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Erik Herber

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## VICTIM PARTICIPATION IN JAPAN

Erik Herber<sup>†</sup>

*Abstract:* In 2008, a victim participation system was introduced in Japan, which enabled crime victims to participate in criminal proceedings. One of the goals of the system was to correct the wrong done to victims due to their lack of previous involvement, thus giving crime victims what they “naturally desire.” Employing Malcolm Feeley’s analytical framework to make sense of planned legal change, this Article shows that the new system emerged against the background of a combination of international trends: victim activism and public perceptions of crime getting out of hand. It finds that for reasons that are not well understood, only a small percentage of victims have made use of the new system. When it comes to the other courtroom players, judges and prosecutors are generally committed to accommodating participating victims, both formally and in practice. The new system further limits defense lawyers’ room to maneuver, while also presenting new opportunities for lawyers to represent victims and champion their rights. This Article concludes that the new system expresses a continued commitment to protecting victims’ rights and interests, and that the new system contributes to remedying victims’ exclusion from their case, even if the extent to which it succeeds in giving victims what they desire remains uncertain.

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### I. INTRODUCTION

In Japan, before the year 2000, crime victims’ involvement in criminal justice proceedings was limited to providing information to investigators or testimony in court. To the extent that victims were involved in proceedings, their involvement served to help others prove or make their point, rather than to make a point or statement of their own. That all changed in 2000, when the Japanese Code of Criminal Procedure (“CCP”)<sup>1</sup> was revised to allow for a Victims’ Statement of Opinion (“VSO”) to be presented in court. The CCP was revised again in 2008, this time making it possible for victims to actively participate in different ways in various stages of criminal proceedings.

This expansion of the victim’s role in criminal proceedings was, as this Article will show, the result of consciously planned legal change. How did this planned change play out? Did the legal changes accomplish what they were supposed to accomplish? Why or why not? This Article aims to address these questions. In doing so, it will contribute to the literature on victim participation in Japan. Studies have introduced and analyzed the design of the

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<sup>†</sup> Lecturer at the Leiden University Institute for Area Studies, School of Asian Studies.

<sup>1</sup> KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 292-2 (Japan).

new system and the legal theoretical issues and debates linked to the expansion of victims' role in Japanese criminal justice.<sup>2</sup> Additionally, various studies have addressed the impact of victim participation on sentencing using mock trials and hypothetical cases and scenarios.<sup>3</sup> Others have addressed how participation affects victims' confidence in the criminal justice system and other aspects of victims' court experiences.<sup>4</sup> However, the data on this topic lacks studies aimed at evaluating the successes or failures of the new system in its own terms. This Article constitutes a first step to fill this void.

In addressing the successes and failures of this instance of planned legal change, the Article will build on Malcolm Feeley's analysis of such change as presented in his 1983 book *Court Reform on Trial: Why Simple Solutions Fail*.<sup>5</sup> In accordance with its title, Feeley's book is concerned with the reasons for failed legal change and the reasons why "so many *good* ideas put forward by *well-intentioned* people go astray."<sup>6</sup> In addressing this question, Feeley focuses on four examples of legal reform in the United States criminal justice

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<sup>2</sup> See, e.g., Tatsuya Ota, *A New Horizon of Victim Support in Japan*, in SUPPORT FOR VICTIMS OF CRIME IN ASIA 240 (Wing-Cheong Chan ed., 2008); Abe Chizuko, *Higaisha sanko seido ni kansuru ikkōsatsu: higaisha sanko no konkyo, higaisha sanko no mokuteki, higaisha no hōteki chii* [A Study on the Victim Participation System: The Basis for Victim Participation, the Purpose of Victim Participation, and the Legal Status of Victims], 62 DŌSHISHA HŌGAKU [DŌSHISHA L. REV.] 963 (2010); Shigenori Matsui, *Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan*, 13 ASIAN-PAC. L. & POL'Y J. 54 (2011).

<sup>3</sup> Saeki's ground-breaking work, which involved an extensive range of lay judge mock trials and deliberations, shows that victim participation cannot be conclusively argued to have a clear impact on sentencing. See Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT'L J.L. CRIME & JUST. 149 (2010); SAEKI MASAHIKO, HANZAI HIGAISHA NO SHIHŌ SANKO TO RYŌKEI [THE IMPACT OF VICTIM PARTICIPATION IN CRIMINAL TRIALS ON SENTENCING DECISIONS] (2016). Shiraiwa & Karasawa have in turn observed that mock lay judges who oppose victim participation may compensate for the impact that they assume victims' participation has on their fellow lay judges and regard "the defendant as deserving a more lenient punishment." Shiraiwa Yūko & Karasawa Kaori, *Higaisha sankanin no hatsugen oyobi higaisha sanko seido e no taido ga ryōkei handan ni ataeru eikyō* [The Effect of the Victim Participant's Statements and People's Attitudes to Victim Participation on Sentencing Decisions], 53 JIKKEN SHAKAI SHINRIGAKU KENKYŪ [JAPANESE J. EXPERIMENTAL SOC. PSYCHOL.] 12, 21 (2013).

<sup>4</sup> See, e.g., Shiraiwa Yūko & Karasawa Kaori, *Hanzai higaisha no saiban kan'yo ga shihō e no shinrai ni ataeru kōka: tetsuzukiteki kōsei no kanten kara* [The Effect of Participation of the Victims in Trials on Their Confidence in the Criminal Justice System: Procedural Justice], 85 SHINRIGAKU KENKYŪ [JAPANESE J. PSYCHOL.] 20 (2014). Shiraiwa and Karasawa found that prior to participating, crime victims generally had no faith in the criminal justice system. Participating in criminal proceedings either by presenting a statement or through the victim participation system was found to increase victims' faith in the system. *Id.* at 25. Saeki similarly found that victims tended to evaluate the presenting of a statement of opinion positively, regardless of the perceived impact of such a statement. SAEKI MASAHIKO, *supra* note 3, at 161–62. See also SAEKI MASAHIKO, *supra* note 3, at 32–51, for an overview of research on the impact of victim participation on lay judges' decisions.

<sup>5</sup> MALCOLM M. FEELEY, COURT REFORM ON TRIAL: WHY SIMPLE SOLUTIONS FAIL (Quid Pro Books 2013) (1983).

<sup>6</sup> *Id.* at vi (emphasis added).

system,<sup>7</sup> identifying various factors that stand in the way of their effective implementation. While Feeley's book presents four case studies of planned legal change in the United States, in doing so, he also introduces a general analytical framework identifying five stages of legal innovation that, as this Article will show, can be used as heuristic tools to make sense of planned legal change in non-U.S. contexts. This Article will apply the framework developed by Feeley to Japan's attempts to increase victim participation in criminal trials.

Part II of this Article provides a brief introduction to Malcolm Feeley's theoretical framework, bringing into focus why a book that addresses four examples of planned change in United States criminal justice is useful when thinking about Japanese criminal justice. The following sections correspond with the different stages of legal reform as differentiated by Feeley. Sections A through D of Part II address Feeley's stages of: A) *diagnosis or conception*, B) *initiation*, C) *implementation*, and D) *routinization*. The final stage, *evaluation*, is discussed in the conclusion.

This Article uses transcripts of twelve two-and-a-half-hour-long meetings ("MOJ meetings") organized by the Japanese Ministry of Justice ("MOJ").<sup>8</sup> These meetings involved legal professionals who participated in "victim participation trials" as well as representatives of victim interest groups, where they shared their experiences and exchanged opinions about the system to determine whether a revision of the 2008 system was necessary. This Article is also based on interviews, conducted between 2011 and 2016, with 15 Japanese lawyers and 8 public prosecutors with experience in trials in which victims participated, as well as a MOJ survey conducted among 111 crime victims who had recently participated in criminal trials.<sup>9</sup>

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<sup>7</sup> *Id.* at 6. The examples provided by Feeley are: bail reform, pretrial diversion, mandatory minimums and determinate sentencing, and speedy trial rules.

<sup>8</sup> Transcripts of these meetings can be accessed at *Heisei 19-nen kaisei keiji soshōhō tō ni kansuru iken kōkankai ni tsuite* [Meetings to Exchange Views on the 2007 Revised Code of Criminal Procedure], HŌMUSHO [MINISTRY JUST.], [http://www.moj.go.jp/keiji1/keiji12\\_00068.html](http://www.moj.go.jp/keiji1/keiji12_00068.html) (last visited Oct. 7, 2017) [hereinafter *MOJ Meetings*]. For ease of reference, individual meeting minutes (*gijiroku*) will be referred to by meeting number ("mtg.") followed by the specific page number.

<sup>9</sup> Survey Results, Ministry of Justice, *Hanzai higaisha no katagata ni taisuru ankēto chōsa* [Questionnaire Survey of Crime Victims] (Jan. 31, 2008), <http://www.moj.go.jp/content/000110030.pdf>.

## II. FEELEY'S STAGES OF INNOVATION

Feeley's motivation to identify stages of innovation stemmed from his observation that each stage in the process has its own distinctive pitfalls and therefore must be considered separately. It is important to note that Feeley's analytical framework results from his ambition to pursue and analyze sources of *failure*, as opposed to more general characteristics of planned legal change. The adoption of Feeley's framework in this Article does not mean, however, that it assumes that the legal change focused on in this Article is an example of failed legal change. Rather, the assumption is that if Feeley's stages allow for the identification of pitfalls, they may also allow for identification of success.

*Stage 1: Diagnosis or Conception.* As Feeley notes, *diagnosis* is about identifying problems and considering solutions. In the realm of criminal justice, however, such diagnoses tend to differ depending on the perspective of the party offering them. Since different diagnoses bring into focus different ailments, they also tend to translate into the proposal of different cures.<sup>10</sup>

*Stage 2: Initiation.* As a consequence of party-dependent differences in focus, reformers will often find themselves having to choose between several options. It is at this stage that issues, such as the choice between different alternatives and the financing of the new program, are decided upon.<sup>11</sup>

*Stage 3: Implementation.* Feeley observes that outsiders are often the ones who initiate criminal court reforms. For example, the outsiders, e.g., lawmakers, are the ones who respond to perceived societal needs, international legal trends, or the activism of specific interest groups, as opposed to the insiders, e.g., prosecutors. In light of this observation, those who devise the changes are thus unlikely to be the ones implementing those changes—changes that may cause, or be seen to cause, an uninvited disruption of insiders' existing, predictable practices. Insiders' commitment to implementing the changes is key to

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<sup>10</sup> FEELEY, *supra* note 5, at 25.

<sup>11</sup> *Id.*

their successful implementation, so it is necessary for the commitment to be a joint one with a sufficient amount of coordination and cooperation from both sides.<sup>12</sup>

*Stage 4: Routinization.* Aside from a lasting commitment on the part of criminal justice actors and institutions to break from earlier practices and routines, Feeley also refers to the necessity of continued funding. Both are necessary to allow for changed practices to become criminal justice routine. And ultimately, the proof of legal change lies in the extent to which and manner in which this happens. It is only at this stage of *routinization* that the effective, practical impact of the changes can be assessed.<sup>13</sup>

*Stage 5: Evaluation.* In spite of this last observation, Feeley notes that “new programs are usually assessed during their experimental . . . stages rather than their routine periods.” Accordingly, such evaluations typically have little to say about the continued viability of new routines.<sup>14</sup>

In addition to identifying these stages and the potential pitfalls they present, Feeley also provides a number of general observations on the reasons for legal change failures in different United States contexts. An important theme in these observations, which are based on his studies of legal change in United States criminal courts, is that of fragmentation. Besides being bureaucratic organizations committed to achieving clearly defined goals, criminal courts are also arenas where competing interests collide. This is in fact one of the most important characteristics of the criminal courts, visible in the fragmentation of their organization, their operations, and their goals.<sup>15</sup>

Different factors contribute to such fragmentation. Theoretical tenets that lie at the basis of the United States criminal justice system play an especially important role. The United States “combat based” adversary system, for example, is based on the theory that the truth is most likely to come out through an oral combat between two parties who, driven by self-interest, point out the strengths of their own arguments and the weaknesses of

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<sup>12</sup> *Id.* at 26.

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> *Id.* at 9.

the other party's. Here, the underlying assumption is that the best criminal justice outcomes are those that result from different parties pursuing partisan interests.<sup>16</sup>

Another factor identified by Feeley is that of due process. Due process is fundamentally about the fear of authority and the concern that state power might be abused. These concerns, then, have been the driving force behind the separation of functions, circumscription of power, and fragmentation of authority in the United States criminal justice system.<sup>17</sup> Discretionary authority, as exercised by prosecutors when deciding whether and what to charge, and by judges in sentencing, allows these actors a certain freedom to make decisions that are not necessarily predictable. Such authority is furthermore part and parcel of the professionalism of these actors—a professionalism that also fosters “independence of judgment and autonomy.”<sup>18</sup>

The picture of United States criminal justice that Feeley paints is one of a battleground of conflicting and competing interests and demands. In other words, it is an arena where different players, such as lawyers, prosecutors, judges, and police officers, each pursue their own strategies in line with their respective goals and different audiences in mind.<sup>19</sup> As a result of this constellation of actors, who each play their own games in pursuit of their own goals, there is no clear shared agreement on how courts should function and what reforms should accordingly be implemented. As there is no agreement on the ailment, there also is no agreement on the cure.

Besides such fragmentation leading to differences in ideas about acceptable practice and corresponding courses for reform, such reform may be further complicated—or set up to fail—as a result of reformers' inability to acknowledge and adequately conceptualize the criminal process. In this regard, Feeley refers in the preface of the 2013 edition of his book to reformers' *idealized visions* of the adversary process on which reforms are superimposed. As reforms are devised in reference to an image of legal practices that has little to do with reality, something which is related to the fact that reforms are often initiated by outsiders, they also have little chance of succeeding.

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<sup>16</sup> *Id.* at 12–13.

<sup>17</sup> *Id.* at 14.

<sup>18</sup> *Id.* at 15.

<sup>19</sup> *Id.* at 19.

This brief overview of Feeley's stages of legal innovation and findings concerning (failed) legal change is, of course, exactly that: a brief overview that can only do partial justice to Feeley's argument. It does, however, present the tools and points of reference that allow for an analysis of legal changes concerning the role of victims in Japanese criminal justice, to which the following sections will turn.

#### A. *Diagnosis or Conception*

This stage of legal innovation is about identifying problems and considering solutions. The questions here are twofold: How were problems identified with regard to victims' roles in criminal justice? And what solutions were considered in response?

Some questions that need to be addressed are: What does the process of identification entail? And where does it start? The sociology of social problems, which has in the past forty years been dominated by a constructionist perspective, alerts us to the fact that social problems do not exist independently from people's claim-making activities regarding these problems. Identification of social problems is about people defining and labeling a certain state of affairs as problematic. Whether or not a given label sticks depends on who is making the claim and how they go about it. This approach to social problems is thus not about making statements or claims as to whether the problems are, in fact, problems, but rather about studying the processes through which certain states of affairs come to be defined and recognized as problems, bringing into focus the strategies, "successes," and "failures" of claims-makers.<sup>20</sup> This perspective is useful when examining how problems with regard to victims' roles in Japanese criminal justice were identified. How did this come about, considering that victims' roles in Japanese criminal justice had not changed since Japan adopted a Western-style criminal justice system?

The roots of the claim-making activities of the 1990s that eventually led to legal change can be traced to phenomena witnessed some 30 years earlier in different parts of the world. For example, from the 1960s on, governments in different countries around the world started setting up

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<sup>20</sup> See, e.g., Malcolm Spector & John I. Kitsuse, *Social Problems: A Re-formulation*, 21 *SOC. PROBS.* 145 (1973); *RECONSIDERING SOCIAL CONSTRUCTIONISM: DEBATES IN SOCIAL PROBLEMS THEORY* (James A. Holstein & Gale Miller eds., Transaction Publishers 2006) (1993); *A SOCIOLOGY OF JAPANESE YOUTH: FROM RETURNEES TO NEETS* (Roger Goodman et al. eds., 2012).

schemes aimed at providing accident and crime victims—and their dependents—some form of financial compensation. Pursuant to these developments in Japan, the issues of victims’ rights and interests started receiving more media attention, though to a modest degree.<sup>21</sup> Highly publicized crimes helped to further raise public awareness of victims’ rights and interests, as well as the relative lack of laws and measures in place to help secure those rights and interests.<sup>22</sup> Individual crime victims’ statements and claims also played an important role in this regard. At a 1991 symposium commemorating the implementation of the Crime Victim Benefit System, a mother whose son had been killed in a drunk driving incident delivered a statement that conveyed the lack of support mechanisms for victims:

I desperately looked for any place in Japan where they could provide me with mental support, but there wasn’t anything. . . . In today’s Japan, you can’t cry out loud even if you want to. It seems to me that victims’ role in today’s Japan is one of having to silently endure by yourself.<sup>23</sup>

This statement, made by a crime victim who had been forced to look for help outside Japan, provided an impetus for both private and public measures aimed at supporting crime victims. Attention for claims regarding victims’ plight exploded following a range of highly publicized crimes, some of which involved minors as perpetrators and victims.<sup>24</sup> Especially influential in this regard was the Kobe murder case that took place in 1997. This case involved a fourteen-year-old boy who had killed two children aged ten and eleven, one

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<sup>21</sup> See Ogawa Tarō, *Hanzai ni yoru higaisha no kyūsai seido: eibei hōkei wo chūshin ni* [Systems to Provide Aid for Victims of Crime: Focusing on the U.K. and U.S. Legal Systems], 575 JURISUTO 42 (1974); Ōtani Michitaka, *Shakaiteki na kyūsai no taisho to shite no “hanzai higaisha”: 60-70-nendai no Nihon no higaishagaku to hoshōron no kōsatsu kara* [Crime Victim as Object of Social Relief: Victimology and Crime Victim Compensation Theory in Japan in the 1960s and 1970s], 4 CORE ETHICS 25 (2008).

<sup>22</sup> These include incidents such as the 1974 attack by members of a left-wing terrorist organization on a Mitsubishi Heavy Industries office that killed eight people and left another 376 wounded, and the 1994 and 1995 sarin gas attacks by members of a doomsday cult carried out successively in Matsumoto and Tokyo that left a total of 20 people dead and more than 5000 injured. See SAEKI MASAHIKO, *supra* note 3, at 3; Shigenori Matsui, *supra* note 2, at 61.

<sup>23</sup> *Higaisha shien no rekishi to kore kara* [The History and Future of Victim Support], ZENKOKU HIGAISHA SHIEN NETTOWĀKU [NAT’L NETWORK FOR VICTIM SUPPORT], <http://www.nnvs.org/higai/history/> (last visited Oct. 7, 2017) (“[N]ihon ni wa nani ka watakushi o seishinteki ni tasukete kureru tokoro ga nai no ka to hisshi ni natte sagashimashita keredomo nani mo arimasen deshita. . . . Ima no Nihon wa ōki na koe de nakitakute mo nakenai n desu. Tada jitto jibun de gamanshinakereba naranai no ga ima no Nihon ni okeru higaisha no sugata da to omoimasu.”). In addition to a shortened version of Emiko Ōkubo’s statement, this website provides a timeline of the different measures and laws set up in support of victims of crime. *Id.*

<sup>24</sup> See Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC’Y 47 (2008).

of whom he beheaded. The fourteen-year-old boy also assaulted two other victims. This case spurred a great deal of public and political debate on Japan's juvenile laws.<sup>25</sup> Victims and their families publicly discovered that in those cases where the suspect was tried in the family court—as is normally the case when the suspect is younger than twenty years old—proceedings took place behind closed doors. While the court is set up that way for the sake of improving a juvenile delinquent's prospects of rehabilitation by avoiding the stigma of a public conviction, the private character of these proceedings also precluded any involvement by crime victims or their families in these proceedings. Even in the public proceedings of regular (adult) courts, however, victims did not fare much better and were not necessarily notified of court hearings of their case, nor did they necessarily have access to those hearings.<sup>26</sup>

These issues were to be put firmly on the public agenda following the founding of the National Association of Crime Victims and Surviving Families (“NAVS”) in 2000. Headed by Isao Okamura, a prominent and well-connected lawyer, the NAVS was very successful in infusing its claims into media and political discussions.<sup>27</sup> In its statements, the NAVS has consistently highlighted how, within the Japanese criminal justice system, criminals are treated better than crime victims, comparing the money spent on treatment, food, and clothing for convicts to the money spent on support services for crime victims. In connection with this claim, the NAVS has also consistently pointed out the comparatively small role allotted to victims of crime in criminal proceedings in Japan when compared with, for instance, France or Germany.<sup>28</sup>

While the NAVS has not stopped drawing attention to a twenty-year lag between Japan and these countries, in 2003 and 2004 at least some of the claims made by the NAVS and organizations in the National Network for

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<sup>25</sup> *Id.* at 48–49. Other cases that again stirred up the public controversy surrounding the juvenile legal system include the hijacking of a bus in 2000 by a seventeen-year-old boy who killed one passenger and wounded two others, as well as a case that took place in Sasebo in 2004, in which an eleven-year-old girl murdered her twelve-year-old classmate. *See id.* at 54, 58; *see also* Jae Joon Chung, *The Politics of Criminal and Juvenile Justice Policies in Japan*, 66 *CRIME L. & SOC. CHANGE* 359, 369–70 (2016); Shunsuke Kyo, *Issue Salience and ‘Penal Populism’: Juvenile Lawmaking Process in Japan* 5, 9 (W. Political Sci. Ass’n, Working Paper for Panel 01.18, 2015).

<sup>26</sup> Seats in court used to be reserved only for members of the press. Remaining seats were available on a first-come, first-served basis, or in cases with much public attention, on the basis of courtroom seat lotteries. Interview with Spokesperson, Kōbe Dist. Court, in Kōbe, Japan (Mar. 15, 2013).

<sup>27</sup> Setsuo Miyazawa, *supra* note 24, at 64.

<sup>28</sup> *See* Okamura Isao, *Hanzai higaisha ni shinyōsarenai keiji shihō* [*Criminal Justice Not Trusted by Crime Victims*], 19 *GENDAI KEIJIHŌ* 55 (2000), <http://www.navs.jp/report/1/opinion3/opinion3-1.html#1>.

Victim Support<sup>29</sup> were officially acknowledged in the government's *Basic Act on Crime Victims* (2004, enacted in 2005),<sup>30</sup> as well as a *Basic Plan* (2005).<sup>31</sup> These documents outlined a roadmap for reform, affirming that "the recognized rights of victims are meagre," and that criminal justice "exists for the sake of crime victims too," while noting that "a criminal justice that is not trusted by victims of crime . . . will also not be trusted by the people as a whole."<sup>32</sup>

The claims made by representatives of the NAVS stuck, in the sense that they translated into concrete criminal justice reforms. As the foregoing sections show, the reasons for the claims-makers' success are found in a growing awareness (nationally and internationally) of victims' rights, as well as the specific attributes of the NAVS foreman, who was a former vice president of the Japan Federation of Bar Associations ("JFBA") as well as a former head of one of the three Tokyo bar associations. This societal position contributed to his claims, receiving attention from the media as well as legal policymakers. The apparent importance attached to the issue of the people's trust in criminal justice can arguably be understood in light of the large-scale legal reforms, including a lay judge system introduced in 2009, that were also explicitly aimed at bringing about a criminal justice system with "democratic bases."<sup>33</sup>

The reason for the claims-makers' success also must be understood, however, in the context of greater societal perceptions of a growing crime threat. While highly publicized crimes referred to earlier drew public attention to crime victims' plight, they also helped create the impression that crime in general, and violent crime in particular, was on the rise.<sup>34</sup> The

<sup>29</sup> See NAT'L NETWORK FOR VICTIM SUPPORT, <http://www.nnvs.org> (last visited Oct. 7, 2017).

<sup>30</sup> Hanzai higaisha tō kihonhō [Basic Act on Crime Victims], Law. No. 161 of 2004, *translated in* (Japanese Law Translation [JLT DS]), <http://www.japaneselawtranslation.go.jp>.

<sup>31</sup> MINISTRY OF JUSTICE, HANZAI HIGAISHA TŌ KIHON KEIKAKU [BASIC PLAN ON CRIME VICTIMS] (2005), <http://www.moj.go.jp/content/000005098.pdf> [hereinafter BASIC PLAN].

<sup>32</sup> *Id.* at 10 ("[H]anzai higaisha tō ni mitomerareta kenri wa hinjaku de ari, . . . hanzai higaisha tō ni shin'yōsarenai keiji shihō wa kokumin zentai kara shin'yōsarenai . . . [K]eiji shihō wa hanzai higaisha tō no tame ni mo aru . . .").

<sup>33</sup> *Justice System Reform*, JAPAN FED'N B. ASS'NS, [https://www.nichibenren.or.jp/en/about/judicial\\_system/justice\\_system\\_reform.html](https://www.nichibenren.or.jp/en/about/judicial_system/justice_system_reform.html) (last visited Oct. 7, 2017).

<sup>34</sup> Such perceptions were also fueled by crime statistics that did show rising registered crime rates. These statistics were, however, very much affected by changes to crime-registration practices on the part of the police, which were brought about by scandals surrounding cases where the police were perceived to have failed due to an unwillingness to take reports of crime seriously and officially register those reports. See Hamai Kōichi, *Nihon no chian akka shinwa wa ikani tsukurareta ka: chian akka no jittai to haikai yōin (moraru panikku o koete)* [How 'the Myth of Collapsing Safe Society' Has Been Created in Japan: Beyond the Moral Panic and Victim Industry], 29 JAPANESE J. SOC. CRIMINOLOGY 10 (2004); Koichi Hamai &

relevance of this perceived threat is apparent in the rationale for reforms as outlined in the preamble of the *Basic Act*:

[T]here have occurred various kinds of Crimes unceasingly in recent years, and most Crime Victims, whose rights have not been respected, have been isolated in society without receiving sufficient support. . . . *Now that everybody has a higher probability to become a Crime Victim*, it is required to make policies from the Crime Victims' viewpoints, and to make a step forward to realize a society where their rights and profits are well protected.<sup>35</sup>

Somewhat cynically speaking, once the risk of victimization appeared to threaten every citizen, it was time to act and show solidarity with victims of crime. That solidarity consisted of various measures aimed at supporting victims in their daily lives, including ensuring that victims would “get appropriately involved in criminal justice procedures related to their harm.”<sup>36</sup>

In elaborating on the rationale for such appropriate involvement, the *Basic Plan* notes that victims' involvement is only natural, given the fact that they constitute one of the “parties” (*tōjisha*) to the case. As such, it was natural (*tōzen*) for them to wish to know the truth, to have it made clear who was right, who was wrong, and who was responsible, and to restore their own honor or that of their family.<sup>37</sup> The *Basic Plan* also asserts that a just resolution of their case is indispensable for victims' recovery, as is the feeling of having done their part, and of having fulfilled their responsibility in the process leading up to that solution. The *Basic Plan* finally notes that criminal procedures should be advanced with the awareness that in addition to the aim of maintaining social order, “these have an important purpose in terms of restoring victims' rights as well as their rightful place in society.”<sup>38</sup>

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Thomas Ellis, *Crime and Criminal Justice in Modern Japan: From Re-integrative Shaming to Popular Punitivism*, 34 INT'L J. SOC. L. 157 (2006).

<sup>35</sup> Law No. 161 of 2004, pmbi. (emphasis added), translated in (JLT DS, Mar. 31, 2009 trans.), <http://www.japaneselawtranslation.go.jp/law/detail/?vm=04&re=01&id=138&lvm=02>.

<sup>36</sup> *Id.* art. 2, para. 3 (“[H]anzai higaisha tō ga sono higai ni kakawaru keiji ni kansuru tetsuzuki ni tekisetsu ni kan'yosuru koto ga dekiru yō ni . . .”). Coincidentally, in later iterations of the semi-official translation from JAPANESE L. TRANSLATION DB, <http://www.japaneselawtranslation.go.jp> (last visited Oct. 23, 2017), the word “appropriately” (*tekisetsu ni*) is left untranslated. The same phrasing “to get appropriately involved” (*tekisetsu ni kan'yosuru*) is also used in BASIC PLAN, *supra* note 31, at 11.

<sup>37</sup> BASIC PLAN, *supra* note 31, at 10.

<sup>38</sup> *Id.* (“[S]hakai ni okeru seitō na tachiba o kaifukusuru imi mo mochi, . . . kojīn no kenri rīeki no kaifuku ni jūyō na igi o yūshite iru.”).

The *Basic Plan*, which represents the outlook underlying the *Basic Act*, speaks up on crime victims' behalf and takes note of what victims "naturally" (*tōzen*) desire, what is beneficial to them, and how participating in criminal justice could play a role in this regard. To the extent that one can speak of (obliquely formulated) aims, victim participation on one hand implies in and of itself the correcting of a wrong, while the fulfilling of reform aims depends on the extent to which these succeed in providing victims with what they naturally desire and need.

It is important to note that here, victim participation is part of a range of measures aimed at promoting crime victims' rights and providing support that will help them recover, and that victim participation will support the victims in returning to a peaceful life. It is within this bigger framework of measures aimed at supporting victims and promoting their rights that this instance of legal innovation—the victim participation system—can be understood.

#### B. *Initiation*

Ultimately, the outlook and reform aims presented in this *Basic Plan* translated into legal reforms that allowed victims to be involved in their case by:

- 1) Attending the trial and sitting next to the public prosecutor, and by inspecting and questioning witnesses in preparation for the trial;
- 2) Expressing their opinion to the public prosecutor about the prosecutor's use of discretionary authority, in which case the prosecutor must explain the reason for using or not using this authority as required;
- 3) Questioning witnesses in court regarding the credibility of witness statements that concern mitigating circumstances surrounding the crime. However, questions about the facts of the crime are not permitted;
- 4) Making a statement about the facts of the case and the application of the law, within the limits of the charges filed by

the public prosecutor. However, this statement does not have any evidentiary value and cannot be considered in sentencing;

5) Asking questions in order to prepare for their statement (as described above) on the finding of facts and the application of the law.<sup>39</sup>

These opportunities are generally not available to crime victims in all cases; participation is only an option for a specified range of serious offenses,<sup>40</sup> and the presiding judge must approve victim participation. Accordingly, participation is not guaranteed to victims and is conditional on the assessments of legal professionals.

The aforementioned articles specify only general criteria that the court should take into account when making this assessment, such as what is appropriate (*sōtō*) given matters such as the nature of the crime, the victim's relationship with the defendant, the "situation of the hearing" (*shinri no jōkyō*) and the number of victims and their representatives, "as well as other factors" (*sono ta no jijō*).<sup>41</sup> These provisions thus bring into focus the equivocality with regard to victims' roles built into the system despite the formal establishment of a victim participation system. The possibility of participation is always something that remains subject to the court's veto.

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<sup>39</sup> See KEISOHŌ arts. 316-34–316-38. The five modes of participation introduced here are part of the so-called victim participation system (*higaisha sanko seido*) implemented in 2008. From the year 2000 on, victims or their legal representatives already had the opportunity to present a Victims' Statement of Opinion ("VSO") expressing their sentiments and opinions about the case and the impact it has had on their lives. *Id.* art. 292-2, paras. 1–4. The 2008 victim participation system also facilitates the making of such VSOs, as it is in preparation thereof that victims may ask questions as outlined above. However, the making of a VSO is subject to the permission of a judge, who may also prohibit it or order a victim or their representative to submit a written statement whose content may be explained or read out loud by the judge in court. *Id.* art. 292-2, paras. 5–8.

It should also be noted that under the new system victims are informed about how their case is being handled (e.g., whether the suspect will be prosecuted or not, and why), the results of the trial, the circumstances a convicted defendant will face in prison, and when he or she will be released from prison. However, the public prosecutor may decide not to release some of this information. In case of a trial, the public prosecutor will normally inform victims of the content of his or her opening statement and the charges he or she intends to file. In addition, crime victims can apply for permission to make copies of court records (such permission is usually granted) that they may use when suing the defendant for damages. See *Kōhan dankai de no higaisha shien* [Victim Support During the Trial Stage], MINISTRY JUST., [http://www.moj.go.jp/keiji1/keiji\\_keiji11-4.html](http://www.moj.go.jp/keiji1/keiji_keiji11-4.html) (last visited Oct. 7, 2017).

<sup>40</sup> These are: a) intentional crimes that result in the death of a person, b) bodily injury or death through negligence in the pursuit of social activities or in driving a vehicle, c) indecent assault and rape, d) unlawful capture and confinement, and e) kidnapping and human trafficking. KEISOHŌ art. 316-33, para. 1.

<sup>41</sup> *Id.* arts. 316-33–316-34.

Furthermore, as explained under the third outlook and reform aim presented in the *Basic Plan*, victims are not free to ask any question they would like. Under the new system, they still are not involved in any dispute regarding the facts of the crime—that is, the facts relevant to the indictment the defendant is facing. Therefore, formally speaking, victims are still not directly involved in establishing the defendant’s guilt or innocence. As their questions may concern only statements with regard to the mitigating circumstances surrounding the crime (or lack thereof), victims’ involvement is rather predicated on defendants’ guilt. It is predicated on defendants and witnesses aiming to qualify that guilt in court, showing that there are circumstances in the defendant’s favor that should be taken into account. In this sense, the role as envisioned for victims also appears to be predicated on the pattern that criminal cases normally follow, as in most cases defendants do not or only partially contest their guilt,<sup>42</sup> and as a practical matter most court cases are about establishing *how* guilty the defendant is, rather than establishing *whether* he or she is guilty. The system of victim participation in this sense formally enhances this pre-existing characteristic of Japanese criminal trials.

### C. *Implementation*

As the previous section showed, whether and to what extent victims can actually participate in criminal trials depends on the approval of the court, and participation is only available for a selected range of serious offenses. The questions then are: How has this been working in practice? How have victims been making use of the new system? To what extent were ambitions to participate thwarted by judges’ assessment concerning appropriate participation?

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<sup>42</sup> For example, according to the Supreme Court of Japan’s statistics, in 2015 defendants pleaded guilty in 89.5% of all cases. *Shihō tōkei nenpō 2 keiji hen* [Annual Report of Judicial Statistics Vol. 2 Criminal Cases], 2015 SAIKŌ SAIBANSHO JIMU SŌKYOKU [GEN. SECRETARIAT SUP. CT.] 28, <http://www.courts.go.jp/app/files/toukei/632/008632.pdf> [hereinafter *2015 Judicial Statistics*].

Table 1: Victim Participation in District Courts, 2009–2015<sup>43</sup>

Year	Number of victims that applied for participation	Number of victims given permission to participate	Number of victims questioning witnesses	Number of victims questioning the defendant	Number of victims making a statement or demanding a sentence pursuant to CCP 316-38
2009	570	559	130	344	287
2010	846	837	217	483	427
2011	884	872	172	446	446
2012	1019	997	193	473	479
2013	1300	1291	257	593	603
2014	1236	1224	261	586	594
2015	1389	1376	268	603	685

As shown in Table 1, the number of victim participants has risen ever since the system was implemented in 2009. The statistics also show that, between 2009 and 2015, around ten to twenty applications (approximately one to two percent) for participation were denied each year, and accordingly, the vast majority of those wishing to participate were given permission to do so.<sup>44</sup> It should also be noted, however, that participation occurs in only a small percentage of the cases for which participation is available.<sup>45</sup> An important question, but unfortunately one that has not been addressed, is why victims do *not* participate in criminal proceedings.

<sup>43</sup> This table was compiled from data published in the *Annual Report of Judicial Statistics Vol. 2 Criminal Cases* for 2009–2016, which is available online in a searchable format at *Shihō tōkei* [Judicial Statistics], SAIBANSHO, [http://www.courts.go.jp/app/sihotokei\\_jp/search/](http://www.courts.go.jp/app/sihotokei_jp/search/) (last visited Oct. 7, 2017).

<sup>44</sup> Statistics show that the number of victims making a VSO has continued to rise since victims have had the opportunity to participate in this way. In 2015, the number of victims making a VSO was 1376, compared to 559 in 2006. See *supra* Table 1.

<sup>45</sup> The available statistics count the number of victim participants, not the number of cases in which they participate. Several victims may participate in a single case when, for example, different family members of a deceased victim participate. The number of victim participants thus represents a smaller number of cases. In addition, in 2015 the total number of victims whose request for participation was granted (1377 granted, 14 denied) represented around 20% of all cases for which participation was formally available (6343 total). *Annual Report of Judicial Statistics, Vol. 2 Criminal Cases*, 2016 GEN. SECRETARIAT SUP. CT. 36, 63; see also *Judicial Statistics, supra* note 43. In 2012, a year for which more differentiated data is available, 115 victims participated in 367 murder cases, 71 in 3902 assault cases resulting in bodily injury, 59 in 1469 sexual assault cases, 39 in 554 rape cases, and 291 in 213 cases of vehicular negligence resulting in death. See *supra* Table 1; Summary Table, Ministry of Justice, Higaisha sankā mōshide no atta jiken no higaisha tō no nin'in (zaimai betsu) bassui (chisai, kansai) (Heisei 24-nen) [Excerpted Number of Persons (by Crime Name) of Cases with Applications for Victim Participation (District and Summary Courts) (2012)] (Oct. 3, 2013), <http://www.moj.go.jp/content/000115194.pdf> (last visited Oct. 27, 2017).

While crime victims' reasons for not participating in criminal proceedings remain unknown, there is data on why those who did participate chose not to make use of some of the options available to them. The results of the 2012 MOJ survey of 111 crime victims show that, of those who did not ask witnesses or the defendant any questions, most (54.3% and 43.2% respectively) refrained because "it was enough to leave that up to the public prosecutor."<sup>46</sup> Of those who did not present a statement about the facts of the case and the application of the law or a VSO, most (61.1% and 56.0% respectively) also indicated they made their decision for the same reason.<sup>47</sup> These percentages thus suggest that those participating trusted the public prosecutor to ask the necessary questions.

Comments by those who made use of only some of the options available to them point to very practical circumstances that kept them from participating more extensively. One victim remarked, for example, that she had not been able to find childcare for the duration of the trial and therefore had not made use of the option to have seats reserved in the courtroom. Another stated that they had not been able to take time off from work, while another noted that they could not afford the necessary travel and accommodation expenses.<sup>48</sup> In response to the question of why they had delivered a VSO but had not made use of the victim participation system, five out of twenty-four victims noted that they thought participation would be too hard in terms of time and effort, four thought that participation was difficult considering their financial means, while another four indicated that they had not understood the procedures for participation. Providing a more extensive explanation, one victim who delivered a VSO but did not take part in proceedings as a participating victim noted, "[e]ven though I wanted to participate, I didn't want the perpetrator and the perpetrator's family to know my face."<sup>49</sup>

Privacy was a point of concern to more victims, especially those living in the countryside. For them, no measures the court could take, such as the

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<sup>46</sup> Survey Results, Ministry of Justice, *supra* note 9, at 7 ("Kensatsukan ni makaseru koto de jūbun de atta").

<sup>47</sup> *Id.*

<sup>48</sup> *Id.* at 7, 18. The answers provided do not reveal the respondents' sex. It should be noted that as of Dec. 1, 2013, participating crime victims are entitled to reimbursement of their traveling expenses and hotel costs, which they can receive on the day of their participation. See *Higaisha sanko seido ga riyōshiyasuku narimashita: hanzai no higaisha o sapōtosuru tame ni* [The Victim Participation System Has Become Easier to Use: To Support Crime Victims], SEIFU KŌHŌ ONRAIN, <http://www.gov-online.go.jp/useful/article/201312/3.html> (last updated May 15, 2014).

<sup>49</sup> Survey Results, Ministry of Justice, *supra* note 9, at 30 ("Higaisha sanko wa shitakatta mono no, kagaisha ya kagaisha kazoku ni kao o shirareru koto wa iya datta.").

providing the option of testifying via a video link and the placing of screens in court, would seem to guarantee anonymity, given the detailed media coverage of their cases. One such victim stated:

I thought about my daily life after this. I have my job, and taking time off puts a strain on my daily life. As I was allowed to take time off from work immediately after the incident . . . I can't burden my working place any further, and I can't put any more strain on my daily life. Even though I'm a crime victim I don't get any compensation, and in addition to the mental strain, it's also tough in financial terms.<sup>50</sup>

Comments such as these point to the various practical circumstances that may keep crime victims from fully participating in their case.

Statistics show that when it comes to those who *did* participate, 67.6% felt good overall about their participation, while another 20.6% felt, if they had to choose, their experience was good rather than bad (“*dochira ka to iu to yokatta*”), 2.9% did not know, while another 2.9% did not feel good about participation. Additionally, 83.9% felt positive that the system allowed them to reserve seats in court, 37.1% felt positive about their questioning of the defendant, while another 46.8% felt positive about the experience of making a statement about the facts and the application of the law.<sup>51</sup> However, victims and representatives of victim interest organizations have repeatedly indicated that they would like more flexibility to ask the questions they would like to ask, and that they would like to be involved in the pretrial conference that precedes a lay judge trial.<sup>52</sup>

The MOJ does not actively encourage victims to participate, but it does provide information through its websites aimed at making crime victims

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<sup>50</sup> *Id.* (“*Kore kara no seikatsu no koto o kangaeta. Shigoto mo ari, yasumu koto wa seikatsu ni futan ga kakaru. Jiken chokugo kara . . . shigoto o yasumasete moratte ita no de, kore ijō no shokuba, seikatsu ni futan wa kakerarenai. Higaisha na no ni, nani mo hoshō mo naku, seishinteki na futan ni kuwae, kinsenteki ni mo taihen de aru.*”).

<sup>51</sup> *Id.* at 6.

<sup>52</sup> *Id.* at 26; *MOJ Meetings*, *supra* note 8. In these pretrial conferences (*kōhanzen seiri tetsuzuki*) the prosecution and defense determine, in front of a judge, the issues that they will dispute during the trial and which pieces of evidence the parties will and will not introduce in support of their arguments. The procedure serves to determine matters such as the time that will be allotted to the inspection of the evidence and when interrogation of the witnesses will take place. The aim of this procedure is to minimize the burden placed on lay judges, who do not have the time to go through large amounts of written statements, and to ensure a speedy trial. For more on this procedure, see *Kōhanzen seiri tetsuzuki ni tsuite* [*On Pretrial Conference Procedure*], SAIBANSHO, [http://www.courts.go.jp/vcms\\_1f/20903007.pdf](http://www.courts.go.jp/vcms_1f/20903007.pdf) (last visited Oct. 7, 2017).

aware of the different options available to them.<sup>53</sup> Various victim support groups and centers also provide similar information as well as support for participating victims, including information on how to obtain a lawyer who could represent them in court.<sup>54</sup> Besides helping victims make use of their new rights, this support provided also generally concerns victims' physical and mental well-being. This fact again brings into focus that the system of victim participation forms part of a larger whole of measures aimed at promoting victims' rights, as well as their mental and physical well-being.

A consequence of this outlook, then, is that in the process of victims' involvement in criminal proceedings, the well-being and recovery of the victims have become recurring themes as well as a source of rhetorical leverage. Concern for victims' well-being, and legal professionals' assessments of what is good for the victim, winds up shaping victims' roles in court. For example, the judge may deny a young victim the opportunity to ask the defendant questions, fearing "secondary victimization."<sup>55</sup> Conversely, a victim's lawyer may request a judge's permission for the victim to make a statement, arguing that disallowing her to do so would cause her to "suffer a wound from which she would never recover."<sup>56</sup> Such concern for the well-being of the victim also affects the other courtroom players. For example, a

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<sup>53</sup> See *Victim Support During the Trial Stage*, *supra* note 39. This site also provides information on the crime victims' hotlines located in the different district prosecutors' offices, as well as links to other organizations providing support for victims. The Japan Legal Support Center ("JLSC"), established by the government as "the central organization to provide legal assistance to citizens, based on the goal to 'realize a society where legal information and services are accessible anywhere in the country,'" similarly provides information and services for victims and others seeking legal help and information via its website as well as the 109 district and local offices located all over Japan. See *What Is the JLSC?*, JAPAN LEGAL SUPPORT CTR., [http://www.houterasu.or.jp/en/about\\_jlsc/index.html](http://www.houterasu.or.jp/en/about_jlsc/index.html) (last visited Oct. 7, 2017). In addition to providing information on, among other things, how to obtain legal counsel, victims who lack the financial means to do so can also apply for a state-appointed (*kokusen*) lawyer through the JLSC. *Id.*

<sup>54</sup> See, e.g., ZENKOKU HANZAI HIGAISHA NO KAI [NAT'L ASS'N CRIME VICTIMS & SURVIVING FAMILIES], <http://www.navs.jp> (last visited Oct. 7, 2017); NAT'L NETWORK FOR VICTIM SUPPORT, *supra* note 29.

<sup>55</sup> For examples of this, see *MOJ Meetings*, *supra* note 8, mtg. 3, at 28; *id.* mtg. 5 at 5; *id.* mtg. 6 at 2. It should be noted that from the sources referred to here, it is not necessarily clear what "secondary victimization" stands for. In the meeting minutes, depending on the speaker, this term appeared to stand for, among others, victims' disappointment or disillusionment (*shitsubō*), frustration (*furasutorēshon*), or feeling hurt (*kizutsukerareta*). *Id.* This lack of conceptual clarity is symptomatic of the commonsense, anecdote-based character of the discussions regarding what it is that will help victims "recover," from which psychiatric or psychological perspectives were and are still conspicuously absent.

<sup>56</sup> KESUSUTADI HIGAISHA SANKA SEIDO [CASE STUDIES OF THE VICTIM PARTICIPATION SYSTEM] 171 (Hanzai Higaisha Shien Bengoshi Fōramu ed., 2013) [hereinafter VS FŌRAMU] ("[K]okoro ni fukai kizu o isshō seou koto ni naru deshō."). For an account of this case and the contents of the petition the lawyer filed to the court, see *id.* at 165–75.

judge may limit the number of questions asked by lay judges out of concern for the victim.<sup>57</sup>

Victim participation also has an effect on the in-court behavior of the defendant's lawyer, although this effect has arguably more to do with strategic concerns related to securing the best result for the defendant. For example, lawyers have indicated that they have refrained from asking a victim confronting questions out of a concern that they will be perceived as offensive or that it will seem like they are fighting with the victim.<sup>58</sup> In addition, lawyers have noted that defendants find themselves unable to speak up on their own behalf for the same reason, even when asked questions. This is the result of the presence of victims or family members who may, for example, each deliver a statement in which they each recommend the death penalty, even when the offense does not carry the death penalty.<sup>59</sup> This is reported to happen especially when defendants admit to the charges. Here, when trying to make sense of such “withering” (*ishukusuru*)<sup>60</sup> on the part of the defendant, one has to take into account the role that confessing defendants are expected to assume in Japanese courts.

When defendants confess guilt—as most defendants do<sup>61</sup>—the arguments that the defense presents in court are typically aimed at securing a lenient sentence. One important point that is taken into consideration when deciding whether a defendant is eligible for a lenient sentence is whether he or she shows remorse.<sup>62</sup> It is thought that by doing so, the defendant publicly

<sup>57</sup> See *MOJ Meetings*, *supra* note 8, mtg. 7, at 21.

<sup>58</sup> Interviews with Fifteen Lawyers, Japan Fed'n of Bar Ass'ns, in Neth. (Leiden & The Hague) & Japan (Tōkyō, Kōbe & Nagasaki) (Nov. 25, 2011–Jan. 5, 2017) [hereinafter *JFBA Lawyers*]. The term used here by different lawyers—a term that also has been used in this context by judges in their verdicts—was “*gyakunadesuru*,” which literally means, “to rub the wrong way.” *Id.*

<sup>59</sup> *Id.*

<sup>60</sup> *Id.* This is the term used by the lawyers interviewed.

<sup>61</sup> See *2015 Judicial Statistics*, *supra* note 42.

<sup>62</sup> Both public prosecutors and judges take into account whether a suspect or defendant is remorseful. Remorse not only factors into decisions regarding the sentence demanded and imposed, but also decisions regarding the widely practiced suspension of prosecution. In 2015, for example, prosecution was suspended in 50.4% of all penal code offences, excluding traffic offences. See *Hanzai hakusho: saihan no genjō to taisaku no ima* [*White Paper on Crime: The Current State of Recidivism and Its Countermeasures*], 2016 MINISTRY JUST. § 2-2-2, tbl.2-3 (Hōmusho Hōmu Sōgō Kenkyūsho ed., CD-ROM, Dec. 4, 2015), <http://hakusyo1.moj.go.jp/jp/63/nfm/excel/shiryo2-03.xlsx>. With regard to the suspension of prosecution and sentencing, the emphasis placed on remorse is based on the governing interpretations of the provisions of the Code of Criminal Procedure that allow prosecutors and judges to take into account the defendant's situation, KEISOHŌ art. 248, and their attitude, *id.* art. 48, after the crime. See Kawai Masayuki, *Hikokunin no hansei taido tō to ryōkei* [*The Defendant's Remorseful Attitude and Sentencing*], in 3 RYŌKEI JITSUMU TAIKEI [A TREATISE ON SENTENCING LAW AND PRACTICE IN JAPANESE CRIMINAL CASES] 172, 176 (Ōsaka Keiji Jitsumu Kenkyūkai et al. eds., 2011).

affirms their awareness of, and commitment to, the norms of society, thus taking a first step on the road to rehabilitation. Being and acting remorseful is part of the role that confessing defendants are expected to assume—a role that forces the defendant to tread carefully when explaining their actions in light of the risk of seeming insincere.<sup>63</sup> This behavior is also in line with victims' roles, insofar as this condition seems predicated on the pattern that criminal cases normally follow. Victims' presence and participation appear to push the defendant into an even more remorseful role, reinforcing the existing Japanese courtroom role division.

Nevertheless, the practical significance—as opposed to the symbolic or communicative significance—of this reinforcement of the “traditional” division of courtroom labor is not necessarily clear. The absence or presence of remorse is typically already taken into account in the punishment demanded by the public prosecutor who knows that, from the sentence demanded, judges normally subtract twenty to thirty percent.<sup>64</sup> In lay judge trials, which provide the setting for most cases in which victims participate, these “going rates” have become somewhat more fluid. For example, in lay judge trials sentences for sexual assault have gone up, while those for arson of an inhabited building have gone down, and those for murder have varied.<sup>65</sup> Nevertheless, studies on sentencing and victim participation do not show that victim participation has translated into longer sentences.<sup>66</sup> In other words, victims' expanded role in court does not appear to have led to harsher punishment for the defendant.

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<sup>63</sup> See Erik Herber, *Between 'Benevolent Paternalism' and Genbatsuka: Diversity in Japanese Criminal Justice*, in *THE CHANGING ROLE OF LAW IN JAPAN: EMPIRICAL STUDIES IN CULTURE, SOCIETY AND POLICY MAKING* 111 (Dimitri Vanoverbeke et al. eds., 2014); Erik D. Herber, *Japanese Sentencing Practices: Creating an Opportunity for "Formal" Paternalism*, 2 *INT'L J. CRIMINOLOGY & SOC. THEORY* 303 (2009).

<sup>64</sup> Endō Kunihiko, *Ryōkei handan katei no sōronteki kentō* [A General Consideration of the Sentencing Judgment Process], in 1 *A TREATISE ON SENTENCING LAW AND PRACTICE IN JAPANESE CRIMINAL CASES*, *supra* note 62, at 1, 71–72.

<sup>65</sup> See Harada Kunio, *Saiban'in saiban ni okeru ryōkei keikō: miete kita atarashii sugata* [Sentencing Trends in Lay Judge Trials: The New Shapes Coming into View], 27 *KEIŌ HŌGAKU* [KEIŌ L.J.] 161 (2013); HARADA KUNIO, *SAIBAN'IN SAIBAN TO RYŌKEIHŌ* [SAIBAN-IN TRIALS AND SENTENCING LAW] 274–89 (2011); Kojima Tōru, *Saiban'in saiban ni yoru ryōkei no henka: tōkei dēta kara mita saiban'in saiban no ryōkei keikō* [Changes in Sentencing by Lay Judge Trials: Sentencing Trends in Lay Judge Trials from Statistical Data], 49 *CHŪKYŌ HŌGAKU* [CHŪKYŌ L. REV.] 169 (2015).

<sup>66</sup> See Masahiko Saeki, *supra* note 3; Shiraiwa Yūko & Karasawa Kaori, *supra* note 3; cf. SAEKI MASAHIKO, *supra* note 3, 279–81 (referring to studies on non-Japanese contexts of victim participation that have produced similar results).

#### D. *Routinization*

On the basis of a system that is fully integrated in the criminal justice infrastructure, victims' participation in criminal trials has become an established part of Japanese criminal justice. Accordingly, a discontinuation of the system seems highly unlikely. Beyond the mere continuation of the system, *routinization* also concerns the extent to which the expanded role of the victim has been integrated into the routines of the other courtroom players and the extent to which these players are committed to such integration. Again, however, it is important to keep in mind that, as established as the system may be, use of this system is hardly standard when taking into account the relatively small numbers of victims who participate in criminal proceedings each year. Nevertheless, it is fruitful to look at how the professional courtroom players deal with victims' expanded roles when victims do choose to participate. Given that one could arguably devote an entire article to how each player goes about integrating victims' roles in their working routine, the findings presented here can only provide a general impression in this regard.

##### 1. Judges

With regard to victim participation, a judge's task is especially focused on determining when and in what form victim participation is appropriate. As discussed earlier, the judge may, for example, decide whether it is appropriate for the victim to read his or her statement herself, or whether the making of such a statement is appropriate at all given the nature of the case, among other things. In 2008, the Supreme Court Criminal Affairs Bureau issued some practical guidelines that judges can refer to when applying the CCP articles relevant for victim participation that specify in particular some practical aspects of doing so.<sup>67</sup> When it comes to how judges go about putting the new system into practice, the available statistics show—as we have seen—that the vast majority of those victims who wish to participate are given permission to do so. Besides these statistics, there is only anecdotal evidence on how judges make use of their authority to determine the shape of victims' participation in their case, which is essentially part of their authority to guide criminal legal

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<sup>67</sup> Memorandum, Saikōsai Keijikyoku [Supreme Court Criminal Affairs Bureau], Higaisha sankaseido no kisoku yōkōan ni tsuite [On the Proposed Outline of the Rules for the Victim Participation System] (Mar. 21, 2008), [http://www.courts.go.jp/saikosai/vcms\\_lf/80101010.pdf](http://www.courts.go.jp/saikosai/vcms_lf/80101010.pdf). These guidelines thus specify, for example, how the court should communicate with the different parties concerned on issues regarding victim participation (e.g. in writing or orally). *Id.*

proceedings—their *soshō shikiken*.<sup>68</sup> The picture that emerges from the available data is in any case one of judges who are generally accommodating towards participating victims.

## 2. Lawyers

For defense lawyers, the question is not so much how to integrate victims' expanded roles in their work routine, but rather how to adapt their defense strategy. As indicated above, most lawyers' clients confess guilt, and the defense's role may often be reduced to demonstrating grounds for lenience. Lawyers' remarks indicate that, in their view, the risk of being perceived as “rubbing victims the wrong way” and alienating the jury makes it harder for them to assertively argue guilt-diminishing circumstances, or to point to the role that the victim may have played in the events leading up to the defendant's crime.<sup>69</sup> It is also important to note that Japanese criminal defense lawyers are not generally known for their zealous, assertive defense practices, something which has been explained by the fact that defense practice in Japan attracts young, inexperienced lawyers on the one hand and elderly lawyers no longer looking to make a career on the other.<sup>70</sup>

The JFBA has, however, opposed the victim participation system from the very beginning, arguing among other things that 1) the system would interfere with the fact-finding procedures; 2) victims' new role could not be reconciled with the existing structure of Japanese criminal procedure where two parties, the prosecution and the defense, oppose each other; 3) participation would make a defendant's defense more difficult and lengthy, as victims might argue different theories than the prosecutor, and the defense

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<sup>68</sup> There are reports of judges who allowed hearings to last longer than usual as a result of the leeway given to victims asking questions and making statements, cf. Suwa Masaaki, *Keiji saiban ni okeru higaisha sankā seido no mondaiten: jitsumu jō shin no higaisha kyūsai ni narieru mono ka* [Problems with the Victim Participation System in Criminal Trials: In Practice, Can It Become the True Salvation for Victims?], 15 SHINSHŪ DAIGAKU HOGAKU RONSHŪ [SHINSHŪ U. L. REV.] 55, 65 (2010) (observing a trial with more than two hours of victim questioning and statements); judges who did not provide victims with the opportunity to ask their questions, as the defendant had already indicated he would invoke his right to remain silent, see VS FŌRAMU, *supra* note 56, at 233; judges who were swayed by lawyers' arguments concerning how participation would be conducive to the victims' recovery, see *supra* note 56 and accompanying text; and judges who did not give the victim permission to read her statement in court unless she would inform the court of its content beforehand, see *MOJ Meetings*, *supra* note 8, mtg. 9, at 20. See generally VS FŌRAMU, *supra* note 56, for more such anecdotes.

<sup>69</sup> JFBA Lawyers, *supra* note 58.

<sup>70</sup> This has been explained by the relative lack of career prospects and lower salaries for defense lawyers, as well as the fact that neither young age nor comparative mental agility necessarily affects criminal defense lawyers' measure of success, given what little they can do for their clients. See DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 72–73 (2002).

would be forced to respond to both arguments; and 4) the new system would place a burden on crime victims, bringing about the risk of secondary victimization.<sup>71</sup> In 2012, the JFBA released another statement arguing that those who participated in criminal trials as participating victims should not also be allowed to present a VSO because participation already provided enough opportunity for victims to present their opinion. The JFBA further argued that victims should only participate in sentencing proceedings, given the risk that their participation would have an impact on assessments of the guilt or innocence of the defendant.<sup>72</sup> This Article will return to these arguments below.

While the JFBA thus remains critical of the system in its current form, it also provides support for crime victims seeking legal representation in their cases. While there are defense lawyers navigating the difficulties that victim participation presents for their clients, other lawyers represent and support participating victims. Accordingly, the JFBA, as well as local bar associations, have set up victim support centers which provide information on law firms for crime victims.<sup>73</sup> Although crime victims' expanded role in

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<sup>71</sup> Opinion Paper, Japan Fed'n of Bar Ass'ns, *Hanzai higaisha tō ga keiji saiban ni chokusetsu kanyosuru koto no dekiru higaisha sanko seido ni taisuru ikensho* [Opinions on System for Direct Participation of Crime Victims in Criminal Trials] (May 1, 2007), <http://www.nichibenren.or.jp/library/ja/opinion/report/data/070501.pdf>.

<sup>72</sup> Opinion Paper, Japan Fed'n of Bar Ass'ns, *Genkō no higaisha sanko seido no minaoshi ni kansuru ikensho* [Opinion Requesting a Review of the Current System for Allowing Participation of Victims of Crimes in Criminal Trials] (Nov. 15, 2012), [https://www.nichibenren.or.jp/library/ja/opinion/report/data/2012/opinion\\_121115\\_5.pdf](https://www.nichibenren.or.jp/library/ja/opinion/report/data/2012/opinion_121115_5.pdf).

<sup>73</sup> See, e.g., *Hanzai higaisha ni taisuru shien (Hanzai Higaisha Shien Iinkai)* [Support for Crime Victims (Crime Victim Support Committee)], NIHON BENGOSHI RENGŌKAI [JAPAN FED'N B. ASS'NS], <https://www.nichibenren.or.jp/activity/human/victim.html> (last visited Oct. 7, 2017); *Hanzai higaisha shien sentā* [Crime Victim Support Center], TŌKYŌ BENGOSHIKAI [TŌKYŌ B. ASS'N], <https://www.toben.or.jp/bengoshi/center/madoguchi/higaisya.html> (last visited Oct. 7, 2017). In 2015, lawyers specializing in services for crime victims united in the Victim Support Forum ("VS Fōramu"), a lawyers' organization founded to answer the call, "from victims all over the country, for lawyers who are of use to crime victims, who can be trusted and who are highly skilled in the providing of support services." Opinion Paper, Sugimoto Yoshifumi & Yamada Hiroshi, VS Fōramu, Zenkoku no bengoshikai, *bengoshi ni uttaeru* [An Appeal to Bar Associations and Lawyers Across the Country] (Oct. 19, 2015), [http://www.navs.jp/2015\\_10\\_19.pdf](http://www.navs.jp/2015_10_19.pdf) ("[Z]enkoku de hibi hasseisuru hanzai higaisha no katagata kara, hontō ni jibuntachi no tame ni yakudatte kureru bengoshi, shinrai dekiru bengoshi, shien bengoshi no takai sukuru o motta bengoshi o motomeru koe o ukete"). Besides offering such services, this group also presents itself as an organization aimed at furthering victims' rights. As such, it organizes symposia and publishes statements on victims' rights issues. In doing so, it presents views alternative to those of the JFBA, not only on victim participation but also on the death penalty, for example, which the JFBA opposes while the VS Fōramu supports its retention. See *id.*; "Hōritsu jō, tōzen da" shikei shikkō de bengoshi grūpu ga hatsu no seimei: shikei ni hiteiteki na Nichibenren kaichō seimei wa "bengoshi sōi de wa nai" ["In Legal Terms, It Makes Sense" Lawyer Group Speaks First After Execution: JFBA Head's Anti-Death Penalty Statement "Is Not a Consensus of Lawyers"], SANKEI NYŪSU (Nov. 11, 2016, 1:17 PM), <http://www.sankei.com/affairs/news/161111/afr1611110025-n1.html>.

criminal proceedings may make criminal defense lawyers' work more difficult, it also presents lawyers with enhanced opportunities for a different role in criminal justice.<sup>74</sup> In this sense, lawyers' position vis-à-vis the new system is polyvalent.<sup>75</sup>

### 3. Prosecutors

Different district prosecutors' offices and prosecutors assist participating victims in different ways, some of which have become more or less standard practice. For example, a prosecutor may inform victims about how he or she will handle the case, whether prosecution will be suspended, or what charges will be brought. A prosecutor may also inform victims of the trial date and reserve seats for victims wishing to attend. Of course, while prosecutors may be mindful of victims' rights and interests, as representatives of the public interest (*kōeki no daihyōsha*), they should, in principle, also keep in mind the interests of the defendant, as well as others involved.<sup>76</sup> When it comes to how prosecutors integrate such mindfulness of victims' rights in their working routines, the available evidence is limited. However, the seventeen case studies presented by lawyers of the Victim Support Forum, in addition to lawyers' and prosecutors' accounts of their experiences in the twelve MOJ meetings, provide useful impressions.<sup>77</sup>

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<sup>74</sup> In addition to representation in court, lawyers can also provide a range of services for crime victims, such as negotiating a settlement with the defendant. In the process of sentencing, such a settlement is typically interpreted as a factor in the defendant's favor. JFBA Lawyers, *supra* note 58. Legal representation under the victim participation system may serve an ulterior purpose, as the district court handling the case may also, upon request, address the merits of the case in civil law terms and issue a compensation order for criminal damages. For more information on this system, see *Songai baishō meirei seido* [*The Compensation Order System*], HŌTERASU, [http://www.houterasu.or.jp/higaishashien/trouble\\_ichiran/20081127\\_6.html](http://www.houterasu.or.jp/higaishashien/trouble_ichiran/20081127_6.html) (last visited Oct. 7, 2017).

<sup>75</sup> Nevertheless, the fact that the number of victims making use of the victim participation system remains relatively small also means that even for those specialized in criminal law, the opportunities to represent victims in court are few. As a result, for many lawyers the new system is unlikely to become an integrated part of their work, and more likely to remain unfamiliar territory. Lawyers may also remain insufficiently knowledgeable about the new system, as noted by some victims. See Survey Results, Ministry of Justice, *supra* note 9, at 21; Opinion Letter from Ozawa Juri, Zenkoku Hanzai Higaisha no Kai [Nat'l Ass'n of Crime Victims and Surviving Families], to Hōmusho Keijikyoku [Ministry of Justice Criminal Affairs Bureau], Higaisha sanko seido no 3-nengo minaoshi ni kansuru ikensho [Statement of Opinion on the 3-Year Review of the Victim Participation System] 6 (July 6, 2012), <http://www.moj.go.jp/content/000102446.pdf>.

<sup>76</sup> For an analysis of both the historical development and present day understandings of the responsibilities that come with this position, see Ota Sōji, *Kensatsukan ni okeru kōeki daihyōsha gainen no kenkyū* [*A Study on the Concept of Public Prosecutors as Representatives of the Public Interest*], 9 RYŪKOKU DAIGAKUIN HŌGAKU KENKYŪ [BULL. GRADUATE SCH. L. RYŪKOKU U.] 1 (2007).

<sup>77</sup> See generally VS FŌRAMU, *supra* note 56, at 104–248; *MOJ Meetings*, *supra* note 8.

What stands out in the different accounts is that public prosecutors meet victims and their lawyers numerous times throughout criminal proceedings. During such meetings, prosecutors provide explanations of matters such as the course of the investigation and the charges that will or will not be filed. Meetings are also held to prepare for victims' in-court participation to determine, for example, what questions the victim would like the prosecutor to ask the defendant, as well as which questions are best asked by the prosecutor and which by the victim. Prosecutors can also give the victim access to evidence and investigation records, including evidence the prosecutor will not submit in court.<sup>78</sup> Prosecutors are generally forthcoming in this regard. Nevertheless, practices vary among individual prosecutors and the different District Prosecutors' Offices, and there are also reports of prosecutors who are "extremely passive" (*kiwamete shōkyokuteki*) toward participating victims.<sup>79</sup>

Despite an overall official commitment to respecting victims' rights and wishes, the ways in which this commitment is translated into prosecutors' daily work may thus still depend on the prosecutor and the case at hand.

### III. CONCLUSION

Given the goals of the victim participation system and what the previous sections have shown about its functions, how should this system be evaluated? This question has been addressed, to a certain extent, in the twelve MOJ meetings referred to in the preceding sections. These meetings, held three years after the implementation of the new system (between January of 2012 and July of 2013), were organized to discuss whether a revision of the CCP regulations covering victim participation was necessary. The results of these meetings, as summarized by the MOJ, were as follows:

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<sup>78</sup> See VS FÖRAMU, *supra* note 56, at 209.

<sup>79</sup> See *MOJ Meetings*, *supra* note 8, mtg. 1, at 13; *id.* mtg. 2 at 19. One victim's lawyer noted in this regard: "I tried to persuade the prosecutor in all sorts of way . . . explaining that (access to the records) was necessary to prepare for the questioning of the defendant and our statement, but nothing was shown to us. And so I had no other option than to ask, through the victim support center, the police officers that had been involved the investigation about the facts and particulars. But, after that, another prosecutor took over and the records were immediately made available." VS FÖRAMU, *supra* note 56, at 147–48 ("*Hikokunin shitsumon ya higaisha ronkoku o okonau tame ni hitsuyō de aru to ka, . . . samazama na hōhō ni yori settoku shita ga, mattaku kaiji sarenakatta. Sono tame, higaishashi'en sentaa o tsūjite, sōsa ni atatta keisatsukan kara jujitsu keii o kiku nado shite, jiken o shiru hoka wa nakatta. Shikashi, sono go kensatsukan ga kōtai shita tokoro, suguni kiroku ga kaijisareta.*").

As far as the Ministry of Justice is concerned, the conclusions reached with regard to the . . . victim participation system were that in general it is running appropriately and smoothly, and while it is in the process of becoming established as a system, on the basis of the opinions and comments presented in the abovementioned [MOJ] meetings, the aim should be to further improve the operationalization of the victim participation system within the prosecutors' offices.<sup>80</sup>

Elaborating on this conclusion, the MOJ noted that within the prosecutors' offices, more efforts should be made to provide victims with appropriate information and advice regarding their participation, to communicate more effectively, and to be attentive towards victims' wishes regarding arguments and evidence presented in court.<sup>81</sup> Aside from these suggestions for improvement, the meetings did not result in any recommendation to revise or change the existing rules and regulations, or to change the existing system in any other way.

They did, however, translate into a range of guidelines, released by the Supreme Public Prosecutors Office in 2014, stating that prosecutors are required to follow in their dealings with crime victims. While affirming the general importance of prosecutors' attentiveness to victims' needs, many of these guidelines relate to providing information. Prosecutors should give victims the information that they may need to decide whether to participate, information about the outcome of the criminal investigation, as well as the arguments the prosecutor is planning to present in court, among other things.<sup>82</sup> These guidelines can be seen as another confirmation of the Supreme Public Prosecutors' Office's official commitment to protecting victims' rights and interests.<sup>83</sup>

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<sup>80</sup> Press Release, Ministry of Justice, Heisei 19-nen kaisei keiji soshōhō tō ni kansuru kentō no kekka ni tsuite [The Results of Review for the 2007 Revised Code of Criminal Procedure], <http://www.moj.go.jp/content/001129235.pdf> (last visited Oct. 7, 2017) (“*Kono yō na kentō no kekka, hōmusho to shite wa, . . . higaisha sankā seido tō ni tsuite wa, ōmune tekisetsu katsu junchō ni un'yōsare, seido to shite teichakushi tsutsu aru mono no, jōki iken kōkankai ni okeru goiken, goshiteki o fūmae, kensatsu ni okeru higaisha sankā seido tō no un'yō no yori issō no jūjitsu o hakatte iku beki de aru to no ketsuron ni tasshimashita.*”).

<sup>81</sup> *Id.*

<sup>82</sup> Directive Letter from Inagawa Tatsuya, Sōmu Buchō [Dir. of Gen. Affairs], & Miura Mamoru, Kōhan Buchō [Dir. of Pub. Trials], Saikō Kensatsuchō [Supreme Pub. Prosecutors Office], to All Deputy Public Prosecutors, “Hanzai higaisha tō no kenri rieki no sonchō ni tsuite (imei tsūtatsu)” no hasshutsu ni tsuite [On the Issuance of “Respecting the Rights and Interests of Crime Victims (Official Notice)”] (Oct. 21, 2014), [http://blog.livedoor.jp/i\\_nokai0708/SPOnotification437-20141021.pdf](http://blog.livedoor.jp/i_nokai0708/SPOnotification437-20141021.pdf).

<sup>83</sup> Consider also the wide range of measures taken by the different prosecutors' offices in order to support and assist victims of crime. See *Victim Support During the Trial Stage*, *supra* note 39.

The MOJ's conclusion and the guidelines devised in response are arguably in line with the findings presented earlier, which brought into focus prosecutors' general responsiveness to participating victims, as well as the "extremely passive" stance nevertheless taken by some prosecutors. The MOJ observed that the system is becoming more established, which is also in line with findings presented earlier. This makes a discontinuation of the system seem unlikely. Nevertheless, one question that remains is whether the fact that the system is "running smoothly" also means that the system does what it is supposed to do. In order to answer that question, it is fruitful to return to the rationale underlying the introduction of the system. As noted earlier, victim participation has been presented in terms of correcting a wrong, the assumption being that victims should naturally be appropriately involved in the criminal proceedings of a case in which they were one of the parties concerned.<sup>84</sup> Another focus of victim participation was to give crime victims what they want and need.

Given this rationale, it could be argued that the legal reforms allowing for victim participation alone constitute a correction of the wrong identified: the wrong of not involving crime victims in "their own court case."<sup>85</sup> However, the reference in both the *Basic Plan* and the *Basic Act*<sup>86</sup> to victims' appropriate involvement points to the fact that victim participation is not simply a matter of victims' involvement or non-involvement. Involvement may come in many forms and degrees. The policy documents' references to "appropriate" involvement constitute a recognition of that idea, and the fact that forms and degrees of victim participation are contingent on normative perspectives regarding these issues. Whether victim participation under the current system can be called appropriate or not depends on one's perspective on victim participation as a matter of normative legal principle. As such, a discussion on principles and a corresponding evaluation of legal reform is unlikely to produce a final answer, and victims' appropriate involvement is likely to remain a source of different parties' claim-making activities.<sup>87</sup>

Giving victims "what they naturally desire and need,"<sup>88</sup> however, is a different matter. After all, what victims want and need is something that could be empirically researched. As noted earlier, existing research has looked into

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<sup>84</sup> See BASIC PLAN *supra* note 31.

<sup>85</sup> Nils Christie, *Conflicts as Property*, 17 BRIT. J. CRIMINOLOGY 1, 9 (1977).

<sup>86</sup> See *supra* note 37 and accompanying text.

<sup>87</sup> See sources cited *supra* note 20.

<sup>88</sup> See BASIC PLAN *supra* note 31, at 10.

how participating in criminal proceedings has affected victims' trust in the criminal justice system and how victims have more generally experienced their participation.<sup>89</sup> And as indicated earlier, this research suggests that the majority of those who participate in criminal proceedings feel positive about their participation. Whether such results should be taken to mean that the victim participation system succeeds in giving victims what they want and need, however, is unclear. At the most, the system may succeed in giving some of *those who have chosen to participate* some of the things they want and need. It is important to remember that victims who do participate constitute a small minority, as victims participate in only a small percentage of the cases for which participation is available (20% in 2015).<sup>90</sup> Thus, there is still much to do when it comes to establishing what victims more generally want and need—assuming for the moment that general wants and needs in fact exist.

Be that as it may, the MOJ meetings show that participating victims' experiences, as expressed through the 2008 MOJ survey and as relayed by victims' lawyers and other representatives, became an important point of reference when evaluating the way the system had been operating up until then.<sup>91</sup> There, a small group wound up making claims on behalf of "crime victims," even though it is unclear to what extent this group's claims represent crime victims' general consensus—assuming that such a consensus could exist. Given this lack of clarity, the success or failure of this system is—in terms of the system's goal of giving victims what they desire and need—impossible to assess.

When it comes to criminal justice, it is, of course, not uncommon for the success or failure of reforms to be impossible to assess. This is hardly unique to Japanese criminal justice reforms. After all, the goals of such reform aims often involve questions that do not allow for clear-cut answers. When, for example, minimum sentences are increased, as was done in Japan in 2004, to what extent will that allow for a more effective tackling of sentencing goals?<sup>92</sup> When crime rates decline, as they did in Japan after 2004,

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<sup>89</sup> See sources cited *supra* notes 3–4.

<sup>90</sup> See sources cited *supra* note 45. The question to investigate is why victims do not participate in greater numbers. As we have seen, practical circumstances, such as the difficulty people encounter taking time off from work, may play a role in this regard. See *supra* notes 46–50 and accompanying text. In this respect, however, more research is called for.

<sup>91</sup> See *MOJ Meetings*, *supra* note 8; Survey Results, Ministry of Justice, *supra* note 9.

<sup>92</sup> The sentencing goals in 2004 involved attempts to make Japanese society more crime resistant and improve people's subjective sense of security (*taikan chian*). On these and the other goals of the sentencing

to what extent can such decline be traced to specific criminal justice reforms? Given the difficulty of answering questions such as these, one could argue that what is especially significant about criminal justice reforms is what they tell us—what they communicate—about reformers’ commitment to a specific normative approach to criminal justice.

Of course, this does not mean that the official goals do not actually matter. The fact that it is not entirely clear whether reform goals can be demonstrably attained does not and should not mean that one should stop trying to attain those goals. The reforms concerning victim participation in Japanese criminal justice—welcome, unwelcome, or insufficient as these may be—signify reformers’ principled commitment to a new and expanded role for crime victims. They signify that criminal justice exists for crime victims too (“*keijishihō wa hanzai higaisha tō no tame ni mo aru*”).<sup>93</sup> That in itself can be qualified as successful legal reform, or at least the beginning of one.

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reforms, see Matsumiya Takaaki, *Hōteikei hikiage to keibatsuron [The Raising of Statutory Penalties and Penal Theory]*, 78 HŌRITSU JIHŌ, no. 3, 2006, at 6.

<sup>93</sup> BASIC PLAN, *supra* note 31, at 10.

