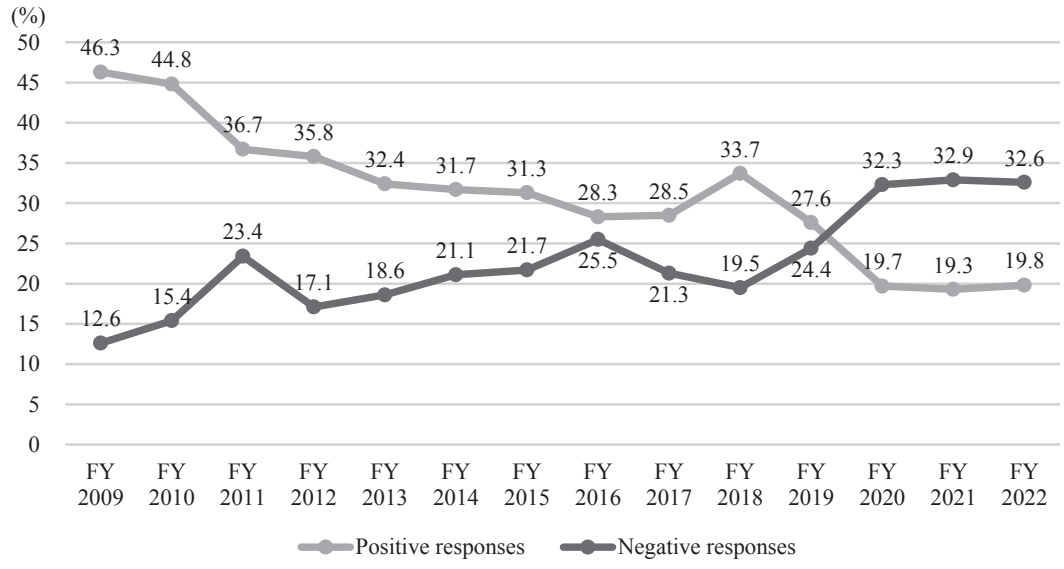
3.1. Citizens' Understanding of and Trust in the Judiciary

3.1.1. Citizens' Understanding of the Judiciary

The Public Opinion Survey poses a question related to the citizens' understanding of the judiciary: "Do you agree that the procedures and contents of trials under the currently implemented *saiban-in* system have become easier to understand?"

Ii (2015: 147) points out that the positive responses (the sum of "Agree" and "Slightly agree") to this question fell from 46.3% in FY 2009 to 31.7% over the five years up to FY 2014. In view of this decrease, Ii insists, "there is a doubt that the purpose of Article 1 of the *Saiban-in* Act has been accomplished."

Figure 5 : Do you agree that the procedures and contents of trials under the currently implemented *saiban-in* system have become easier to understand?



According to the data after FY 2014, which Ii (2015) excludes from his analysis, the rate of respondents who had the impression that the procedures and contents of trials had become easier to understand continued to fall (although it rose in FY 2018). After FY 2019, the respondents who agreed were outnumbered by those who responded negatively (the sum of "Slightly disagree" and "Disagree").

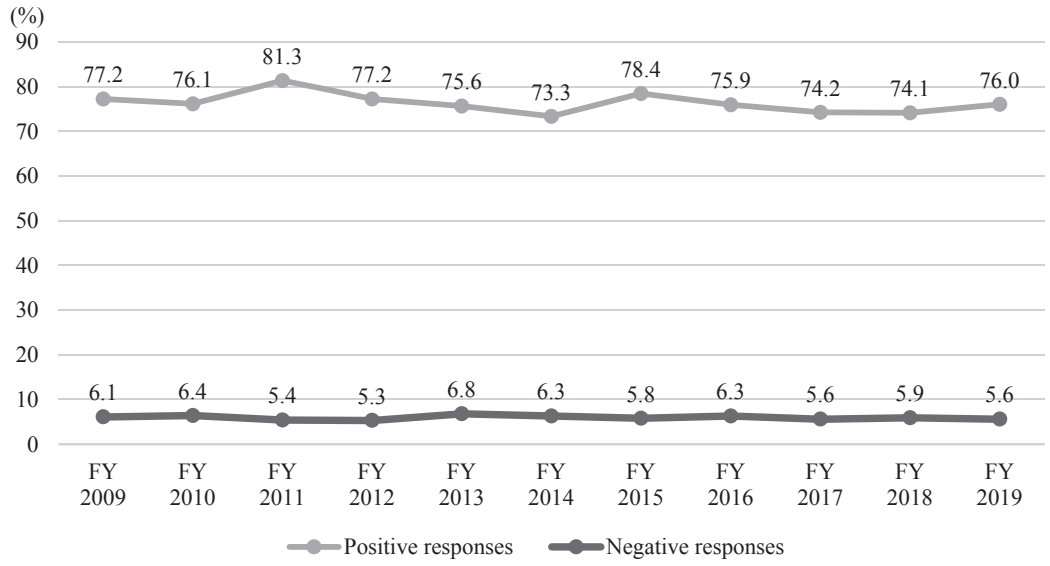
Ii assumes that a decrease in the rate of respondents who agreed that the

public had the impression that the *saiban-in* system had made the procedures and contents of trials easier to understand indicates that understanding of the people about the judiciary has not been promoted, and therefore concludes that the purpose of Article 1 of the *Saiban-in* Act has not been accomplished.

The author believes, however, that this item has no direct bearing on the accomplishment of the purpose of Article 1 of the *Saiban-in* Act. As discussed at the beginning of this paper, the term "judiciary," as used in Article 1 of the *Saiban-in* Act, is a broad concept that is not limited to the specific procedures and contents of criminal trials. It also encompasses all of the other elements making up the whole of the judiciary. From this perspective, measuring the public's understanding of the judiciary solely on the basis of the ease with which the public understands the procedures and contents of trials would be inappropriate.

With regard to the Public Opinion Survey, moreover, any assertion that Figure 5 constitutes proof of the ineffectiveness of the *saiban-in* system in promoting the understanding of the people about the judiciary would be premature.

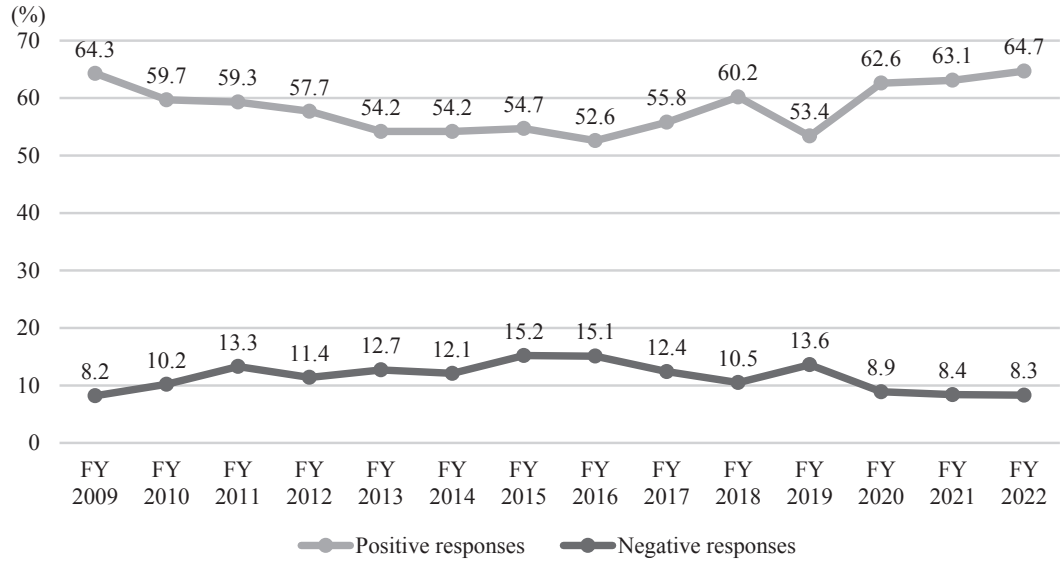
Figure 6 : Do you agree that the procedures and contents of criminal trials in Japan before the introduction of the *saiban-in* system were difficult or hard to understand?



Up to FY 2019, the Public Opinion Survey posed questions about the impression of criminal trials in Japan before the introduction of the *saiban-in* system. One of the questions was, "Do you agree that the procedures and contents of criminal trials in Japan before the introduction of the *saiban-in* system were difficult or hard to understand?" The rate of respondents who

agreed (the sum of "Agree" and "Slightly agree") that the procedures and contents of criminal trials were difficult to understand before the introduction of the *saiban-in* system averaged 76.3%, and showed no decrease over the 10-year survey. As Figure 6 shows, many people thought the criminal trials were difficult to understand before the introduction of the *saiban-in* system, which posed an issue that Japan's judiciary needed to overcome.

Figure 7 : Do you expect the procedures and contents of trials to become easier to understand by *saiban-in* trials?



The Public Opinion Survey posed another question related to the citizens' understanding of and trust in the judiciary: "Do you expect the procedures and contents of trials to become easier to understand by *saiban-in* trials?"[19] As Figure 7 shows, many citizens expected the *saiban-in* system to make the procedures and contents of trials more understandable, and this expectation has increased over time. While this expectation gradually declined after FY 2009 (64.3%), it began to recover from FY 2017. Although the expectation fell sharply from FY 2018 to 2019 (53.4%), it returned to approximately the 2009 level by FY 2022 (64.7%).

Summarizing the results of the surveys up to FY 2019, more than seven out of ten persons found that the criminal trials were difficult to understand before the introduction of the *saiban-in* system (Figure 6). On average, 58.3% of the respondents expected the *saiban-in* system to make the proce-

19) Until FY 2019, the question was, "Do you expect the procedures and contents of trials to become easier to understand by the implementation of the *saiban-in* system?"

dures and contents of trials easier to understand (Figure 7). A low average of only 34.3% responded that the currently implemented *saiban-in* system made the procedures and contents of trials easier to understand (Figure 5). Given their impressions of the previous trials without *saiban-ins* and their expectations for *saiban-in* trials, however, this figure does not rule out the significance of the *saiban-in* system. To the contrary, it suggests that continuing, maintaining, and developing the system will be necessary steps toward fulfilling the expectations of the people.

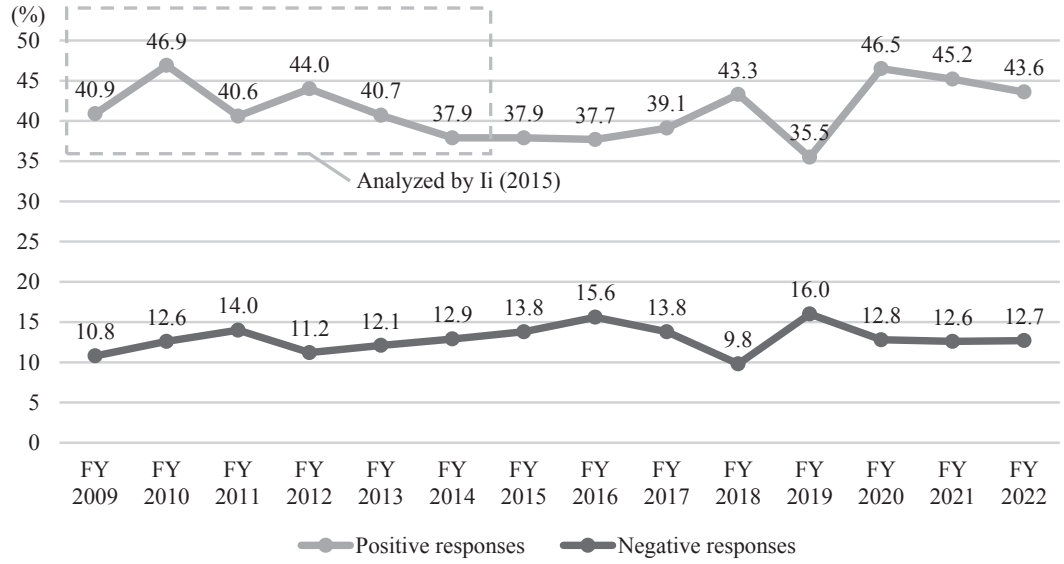
Notably, Figure 5 shows that the positive impression of the currently implemented *saiban-in* system, that is, that it has made the procedures and contents of trials easier to understand, sharply decreased from 2018 to 2020. The sharp decrease in positive responses to the impression that *saiban-in* trials were *becoming* easier to understand may be related to the fact that related questions on the impression of criminal trials before the introduction of the system were no longer asked after FY 2019.

3.1.2. Citizens' Trust in the Judiciary

One of the purposes stipulated by Article 1 of the *Saiban-in* Act for the *saiban-in* system is to enhance the trust of the people in the judiciary. The Public Opinion Survey poses the following question in relation to the trust of citizens in the judiciary: "Do you agree that trials under the currently implemented *saiban-in* system have become more trustworthy?"

Ii (2015: 147) points out a decrease in the rate of respondents to the Public Opinion Survey who had the positive impression that trials under the currently implemented *saiban-in* system had become more trustworthy (from 40.9% in FY 2009 to 37.9% in the five years up to FY 2014). This decrease is one of the arguments Ii uses to back his claim that, "there is a doubt that the purpose of Article 1 of the *Saiban-in* Act has been accomplished." This assertion, as well as the argument in Section 3.1.1., should be criticized, in that they confuse the trials with the judiciary.

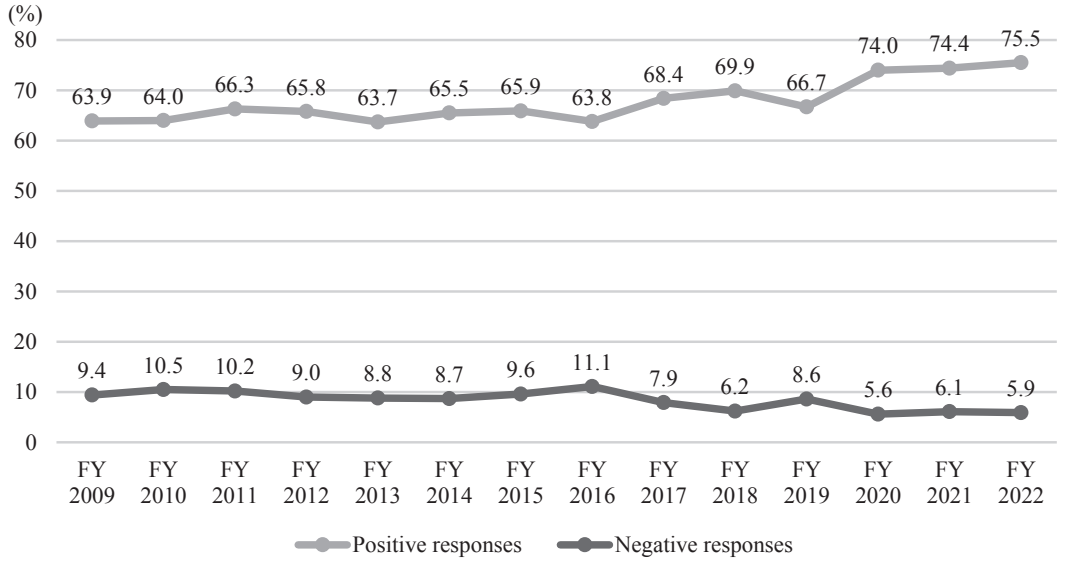
Figure 8 : Do you agree that trials under the currently implemented *saiban-in* system have become more trustworthy?



A decrease can be found in any chronological graph by excluding a specific period of time and comparing the two sets of data. Figure 8 shows a downward trend in the respondents' impressions about trust in *saiban-in* trials by comparing each year from FY 2011 to FY 2014 (or FY 2019) with the baseline year of FY 2009. Ii (2015), however, ignores the two increases in FY 2010 and FY 2012: if the relative decline in the comparison between FY 2009 and FY 2014 signifies doubt that the purpose of Article 1 of the *Saiban-in* Act was accomplished, then the two intermittent increases occurring over the same period should contrarily be assessed as an indication that the purpose of Article 1 of the *Saiban-in* Act was accomplished.

Notably, although Ii (2015) analyzes data only through FY 2014, the positive responses gradually increased from FY 2016 (37.7%) onward, reaching 43.6% in FY 2022 (a rate surpassing that of FY 2009, when the system was initiated). Therefore, according to his argument, the relative increase from 40.9% in FY 2009 to 43.6% in FY 2022 should indicate that the purpose of Article 1 of the *Saiban-in* Act has evidently been accomplished.

Figure 9 : Do you expect that trials will be more trustworthy by *saiban-in* trials?



Another notable aspect is that many people expected the *saiban-in* system to make trials more trustworthy, and this expectation rose year by year. When asked, "Do you expect that trials will be more trustworthy by *saiban-in* trials (implementation of the *saiban-in* system)[20]?", the rate of Public Opinion Survey respondents answering positively (the sum of "Expect" and "Slightly expect") rose from 63.9% in FY 2009 to 75.5% in FY 2022, and never once fell below 60% over that 14-year period. It is unreasonable to doubt the purpose of the *saiban-in* system stipulated in Article 1 of the *Saiban-in* Act, in light of the widespread expectation among people that the *saiban-in* system will make trials more trustworthy (while trust in trials differs from trust in the judiciary, as previously mentioned, the former is part of the purpose of Article 1 of the *Saiban-in* Act). Article 1 of the *Saiban-in* Act cannot be challenged, because many people continuously expect the *saiban-in* system to enhance the public's trust in trials, and because, on a decadal basis, the *saiban-in* system has, in fact, met this expectation.

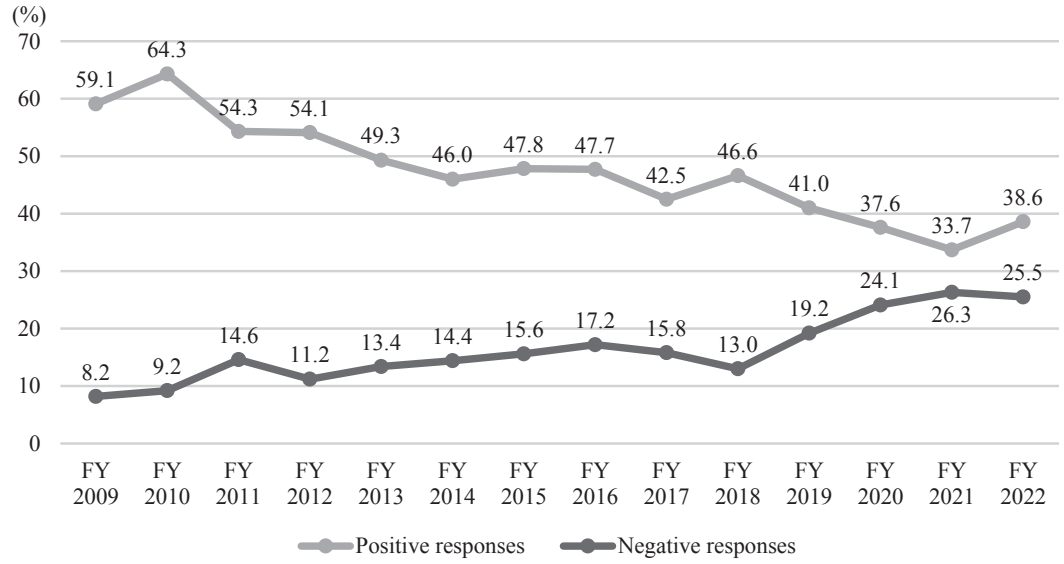
3.2. Citizens' Sense of Ownership in Public Affairs

A few of the questions in the Public Opinion Survey were related to citizens' sense of ownership in public affairs. One of them is, "Do you agree, in considering the currently implemented *saiban-in* system, that citizens have become more interested in public affairs such as criminal trials and

20) The text in parentheses is the wording of the question up to FY 2019.

the judiciary and have begun to think of them as their own problems?"

Figure 10 : Do you agree, in considering the currently implemented *saiban-in* system, that citizens have become more interested in public affairs such as criminal trials and the judiciary and have begun to think of them as their own problems?

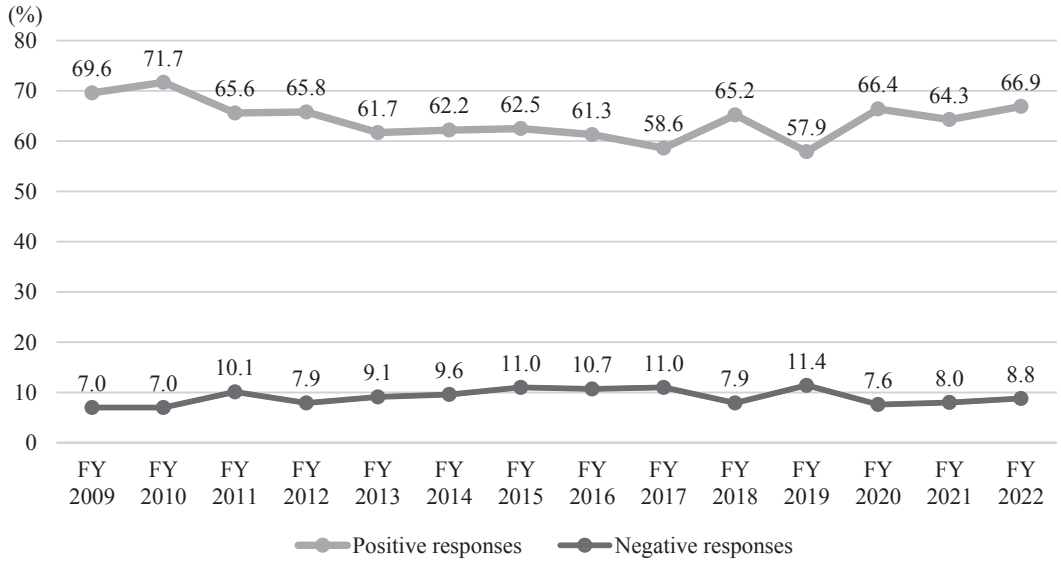


On the basis of the decrease observed in the rate of positive responses (the sum of "Agree" and "Slightly Agree") to this question from 59.1% in FY 2009 to 46.0% in FY 2014, Ii (2015: 148) claims that "the response rates raise doubts on the accomplishment of the purpose of the *saiban-in* system under the Act." At first glance, Figure 10 appears to indicate that people have gradually lost their sense of ownership in public affairs with the implementation of the *saiban-in* system.

The rate of positive responses continued to fall further after FY 2014, the final year considered by Ii (2015), reaching 33.7 by 2021. This sharp decrease may be related to the fact that, as mentioned in Section 3.1.1., the questions on the respondents' impressions of criminal trials before the introduction of the system in the survey from FY 2020 onward.

Note, however, that the Public Opinion Survey asks not only the respondents' impressions of the currently implemented *saiban-in* system, but also what the respondents expect of the system (before FY 2020) (as well as the respondents' impressions of criminal trials before the introduction of the *saiban-in* system). In other words, the appropriate implications of the public's opinions can be derived by considering them together with the survey items conducted at the same time (instead of selecting and analyzing only specific items).

Figure 11 : Do you expect that citizens will become more interested in public affairs such as criminal trials and the judiciary and will begin to think of them as their own problems by *saiban-in* trials?



The percentage of respondents who expected the *saiban-in* system to improve the sense of ownership of citizens in public affairs remained between 60% and 70% (excluding two downward spikes observed in FY 2017 and FY 2019), and no ongoing decreasing trend was observed.

Figure 12a : Impressions of the previous system regarding the sense of ownership in public affairs (FY 2019)

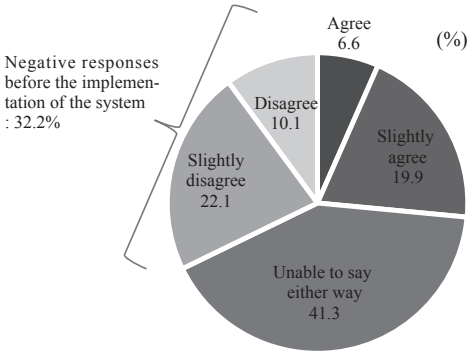


Figure 12b : Impressions of the current system regarding the sense of ownership in public affairs (FY 2019)

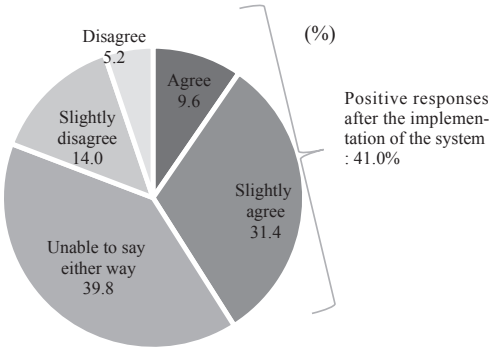
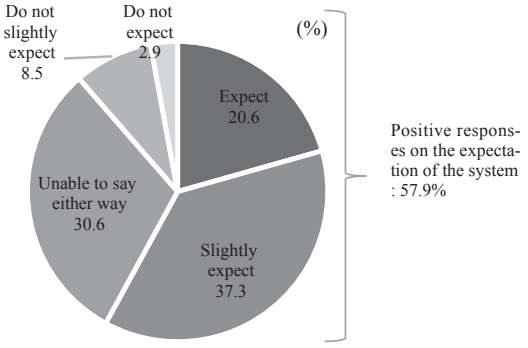


Figure 12c : Expectations of the system regarding the sense of ownership in public affairs (FY 2019)



If the study sets out to consider the structure of the questions in the Public Opinion Survey, then it should consider the contrast between the impressions observed before the introduction of the *saiban-in* system, the impressions observed after the introduction of the system and the expectations of the system, rather than the changes observed over time. In other words, the Public Opinion Survey asked questions in three phases, namely, impressions before the introduction of the *saiban-in* system, evaluations after the introduction of the *saiban-in* system, and expectations of the *saiban-in* system up to 2019. In focusing on this point, contrasting the results of each of the three types of responses is important. Figures 12a, b, and c show the results of the survey conducted in FY 2019, which encompasses the latest iterations of the three types of questions on citizens' sense of ownership in public affairs.

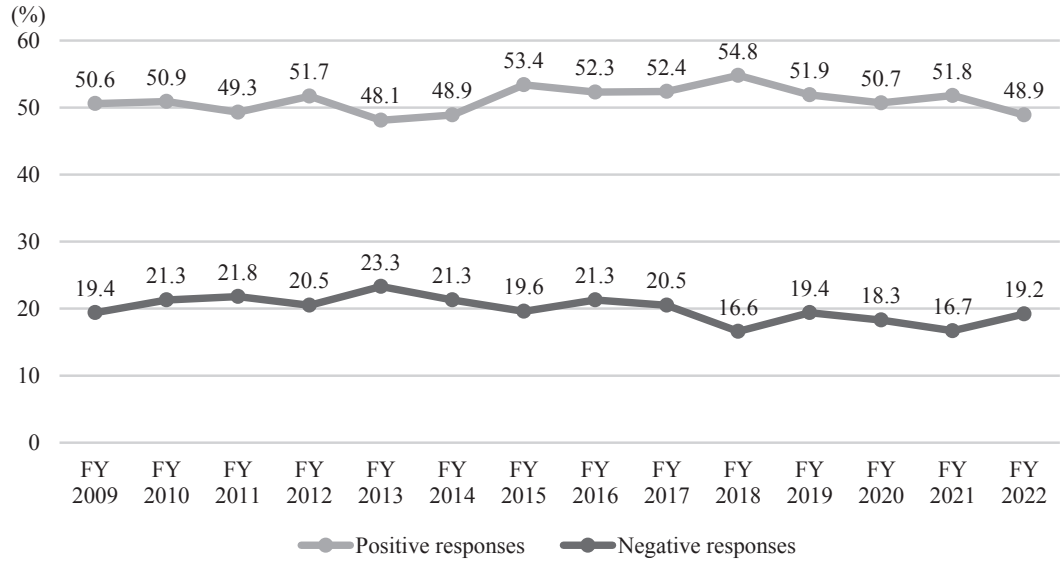
The Public Opinion Survey in FY 2019 posed the following question: "Do you agree, in considering the criminal trials in Japan before the introduction of the *saiban-in* system, that citizens were interested in public affairs such as criminal trials and the judiciary and thought of them as their own problems?" The rate of negative responses to this question reached 32.2% (the sum of "Slightly disagree" (10.1%) and "Disagree" (22.1%)). The next question queried respondents on how citizens' views on the same points had changed since the introduction of the system: "Do you agree, in considering the currently implemented *saiban-in* system, that citizens have become more interested in public affairs such as criminal trials and have begun to think of them as their own problems?" The rate of positive responses to this question was 41.0% (the sum of "Agree" (9.6%) and "Slightly agree" (31.4%)). In summary, although more than 30% of the respondents did not think that the Japanese citizens were highly interested in public affairs such as criminal trials and the judiciary or viewed them as

their own problems, more than 40% of the respondents queried before the introduction of the *saiban-in* system responded that the citizens' interest in public affairs had grown since the introduction of the system and that citizens were more likely to think of public affairs as their own problems.

The Public Opinion Survey also asked the following: "Do you expect, in considering *saiban-in* trials (the implementation of the *saiban-in* system), that citizens will become more interested in public affairs such as criminal trials and the judiciary and will begin to think of them as their own problems?" The rate of positive responses to this question was 57.9% (the sum of "Expect" (20.6%) and "Slightly expect" (37.3%)). More than half of the respondents expected that the *saiban-in* system would increase the interest of the citizens in public affairs and citizens' awareness of the importance of their participation in public affairs.

Since FY 2019, 10 years after the introduction of the *saiban-in* system, *saiban-ins* have been so deeply rooted in criminal trials that Japanese citizens have had difficulty in imagining the trials without them. Accordingly, the Public Opinion Survey has ceased to ask about the respondents' impressions of criminal trials before the introduction of the system. The results of the survey, which asked a set of three questions on the same item: impressions before the introduction of the *saiban-in* system, impressions after the introduction of the system, and expectations of the system, clearly demonstrate that citizens lacked a high sense of ownership before the system was introduced. This sense of ownership increased with the introduction of the system, however, and many of the respondents had expected the same.

Figure 13 : Do you agree that citizens should be voluntarily involved in public affairs, such as criminal trials and the judiciary, and that such affairs should not be left the state and its experts?



The responses to another of the Public Opinion Survey's question on citizens' sense of ownership in public affairs also merit our attention. The survey asked, "Do you agree that citizens should be voluntarily involved in public affairs such as criminal trials and the judiciary, and that such affairs should not be left to the state and its experts?" The rate of positive responses to this question (the sum of "Agree" (20.8%) and "Slightly agree" (34.0%)) reached 50.6% in FY 2009, when the *saiban-in* system was started. Although this percentage dipped below 50% in several of the years, it mostly remained slightly above the 50% level.

To conclude Section 3.2., half of the respondents believed that citizens should be voluntarily involved in public affairs such as criminal trials and the judiciary, and 60% expected *saiban-in* trials to stimulate the interest of citizens in public affairs and to encourage citizens to think of such affairs as their own problems. While only 30% responded that the current implementation of *saiban-in* trials met their expectations, this result does not suggest that the *saiban-in* system, a system expected to produce various positive effects, should be immediately abolished. Moreover, maintaining and developing this system, rather than needlessly criticizing its purpose, would further stimulate the interest of citizens in public affairs and raise their awareness of their own involvement in such affairs.

4. Conclusion

4.1. Accomplishment of the Purpose of the *Saiban-in* System Stipulated in the *Saiban-in* Act

Can it be concluded, from the results of the statistics and questionnaire, that the purpose of Article 1 of the *Saiban-in* Act has not been accomplished? Ii (2015) concludes that this purpose has not been accomplished, mainly for the following reasons.

First, Ii (2015) highlights the low willingness of citizens to participate in trials, a finding pointed in the Public Opinion Survey (the willingness to participate has been low since the outset, but has not declined over the years). According to the Implementation Status, moreover, the declination rate of *saiban-in* candidates has increased over time, and the attendance rate has fallen below the rate observed when the system was initiated.[21] "One reason for the low willingness of citizens to serve as *saiban-ins,"* Ii (2015: 154) argues, "is that the purpose of the *saiban-in* system is bound up with that of Article 1 of the *Saiban-in* Act, in which no clear definition is provided to clarify the meaning of serving as a *saiban-in*."

It is not theoretically possible to conclude, however, from the published statistics and the results of the questionnaire survey, that the increase in the declination rate and the decrease in the attendance rate of *saiban-in* candidates were caused by the purpose of the *saiban-in* system stipulated in Article 1 of the Act. Ii (2015) does not prove a causal relationship between the low willingness of citizens to participate as *saiban-ins* and the purpose stipulated in Article 1 of the *Saiban-in* Act. The Declination/Attendance Analysis Report establishes no causal relationship between Article 1 of the *Saiban-in* Act and the increase in the declination rate or decrease in the attendance rate. The Report fails, moreover, to even establish such a hypothesis.

Another reason, Ii (2015: 147–48) points out, is the downward trend in positive responses to the questions posted in the Public Opinion Survey on whether or not (a) the procedures and contents of trials have become easier to understand, (b) trials have become more trustworthy, and (c) citizens have become more interested in public affairs and have begun to think of them as their own problems. "This trend," he argues, "raises doubts on the

21) Although the dataset Ii (2015) analyzes extends only up to FY 2014, the recovery seen in the attendance rate since 2018 would contradict the conclusion reached according to his theory.

accomplishment of the purpose of the *saiban-in* system under the Act."[22] Ii (2015: 155) also argues that "the narrow, partial, and unclear purpose of the *saiban-in* system [stipulated in Article 1 of the Act] might be one of the factors contributing to a paradoxical situation in which citizens' the public's understanding of and trust in the judiciary is lowered" (as reflected in the Public Opinion Survey).[23]

If the purpose of Article 1 of the Act is to be accurately understood, however, then data that lack any measurement of the accomplishment of such a purpose cannot provide grounds for asserting that the people's understanding of and trust in the judiciary has decreased.

According to the recent data which was not analyzed in Ii (2015), and as discussed in Chapter 3 of this paper, decreases were seen in the positive response rates on the public's understanding of the procedures and contents of trials and the public's sense of ownership in public affairs, on the one hand. On the other hand, the positive response rates on citizens' trust in trials increased. In a trend ongoing for more than 10 years, half of the respondents agreed that citizens should be voluntarily involved in public affairs such as criminal trials and the judiciary, and that such affairs should not be left to the state and its experts.

Trials or their procedures and contents differ from the judiciary as a governmental power; therefore, an increase or decrease in citizens' understanding of or trust in trials does not immediately imply an affirmation or refutation of the accomplishment of the purpose of Article 1 of the Act. The decline in positive responses regarding citizens' sense of ownership in public affairs over time suggests that there is room for improvement in the current *saiban-in* trials. More than 60% of the respondents, however, expected

22) Ii (2015: 147-8) further points that there was an ongoing decrease in the number of Public Opinion Survey respondents who answered, "Have become more interested or concerned than in the previous years" (in response to the question, "Have your interest and concern in trials and the judiciary changed since the *saiban-in* system started, compared to previous years?") from 2009 onward. He cites this tendency as a basis for denying the accomplishment of the purpose of Article 1 of the *Saiban-in* Act. It was natural of the courts and other organizations, however, to have aggressively engaged in public relations activities to inform citizens of the *saiban-in* system immediately before and after the system was introduced. The mass media, moreover, covered the system, which generated an interest in trials and the judiciary among many people. As the system took root, publicity activities and media coverage dwindled from the levels of the initial years, which naturally resulted in a decrease in the number of respondents who answered that their interest in the courts and the judiciary had increased over what it had been in previous years. Thus, refuting the accomplishment of the purpose of Article 1 of the *Saiban-in* Act based on the decrease in the results is an unreasonable argument.

23) Ii only suggests the possibility in this regard and makes no a definitive argument (Ii 2015: 155). Anyone can state a possibility without providing evidence, and such a statement generally requires no proof.

the *saiban-in* system to increase the sense of ownership of citizens in public affairs. Fifty percent, on the other hand, believed that citizens should be voluntarily involved in public affairs, and more than 60% expected the *saiban-in* system to improve citizens' sense of ownership in public affairs. Hence, there is no need to discard the provision of Article 1 of the *Saiban-in* Act, which states that the *saiban-in* system "contributes to promote the people's understanding of and enhance their trust in the judiciary."

In other words, on the basis of the results of the questionnaire on the impressions of citizens regarding the currently implemented *saiban-in* system, this study cannot conclude that the purpose of the system stipulated in Article 1 of the *Saiban-in* Act has not been accomplished.

This Section 4.1 therefore concludes that it is impossible to deny that the purpose of the *saiban-in* system, as stipulated in Article 1 of the *Saiban-in* Act, has been accomplished, based on the analysis of the statistics and survey results collected annually over the 10 years after the enactment of the system.[24)]

4.2. Deliberative Democracy and the Meaning of the *Saiban-in* System

Yanase (2009) emphasizes that the implied intention of the founders of the *saiban-in* system is consonant with the theory of deliberative democracy,[25)] in which value preferences are formed through a process of deliberation in consideration of, and decision-making in, public affairs. He proposes that the *saiban-in* system can be interpreted from the standpoint of a republican concept of deliberative democracy and based on the origi-

24) The study by Ii (2015), which attempts to tackle the purpose of the *saiban-in* system as stipulated in Article 1 of the Act, is extremely thought-provoking and worth reading. The author of the present paper, who shares the same concerns on this issue (but reaches a different conclusion), holds the utmost respect for Ii's research approach of analyzing the statistics and questionnaire results, source materials that are typically neglected by lawyers and law professors.

25) Amidst the tremendous amount of discussion on deliberative democracy from various academic fields such as legal philosophy, political theory, and sociology, Yanase (2016: 338) offers the following summary in relation to the *saiban-in* system from the perspective of constitutional law: "[D]eliberative democracy should be construed as requiring refined preferences formed through the process of internal deliberation by individual citizens and external deliberation with other citizens, based on sufficient information. Such preferences should be respected when public matters are considered and decided." The author supposes that Ethan J. Leib is the first legal scholar to conscientiously connect the concept of deliberative democracy with the jury system. Relying on the civic republican school of deliberative democracy theories (and Tocqueville), he states that "[D]eliberative democrats often look to the jury as a proximate example of a deliberative institution in our polity, where the voices of ordinary citizens speak about the laws that govern them" (Leib 2004: 89).

nal understanding of the system, as stipulated in Article 1 of the *Saiban-in* Act. He proposes three grounds for interpreting the *saiban-in* system based on deliberative democracy: first, the fundamental philosophy of and directions for the judicial system reform described in the "Recommendations of the Justice System Reform Council"; second, the sympathy for deliberative democracy expressed by Koji Sato, a distinguished Japanese constitutional scholar and one of the founders of the *saiban-in* system; and third, the common perceptions that emerged in certain official statements by the Japanese government and Supreme Court of Japan. The essence of Yanase's argument runs as follows:

> Most laypeople do not often think about criminal justice as their own problems but, if appointed as *saiban-ins*, they would serve as members of a judicial body and make judicial decisions through deliberation with judges. It thus follows that such experiences with actual judicial decision-making could naturally increase the public's familiarity with an interest in criminal justice. Consequently, the *saiban-in* trial system can be understood as establishing a sort of forum for public deliberation on criminal cases. Furthermore, there have been studies suggesting the effects of this participation could extend beyond judicial to broader social affairs. Therefore, public participation in the criminal justice system has the added function of cultivating people's civic virtues through their deliberations. (Yanase 2016: 341)

The results of the Public Opinion Survey support the view that citizens did not initially think of public affairs as their own problems. The high rate of respondents (more than 30%) who disagreed that people thought of public affairs such as criminal trials as their own problems before the introduction of the *saiban-in* system (see Figure 12a) implies a high tendency of Japanese citizens toward indifference to society before 2009. Moreover, Yanase's argument on the democratic impact of the participation of citizens in trials is consistent with the results of the Public Opinion Survey. Nearly 60% of the respondents expected that the *saiban-in* system would improve the citizens' attitude toward public affairs and would spur people to become more involved in society (see Figure 12c). The statistical data, however, fall short of fully proving that the currently implemented *saiban-in* system had already improved citizens' sense of ownership in public affairs. The number of respondents who agreed that the currently implemented *saiban-in* system had contributed positive changes to the mindset of the people regarding public affairs could be considered high, but only slightly (see

Figure 12b). A sincere alternative conclusion would be that the effect of the *saiban-in* system in cultivating civic virtue was still in the process of being realized (notwithstanding the high expectations of the people regarding this effect).

A review of the arguments similar to Yanase's in terms of the democratic impact of the participation of citizens in trials immediately evokes "Democracy in America," the 1835 monograph by Alexis de Tocqueville, in the classic literature. Tocqueville eulogized the American jury system as "one of the most efficacious means for the education of the people which society can employ." To quote from his best-known book:

> … The jury teaches every man not to recoil before the responsibility of his own actions, and impresses him with that manly confidence without which political virtue cannot exist. It invests each citizen with a kind of magistracy, it makes them all feel the duties which they are bound to discharge towards society, and the part which they take in the Government. By obliging men to turn their attention to affairs which are not exclusively their own, it rubs off that individual egotism which is the rust of society.
>
> The jury contributes most powerfully to form the judgement and to increase the natural intelligence of a people, and this is, in my opinion, its greatest advantage…. (Tocqueville 1835).

Although Tocqueville is well renowned for his remarks on the democratic implications of the American jury system, this 19th-century French political theorist did not attempt to empirically examine the democratic effects of the jury system. His aspirations were inherited by political scientists of the 21st century.

Gastil et al. (2010: 191) analyze data from a large-scale survey to empirically examine whether or not the experience of Americans in jury service

in criminal cases,[26] especially in deliberations, increases their support for and confidence in the jury system, courts, judges, government, and fellow citizens, as well as their political abilities and virtues, and leads them to become more engaged in political activities, including voting in elections. They argue that the jury system may place limits on the decline of social capital in the United States. "The jury," they state, "teaches deliberation and inspires democratic engagement, and it has particularly powerful effects on the civic behaviors and attitudes of citizens who, short of jury service, might otherwise not be drawn into the public sphere." They insist, moreover, that the jury must be recognized as "a powerful means of civic education that reaches across demographic and cultural divides" (Gastil, et. al. 2010: 157). This latter argument is somewhat similar to Yanase's.[27]

> … By participating in criminal trials as a *saiban-in*, ordinary people can develop an interest in public affairs of which they are seldom aware in their daily lives, such as peace and order, crime victims, and human rights, and cultivate their public consciousness and civic virtue.
>
> The educational effects of the *saiban-in* system on citizens will not only function in the judicial sphere, but also promote citizen participation in the democratic political process …. (Yanase 2009: 252)

Yet the method used by Gastil et al. (2010: 32–34), that is, extracting the

26) Valerie Hans and her colleagues (including John Gastil) prove not only that criminal jury service exerts a civic impact, but also that civil jury service can spark a civic awakening for jurors, depending on the context of the trial (Hans et al. 2014: 712). Scholars have discussed the difference in democratic impact between civil and criminal juries, especially in light of the paradoxical results introduced by Gastil et al. (2010): "the [civic] jury experience can dampen civic engagement" due to the civic confusion caused by the difficulty of understanding civil trials. Nevertheless, Hans et al. (2014) proves the significance of the civil jury for deliberative democracy in a work that has had a significant impact on the arguments not only on the American jury system, but also on the systems of citizen participation in trials in other countries. In Japan, the direct participation of citizens in the trial process is only established in criminal trials, although an emerging argument advocates the introduction a system of direct citizen participation in civil and administrative cases, as well (Wilson et al. (2015), for instance, advocates for the adoption of civil jury trials or the expansion of the *saiban-in* system to civil trials in Japan). If direct citizen participation is extended to civil trials in the future in Japan, then Hans et al. (2014) will draw renewed attention in the Japanese context.

27) Gastil et al. (2010: 172) also seems to be interested in the *saiban-in* system in Japan. Citing the argument from the Australian legal scholars Kent Anderson and Mark Nolan, as well as an excerpt from "Recommendations of the Justice System Reform Council," the authors state that, "[I]f adapted effectively in local traditions and culture, the jury could serve to broaden public participation in such countries and smooth the transition to a democratic system of self-governance."

names of jurors who participated from case files and matching them with voting records in elections, is impossible for Japanese scholars to follow. Publishing a name, address, or any other information that may identify a *saiban-in* is prohibited by Article 101 of Japan's *Saiban-in* Act, and no exemptions are considered, even for academic purposes. While a voter roster listing the name, address, sex, and date of birth of every voter may be accessed for academic purposes (Article 28-3 of the Public Offices Election Act), it contains no information on whether or not a voter voted in a specific election. Regrettably, therefore, there are no available means to examine the degree to which Japanese citizens who have served as *saiban-ins* have become more civically motivated or have begun to vote in elections.

The willingness of citizens to participate as jurors falls short of high levels even in the American jury system. Gastil et al. (2010: 55), however, do not take the pessimistic view that the level of citizen willingness demonstrates that the purpose of the jury system is unachieved. In the same manner, the low willingness of Japanese citizens to participate in trials as *saiban-in* should not be interpreted as grounds to conclude that the purpose of Article 1 of the Act has not been accomplished. Instead, it should be viewed as a reason why the purpose of Article 1 of the Act needs to be better accomplished.

Gastil et al. (2010: 157) proves that the jury "has particularly powerful effects on the civic behaviors and attitudes of citizens who, short of jury service, might otherwise not be drawn into the public sphere." In the same manner, with regard to the *saiban-in* system in Japan, as Yanase (2009: 249) argues, there is a need to cultivate civic virtue through the experience of public deliberation not only among citizens who willingly serve as *saiban-ins,* but also among those who do not.

As discussed in Section 3.2, almost half of the respondents believed that citizens should be voluntarily involved in public affairs, and more than 60% expected the *saiban-in* system to increase citizens' sense of ownership and interest in the same. Given these stances among the citizenry, a crucial approach to realizing more deliberative democracy in Japan will be to encourage reluctant citizens to participate in trials (while respecting due offers of declination).

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