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Lay Adjudication System as a Democratic Institution:

An Evaluation of the Citizen Judge System [*Saiban-in Seido*] in Japan



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Declaration

I hereby declare that this thesis has not been submitted, either in the same or different form, to this or any other University for a degree and the work produced here is my own except stated otherwise.

Sign:

Yumiko Kita

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Abstract

A lay adjudication system that has been the subject of international and domestic reforms democratising criminal justice procedures often reveals a challenging balance amongst the intertwined principles of criminal procedures. In addition, the various stages of lay adjudication procedures, such as its introduction, practice, development, and abolition, have been influenced by political and societal force. Lay adjudicator participation may be an important mechanism for introducing and sustaining the concept of democracy in criminal trial procedures. Whilst the establishment of well-balanced links between international fundamental human rights principles, efficiency and popular justice are significant features in judicial reforms internationally and domestically, the introduction of a lay adjudication procedure can be an appealing addition to judicial reform. A fundamental concern is whether it represents a successful mechanism for democratising criminal procedures. This thesis addresses the issue by examining the *Saiban-in no Sankasuru Keijisaiban ni kansuru Horitsu*, promulgated in 2009, as a result of the 1999 judicial reform in Japan. It does this by firstly setting out evaluative criteria developed through an examination of theoretical perspectives of lay adjudication. It then applies these criteria using quantitative data derived from the Japanese Supreme Court and qualitative data from interviews with former citizen judges and legal professionals who have experience of citizen judge trials. It argues that the introduction and practice of the citizen judge system has been successful. Both procedural and practice tests of the citizen judge system have shown the extent to which citizen judge participation has been accepted and has achieved its targets. The representative and engaging format of the citizen judge system has led to satisfaction and confidence in their duties as citizen judges. However, powerful controls by legal professionals have remained in place throughout the four stages of the citizen judge procedures - the pre-trial arrangement conference process, the selection process of citizen judges, the decision-making process, and the post-trial phrase. Moreover, the controls have supported citizen judges' participation but, at the same time, they could be a direct and indirect impediment to the democratic functions of citizen judges.

CHAPTER 1 INTRODUCTION

In 2001 the Japanese government announced the introduction of *Saiban-in Seido*¹ (hereinafter the citizen judge system²), and in 2009, the *Saiban-in no Sankasuru Keijisaiban ni kansuru Horitsu*³ (hereinafter the Citizen Judge Act (CJA)) was promulgated as part of the Judicial Reform started in 1999. The purpose of introducing the new system was 'to promote the understanding of the people and to enhance their trust in the justice system'⁴. The introduction of the citizen judge system has been a significant and complex challenge facing society as a whole, including the government, lawmakers, personnel involved in trials, such as professional judges, public prosecutors, defence attorneys and lay people whether or not they are selected as citizen judges. My interest in studying the introduction of the CJA derives from the dramatic challenges that grew out of the preparation for its promulgation and enforcement between 2002 and 2009. This introductory chapter is organised into six sections in order to reveal the background analysis of the citizen judge system [*Saiban-in Seido*]. Before giving a brief outline of Japanese Judicial Reform in 1999 in Section 1.2, Section 1.1 will present an assessment of the surrounding criminal justice reform, international historical developments and the current characteristics of the lay adjudication system. Section 1.3 sets out the aims of the research, and definitions of terms used in this research are clarified in Section 1.4. Section 1.5 explains methodologies and the last section summaries the contents of this thesis.

¹In this thesis, the Hepburn Romanisation system will be used in order to transcribe the Japanese language into the Latin alphabet. JC Hepburn, *A Japanese and English Dictionary: With an English and Japanese Index* (Shanghai; American Presbyterian Mission Press 1867).

²There are different translations for the *Saiban-in Seido*, such as 'quasi-Jury system', 'lay assessor system', 'lay judge system', but throughout this research, the citizen judge system will be used. See K Anderson and E Saint, 2005, 'Japan's Quasi-Jury (Saiban-In) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials' 6 *Asian-Pacific Law & Policy Journal* 233–283; A Dobrovol'skaia, 2004, 'An All-Laymen Jury System Instead of the Lay Assessor (Saiban-In) System for Japan? Anglo-American-Style Jury Trials in Okinawa under the US Occupation' 37 *Vanderbilt Journal of Transnational Law* 966–973; A Suto, 'The Role of the Empirical Science in Saiban-in System (Lay Judge System) - A Case Study About the Circumstances Appraisal' (2011) 18 *The Faculty Journal of Komazawa Women's University* 151–159.

³Act No.63 of 2004.

⁴*Ibid*, art. 1.

Establishing lay participation in governmental institutions has become an essential concern for democratic countries seeking to improve or balance the relationship between the state and its citizens. Criminal justice systems are reflections of a nation's government, whether, for example, federal or confederate, democratic socialist or, communist and also a reflection of the nation's political history including its political evolution⁵. Although Ebbe suggests that criminal procedures are one of the most inconsistent areas of law enforcement and correction mechanisms⁶, the courts in authoritarian regimes play an important role in social control by maintaining the legitimacy and authority of the state's power⁷. In other words, lay participation in court procedures is important in democratic societies as a safeguard against oppressive state power⁸. Thus, an analysis of lay participation in criminal procedure can indicate the relationship between the important 'socio-political' platform of a government⁹, and variables established by fundamental citizen participation¹⁰.

The analysis of the performative and constitutive functions of a criminal trial influenced by legal norms is important to explain how the state controls a given society. Restricting the power of the state by legal norms in democratic constitutional states can be shown in a fair trial model with five basic features: bringing a case to court, the imposition of a court verdict on the offender, the importance of unwritten positive law as well as oral testimony, equality of power between the prosecution, defence, professional judges, and independence of professional judges from the state¹¹. The emphasis on unwritten positive law and institutional legitimacy for a participatory

⁵O Ebbe, 'The Purpose of Comparative and International Criminal Justice Systems' in Obi N Ignatius Ebbe (ed), *Comparative & International Criminal Justice Systems: Policing, judiciary, and corrections* (Butternman-Heinemann 1996) 3-8, 4.

⁶Ibid, 7.

⁷HL Packer, *The Limits of the Criminal Sanction* (Stanford UP 1968); N Luhmann, 'Legal Argumentation: An Analysis of Its Form' (1995) 58 *The Modern Law Review* 285–298, 286, .

⁸M Singer, *Jury Duty: Reclaiming Your Political Power and Taking Responsibility* (Santa Barbara, CA; Praeger 2012), ix.

⁹H Fukurai and R Krooth, 'What Brings People to The Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S.' (2010) 38 *International Journal of Law, Crime and Justice* 198–215, 198.

¹⁰R Lempert, 'The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research' (2007) 40 *Cornell International Law Journal* 477–88, 482.

¹¹M Hildebrandt, 'Trial and "Fair Trial": From Peer to Subject to Citizen' in Antony Duff and others (eds), *The Trial on Trial, Volume 2, Judgment and Calling to Account* (Hart Publishing 2006), 18-22.

democracy strongly supports the idea of lay participation in criminal procedures¹². In spite of profound support, the practice and establishment of lay justice has been highly controversial and influenced by an emphasis on popular rights¹³, judicial corruption and politicisation¹⁴, throughout the world since the 18th century.

The lay adjudication system has important historical antecedents which demonstrate clearly its influence upon the legal system. As many scholars have claimed, the origins of lay adjudication seemed to be in Athens in the fifth century B.C.¹⁵. The system then spread to the other parts of Europe through the Roman Empire. The Normans adapted the existing Saxon jury for their own purposes in 1066¹⁶. Since then, lay adjudication systems in different legal systems have repeatedly increased or decreased in their use within the system. For example, because of the French Revolution 1789, the jury model of a lay adjudication system was introduced in continental European countries, such as in France in 1789¹⁷, Greece in 1844, Germany in 1848, Russia in 1864, Spain in 1872, and Italy in 1873¹⁸. Moreover, the cooperative structure between professional judges and lay adjudicators – the mixed judge model - was replaced by the jury model in Belgium (1919), Spain (1931), France (1932), and Austria (1934) through reform¹⁹. The jury model was also introduced in East India as a result of British colonisation²⁰, but it was abolished

¹²E Taman, 'Lay Participation in Criminal Justice: Enhancing Justice System Legitimacy in Post-Conflict States' (2003) 12 Dalhousie Journal of Legal Studies 33–62, 34.

¹³CT Coleman, 'Origin and Development of Trial by Jury' (1919) 6 Virginia Law Review 77–86, 78.

¹⁴G Durston, *Crime and Justice in Early Modern England: 1500-1750* (Chichester; Barry Rose Law Publishers 2004), 472.

¹⁵There are some arguments about the origin of the concept, for example some scholars have claimed the concept originated in 1066 and the original form of a lay adjudication was circulated to other parts of Europe by the Roman conquest. See AW Alschuler and AG Deiss, 'A Brief History of the Criminal Jury in the United States' (1994) 61 University of Chicago Law Review 867–928, 867; SJ Adler, *The Jury Worth Saving? The Jury: Trial and Error in the American Courtroom* (Times Books 1994); S Lloyd-Bostock and C Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales' (1999) 62 Law and Contemporary Problems 7–40.

¹⁶ER Sheyn, 'A Foothold for Real Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental and Juridical Reforms and Can Help Spread These Reforms Across Eastern Europe' (2010) 43 Vanderbilt Journal of Transnational Law 649–700, 655.

¹⁷J Donovan, 'Magistrates and Juries in France, 1791-1952' (1999) 22 French Historical Studies 207–209.

¹⁸H Fukurai, K-W Chan, & S Miyazawa, 'Introduction to the Special Issue: The Future of Lay Adjudication and Theorizing Today's Resurgence of Civic, Legal Participatory Systems in East and Central Asia' (2010) 38 International Journal of Law, Crime and Justice 141–148, 141.

¹⁹R Vogler, *A World View of Criminal Justice* (Aldershot; Ashgate 2005), 237.

²⁰JA Jaffe, 'Custom, Identity, and the Jury in India, 1800–1832' (2014) 57 The Historical Journal 131–155.

after independence, following several reforms²¹. The developments of lay adjudication systems including introductions, modifications, and abolishment of lay adjudication procedures have happened primarily because of political and societal upheavals²².

Throughout their development, the long-lasting liberal admiration of a lay adjudication system, in particular in criminal trials, has been bolstered by the belief in democracy. Therefore, having a lay adjudication system is widely considered to be a symbol of democracy²³.

By way of contrast, legal professionals, in particular professional judges, have felt threatened by lay adjudicators' participation from the start of the lay adjudication system. The threat seems to be derived from doubts over the legitimacy of judgments reached by lay adjudicators' 'consciousness' and not by evidence²⁴, and a reliance on the legislative role and judicial tasks of government or legal professionals²⁵. In his analysis of the English jury system, Auld points out that '... a law should be declared, by statute if need be, that juries have no right to acquit defendants of the law or in disregard of the evidence, and that judges and advocates should conduct criminal cases accordingly'²⁶.

However, Bushell's case in 1670 in England²⁷ was a significant milestone in the history of legal control over lay adjudication²⁸ decisions by the cancellation of attain²⁹. Before this case, the English jury system allowed professional judges to examine a verdict

²¹N Vidmar, 'The Jury Elsewhere in the World' in Neil Vidmar (ed), *World Jury Systems* (Oxford; Oxford University Press 2000), 425-6; K Ramnath, 'The Colonial Difference between Law and Fact: Notes on the Criminal Jury in India' (2013) 50 *Indian Economic & Social History Review* 341-363.

²²For example, the colonisations and released from the English Empire influenced the introduction and abolishment of the lay adjudication system in India. See *ibid*.

²³N Vidmar, 'We the Jury: The Jury System and the Ideal of Democracy by Jeffrey Abramson Review by Neil Vidmar' (1996) 25 *Contemporary Sociology* 97-99; N Vidmar, *World Jury System* (Oxford; Oxford University Press 2000).

²⁴K Crosby, 'Jury Independence and the General Verdict: A Genealogy' (University of Leicester 2013), 65.

²⁵See, C Weinberg-Brod, 'Jury Nullification and Jury-Control Procedures' (1990) 65 *New York University Law Review* 852-870.

²⁶A Auld, 'Review of the Criminal Courts of England and Wales' (London 2001) <<http://webarchive.nationalarchives.gov.uk/+http://www.criminal-courts-review.org.uk/auldconts.htm>>, accessed 31 April 2016, para.107.

²⁷Bushell's Case, 124 Eng. Rep. 1006 (C.P, 1670).

²⁸See Lloyd-Bostock and Thomas, *supra* note 15, 9; J Clark, 'The Social Psychology of Jury Nullification' (2000) 24 *Law and Human Behavior* 39-57; JA Hostettler, 'Jury Power - Illusion or Really?: A Critical Study of Criminal Trial by Jury in England: 1219-2003' (University of Sussex 2004).

²⁹The Honorable Dann, "'Learning Lessons" and "Speaking Rights": Creating Educated and Democratic Juries' (1993) 68 *Indiana Law Journal* 1229-1280, 1233-4.

reached by a jury, reject it, and retry the case³⁰. The jurors in the trial of William Penn and William Mead, including Edward Bushell, were accused and fined because the jury panel did not reach a verdict the court accepted and they had refused a guilty verdict contrary to the court's admonition³¹. They refused to pay the fine and were imprisoned for contempt of court³². On appeal by way of *Habeas Corpus*, Judge Vaughan accepted the possibility of disagreement between professional judges and jurors. Moreover, he expressed support for a jurors' independence of verdict and the principle that jurors should not be punished for contempt of court following any disagreement³³. As a result, this case has greatly influenced not only the English system but also the fundamental idea of the role of lay adjudicators, in particular, in a jury model of lay adjudication systems³⁴. McClanahan pointed out the main three influences of the case: the prevention of judicial oppressive pressure over lay adjudicators' decision-making, the lay adjudicators' power to nullify unjust laws, and the lay adjudicators' capability to investigate government oppression on specified matters³⁵. In addition, Landsman pointed out that Bushell's case showed that the jurors could reject evidence presented in court and are recognised as reaching their decision based on their own personal knowledge³⁶. Therefore, the decision in Bushell's case has been recognised as triggering the concept of jury nullification as well as impacting on the fundamental principle of lay adjudication, which is that lay adjudication is 'a worthy barometer of what is [was] truly just and moral'³⁷.

Notwithstanding the symbolic respect for the lay adjudication system and the international historical events that have suggested that lay adjudicators' participation is

³⁰JH Langbein, *The Origins of the Adversarial Criminal Trial* (Oxford; Oxford University Press 2003), 321.

³¹T Regnier, 'Restoring the Founders' Ideal of the Independent Jury in Criminal Cases' (2011) 51 Santa Clara Law Review 775–852, 764.

³²Alschuler and Deiss, *supra* note 15, 912.

³³K Crosby, 'Controlling Devlin' S Jury : What the Jury Thinks , and What the Jury Sees Online' (2012) 1 Criminal Law Review 15–29, 25.

³⁴IA Horowitz, 'Jury Nullification The Impact of Judicial Instructions , Arguments , and Challenges on Jury Decision Making' (1988) 12 Law and human behavior 439–453, 440.

³⁵J McClanahan, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 725–792, 731-2.

³⁶S Landsman, 'A Brief Survey on the Development of the Adversary System' (1983) 44 Ohio State Law Journal 713–39, 722.

³⁷JE Carroll, 'The Jury's Second Coming' (2012) 100 Georgetown Law Journal 657–708, 667.

an important mechanism for introducing and sustaining the concepts of democracy in criminal trial procedures, there remain widespread doubts about the system because of some widely debated events. American high-profile cases in the twentieth century, such as those of O.J. Simpson³⁸, the Menendez brothers³⁹, and Rodney King⁴⁰, increased public concerns about the impartiality of the lay adjudication system, and competence of lay adjudicators.

In spite of the concerns, since the late twentieth century, the (re)introduction of a lay adjudication system has occurred in several countries. Russia (1993)⁴¹, Spain (1996)⁴², Kazakhstan (2007)⁴³, The Republic of Korea (2008)⁴⁴, and Georgia (2011)⁴⁵ all introduced lay adjudication systems, although the details of each lay adjudication procedure differ. The collapse of the former Soviet Union resulted in international movements for the introduction of lay participation in the legal system motivated by liberal democratic ideologies⁴⁶. Russia, Spain, and Korea introduced the jury model of lay adjudication in their non-adversarial systems, while Kazakhstan and Japan introduced a mixed judge system in their non-adversarial systems. The aim of the introduction of these changes was to increase 'the democratic legitimacy, the transparency, and the credibility of the judicial process'⁴⁷, and were regarded as symbolic of introducing democracy into these

³⁸See A Moore, 'The O.J. Simpson Trial - Triumph of Justice or Debacle?' (1996) 41 Saint Louis University Law Journal; LK Griffin, 'Defending the Jury's Territory at the Heart of the Democratic Process' (1990) 75 Nebraska Law Review 333–376.

³⁹S Burns, 'Impeachment Work in the Menendez Brothers' Murder Trial' (2000) 2 Sociology of Crime, Law and Deviance 233–256.

⁴⁰TM Riordan, 'Copping an Attitude: Rule of Law Lessons from the Rodney King Incident' (1993) 27 Loyola of Los Angeles Law Review 675–733.

⁴¹M Nemytina, 'Trial by Jury : A Western or a Peculiarly Russian Model ?' (2001) 72 Revue internationale de droit pénal 365–370, 366.

⁴²SC Thaman, 'Spain Returns to Trial by Jury' (1997) 21 Hastings International and Comparative Law Review 241–537, 242.

⁴³NP Kovalev and G Suleymenova, 'New Kazakhstani Quasi-Jury System: Challenges, Trends and Reforms' (2010) 38 International Journal of Law, Crime and Justice 261–278, 265.

⁴⁴J-S Choi, 'Korean Citizen Participation in Criminal Trials: The Present Situation and Problems' (2013) September International Journal of Law, Crime and Justice 1–20, 2.

⁴⁵A Smirnov and NP Kovalev, 'The Nature of the Russian Trial by Jury' (2014) 22 European Journal of Crime, Criminal Law and Criminal Justice 115–133, 118.

⁴⁶SC Thaman, 'Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in Taxquet v. Belgium' (2011) 86 Chicago-Kent Law Review 613–668, 619.

⁴⁷K Park, YH Han and YR Seong, 'The Effect of Double Judgments on Public Confidence in Court Decisions for the Trial by Citizen-Participation in Korea' (2010) 38 International Journal of Law, Crime and Justice 166–174, 166.

countries⁴⁸. As part of an international tendency, a new lay adjudication system has been developed in Japan as a part of the Judicial Reform started in 1999. The international movements seem to be driven by ideas about the democratisation of the criminal justice system.

The introduction of democracy into the criminal justice system appears to be founded on Western countries' support for democratic reform in transitional countries moving from authoritarianism to democracy in Eastern Europe, Africa, and Latin America⁴⁹ and, for example, in Poland and Serbia⁵⁰. The liberal idealism inspired by Western countries has encouraged the transformation of their criminal procedures, in particular adversarial procedures including a lay adjudication system⁵¹.

The international movement supporting democratic principles in criminal procedures has revealed the main issues and challenges to the practice of lay adjudication systems. The problems relate to the lay adjudicators themselves, such as how representative the lay adjudicator panel is of the people, the competence of lay adjudicators, their reliability as decision-makers, and the challenges related to lay adjudication procedures such as lay adjudicators' perceptions, comprehension, confidence and satisfaction⁵² within the operation of the system. The rise of these concerns has led to an increase in international lay adjudication studies comparing different legal systems⁵³.

⁴⁸Sheyn, *supra* note 16, 653.

⁴⁹I Shapiro, *Democratic Justice* (New Haven, London; Yale University Press 1999).

⁵⁰T Carothers, 'Democracy Assistance: Political vs. Developmental?' (2008) 20 *Journal of Democracy* 5–19, 11.

⁵¹For example, Croatia, Bosnia and Herzegovina, Georgia, and the former Soviet Union countries have transplanted adversarial criminal procedure elements into their procedures. See SK Ivkovich, *Lay Participation in Criminal Trials: The Case of Croatia* (Austin and Winfield Publishers; Lanham 1999); LJ Nettelfield, *Courting Democracy in Bosnia and Herzegovina: The Hague Tribunal's Impact in a Postwar State* (Cambridge University Press; New York 2010); R Vogler & G Jokhadze, 'Plea Bargaining in Georgia: A Utilitarian Perspective' Ministry of Justice (Georgia) (Tbilisi 2011); NP Kovalev, *Criminal Justice Reform in Russia, Ukraine and the Former Republics of the Soviet Union: Trial by Jury and Mixed Courts* (Lewiston, NY; Edwin Mellen Press 2010).

⁵²J Goodman-Delahunty and others, 'Practices, Policies and Procedures That Influence Juror Satisfaction in Australia, No.87', vol 2007 (2007), 2.

⁵³Vidmar, *supra* note 21; *supra* note 23.; JD Jackson and NP Kovalev, 'Lay Adjudication and Human Rights in Europe' (2006) 13 *Columbia Journal of European Law* 83–124; SC Thaman, 'Europe's New Jury Systems: The Cases of Spain and Russia' (1999) 62 *Law and Contemporary Problems* 233–259.

1.1 Assessment of Criminal Justice Reform and Popular Justice

Current reviews of domestic criminal justices reform often reveal international influences. Asmal confirms that globalisation, through social, economic, and political transactions, 'affects law reform of criminal justice both at an international and domestic level'⁵⁴. Similarly, Menski points out the recent pressure that globalisation in Western terms puts on Asian countries including people, and laws⁵⁵. Domestic criminal justice reforms in non-Western countries may bring confusion between their indigenous and legal cultures. Twenty-first century ideas should not be based on specific understanding of only Western cultures. As Boughey has suggested, indigenous cultures can continue to be represented or influenced by Western perspectives at various stages in criminal justice systems⁵⁶. As a result, 'the moral justifications for punishment and the perceived legitimacy of sentencing outcomes' transferred from Western countries⁵⁷ into non-Western countries may conflict with indigenous concepts, and therefore, the moral justifications should be reviewed from both the indigenous as well as Western perspectives.

This section considers links between international fundamental human rights principles, efficiency, and popular justice in the examination of criminal justice. Muncie claims that the 'homogenisation of criminal justice policies' is due to reflections of the mixture between international human rights developments in society and the economy, and extending policy transfers⁵⁸. In addition, promoting efficiency and effectiveness along with delivering justice is one of the significant targets of the function of a criminal

⁵⁴K Asmal, 'Human Rights and the Administration of Criminal Justice: Law Reform in the Age of Globalism', *14th International Conference of the International Society for the Reform of Criminal Law* (2000), 1.

⁵⁵W Menski, *Comparative Law in a Global Context: The Legal Systems of Asia and Africa* (2nd edn, Cambridge Univ Press 2006), 1-5.

⁵⁶J Boughey, 'Administrative Law: The Next Frontier for Comparative Law' (2013) 29 *International and Comparative Law Quarterly* 17-30, 22.

⁵⁷R Henham, 'Penal Ideology, Sentencing and the Legitimacy of Trial Justice' (2011) 57 *Crime, Law and Social Change* 77-98, 84.

⁵⁸J Muncie, 'The Globalization of Crime Control--the Case of Youth and Juvenile Justice: Neo-Liberalism, Policy Convergence and International Conventions' (2005) 9 *Theoretical Criminology* 35-64, 36.

justice system in many legal systems⁵⁹ and international courts⁶⁰. As the emphasis of popular justice is also a recent international movement, popular justice can lead to links between the state and indigenous perspectives on criminal justice,⁶¹ although it can be manipulated by a dominating party and external influences⁶². The balance of the tripartite relationship should be considered in order to examine current criminal justice.

According to Howard-Hassman, current globalisation is 'the second great transformation spreading capitalism over the world'⁶³, and 'may well create a world of increased prosperity, democracy, and protection of human rights.'⁶⁴ Moreover, globalisation by obvious democratising institutions and standards has been adopted in international organisations such as the U.N. as well as domestic authorities⁶⁵. As Frank has claimed, the right to democracy is subsidiary to the right to peace⁶⁶. According to Article 21 of the 1948 Universal Declaration of Human Rights, '[e]veryone has the right to take part in the government of his country, directly or through freely chosen representatives'⁶⁷, and 'everyone has the right of equal access to public service in his country.'⁶⁸ In other words, the right to self-govern in the globalised democratic society is required to protect human rights. This principle is accepted as a foundation of human rights in both international treaties and laws in many domestic legal systems⁶⁹. Buergethal claimed that the Declaration has been 'the centrepiece of the international

⁵⁹For example, regarding the England system, see, M Zander, 'Lord Justice Auld's Review of the Criminal Courts: A Response' (2001) <https://www.lse.ac.uk/collections/law/staff_publications_full_text/zander/auld_response_web.pdf> accessed 30 June 2016, 5.

⁶⁰S Ford, 'Complexity and Efficiency at International Criminal Courts' (2014) 29 Emory International Law Review 2–68.

⁶¹SE Merry, 'Popular Justice and the Ideology of Social Transformation' (1992) 1 Social & Legal Studies 161–176, 163.

⁶²Vogler examines the historical events of manipulations in colonial native courts in Rwanda, China, Cuba, Mozambique, and South Africa. See, *supra* note 19, ch.13; Johnson studies the American cases in DT Johnson, 'Vigilance and the Law: The Moral Authority of Popular Justice in the Far West' (1981) 33 American Quarterly 558–586.

⁶³RE Howard-Hassmann, 'The Second Great Transformation: Human Rights Leapfrogging in the Era of Globalization' (2005) 27 Human Rights Quarterly 1–40, 1.

⁶⁴*ibid*, 5.

⁶⁵*ibid*, 166.

⁶⁶M F Thomas, 'The Emerging Right to Democratic Governance' (1992) 86 American Journal of International Law 46, 87.

⁶⁷Sec. 1.

⁶⁸Sec. 2.

⁶⁹K Bard, 'Trial and Sentencing: Judicial Independence, Training and Appointment of Judges, Structure of Criminal Procedure, Sentencing Patterns, the Role of the Defence in the Countries in Transition', *Criminological Research Conference* (Strasbourg; Kluwer Law 1999).

human rights revolution’ ranking with the Magna Carta, the French Declaration of the Rights of Man, and the American Declaration of Independence⁷⁰. The Constitutions and legislation in various legal systems⁷¹ was proclaimed to be based on the principle of the Declaration. Therefore, it could be said that achieving a fair trial in open court with a protection of human rights in criminal procedures has been a considerable goal in not only international but also domestic criminal procedures.

Democratic countries throughout the world seeking the developments of their criminal justice systems often share challenges in terms of ‘inefficiencies, growing costs or lack of timeliness’ as well as the maintenance of the essential aspect of a fair and effective criminal justice systems⁷². England and Wales has adopted the ‘criminal justice system efficiency programme’ in order to modernise and reform the system which has protected victims and the public since 2013⁷³. In the U.S. the bipartisan bill called the SAFE Justice Act 2015, which will greatly decrease prison costs and population, was introduced in the House of Representatives⁷⁴. The reforms for an efficient criminal justice systems appear to be sought by applying highly technological procedures and having alternative correctional processes⁷⁵. Sanders presents the nine goals of criminal justice as follows:

1. preventing crimes;
2. reduction of reoffending;
3. bringing offenders to justice;
4. respecting victims and witnesses, and not creating secondary victimisation;
5. protecting the innocent;
6. invading the rights and liberties of suspects and offenders;

⁷⁰T Buerghenthal, ‘International Human Rights Law and Institutions: Accomplishments and Prospects’ (1988) 63 Washington Law Review 1–20, 6.

⁷¹See GR Newman, JP Stamatel and H-E Sung, *Crime and Punishment Around the World, vol.1, Africa and the Middle East*, vol 1 (GR Newman, JP Stamatel and H Sung eds, California; ABC-CLIO 2010), 91, 101.

⁷²Y Dandurand, ‘Criminal Justice Reform and the System’s Efficiency’ (2014) 25 Criminal Law Forum 383–440, 386–7.

⁷³Ministry of Justice, ‘Reforming the Criminal Justice System’ [Japanese] (2013) <<http://www.justice.gov.uk/about/justice/criminal-justice-system-efficiency-programme2>> accessed 6 August 2015.

⁷⁴Sensenbrenner-Scott Over-Criminalization Task Force Safe, Accountable, Fair, Effective Justice Reinvestment Act, H.R. 2944, 114th Cong. (2015).

⁷⁵Such as alternative community-based corrections. See UNODC, ‘Compendium of United Nations Standards and Norms in Crime Prevention and Criminal Justice’ (New York; 2006).

7. adversely affecting only people directly involved;
8. using scarce resources that could be put to better use proportionately, not disproportionately;
9. securing appropriate public respect for, and trust in, the criminal justice system⁷⁶.

These essential aspects of criminal justice systems should not compromise efficiencies. Transitional countries moving from authoritarian to democratic systems tend to focus on 'the promotion of the role of law, good governance, police training, and the development of international human rights standards'⁷⁷ for criminal justice reforms. This provokes questions as to whether the success or failure of the reforms should be evaluated by societal factors rather than the institutional structures⁷⁸.

Two main scholars have influenced contemporary criminal justice research: Herbert Packer and Mirjan Damaska. There is no existing pure system of theoretical categories presented by either scholar owing to the mixtures and transformations that have occurred in different criminal justice systems⁷⁹. Packer has presented the principle aspects in terms of the policy of the criminal justice system: the crime control model and the due process model⁸⁰. The crime control model emphasises the conviction of the guilty, while the due process model emphasises the organisation and function of legitimate procedures, including the notion of human rights and the accused person's rights. The normative procedural categories of criminal justice procedures, Damaska has claimed, are 'the adversarial' or 'non-adversarial models' at the trial stage⁸¹. The inquisitorial model can be defined as taking a stance, which is 'the initial probability that a crime has been committed', and the procedural target is the justification of the facts and criminal sanctions⁸². On the other hand, the adversarial model can be defined as

⁷⁶A Sanders, 'Reconciling the Apparently Different Goals of Criminal Justice and Regulation: The "Freedom" Perspective' in Hannah Quirk, Tody Seddon and Graham Smith (eds), *Regulation and Criminal Justice: Innovations in Policy and Research*2 (Cambridge University Press 2010), Ch 3, 42-71, 44-5.

⁷⁷A Robertson, 'Criminal Justice Policy Transfer To Post-Soviet States: Two Case Studies Of Police Reform In Russia And Ukraine' (2005) 11 *European Journal on Criminal Policy and Research* 1-28, 1.

⁷⁸S C Krasnokutski, 'Human Rights in Transition: The Success and Failure of Polish and Russian Criminal Justice Reform' (2001) 13-69, 68.

⁷⁹H Kuhne and others, *Criminal Procedure Systems in the European Community* (Butterworths 1993).

⁸⁰Packer, *supra* note 7.

⁸¹M Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506-589, 506.

⁸²*ibid*, 564.

taking a stance, which valued the ‘search for the procedural truth’. Therefore, the procedural target is the conflicts between each party (the prosecution and the defendant)⁸³. He also put forward two types of organisational structure: the hierarchical and co-ordinated models⁸⁴. The ‘hierarchical model’ puts emphasis on the professionalism of officials, the hierarchical engagement and the technical guidelines for the decision-making process, while the ‘coordinate model’ puts emphasis on the separations and equal power of authority⁸⁵. Both Packer and Damaska presented these standards in order to examine enormously diverse criminal procedures throughout the world.

However, on the basis of those standards and the need to develop them, many scholars have suggested various theoretical frameworks in order to evaluate diverse criminal procedures. These evaluations have different viewpoints and focuses⁸⁶. For example, Frase evaluated macro- and micro- level models in terms of the teaching of comparative law and criminal procedures with a particular focus on international human rights standards and challenges⁸⁷. As a result of arguments about ‘types of control’ in criminal procedures including the ‘psychological analysis’ of Thibaut and Walker and the victim-centred model by Roach, Vogler presents a conceptual framework of three models: the adversarial, inquisitorial, and popular justice models, in terms of relationships between ‘state, civil society, and the defendant’⁸⁸. The dominant participants in the adversarial model are lawyers, and those in the inquisitorial are judges, prosecutors, police and other state officials⁸⁹. Those in popular justice are lay participants⁹⁰.

⁸³K Ambos, ‘International Criminal Procedure: “adversarial”, “inquisitorial” or Mixed?’ (2003) 3 International Criminal Law Review 1–37.

⁸⁴M Damaska, *The Faces of Justice and State Authority: A Comparative Approach to the Legal Process* (New Haven; Yale University Press 1986).

⁸⁵*Ibid*, 18-23.

⁸⁶See J Thibaut and L Walker, *Procedural Justice: A Psychological Analysis* (Hillsdale, NJ.; Wiley 1975); E Luna, ‘A Place for Comparative Criminal Procedure’ (2004) 42 University of Louisville Law Review 277–328.

⁸⁷RS Frase, ‘Main-Streaming Comparative Criminal Justice: How to Incorporate Comparative and International Concepts and Materials into Basic Criminal Law and Procedure Courses’ (1997) 100 West Virginia Law Review 773–798.

⁸⁸Vogler, *supra* note 19, 14-5.

⁸⁹*Ibid*, 15.

⁹⁰*Ibid*.

A popular justice system, which Depew defines as a 'communitarian model'⁹¹, leads to links between those models and efficiency. In addition to the modelled procedures suggested by Packer and Damaska, a popular justice system based on community participation leads to a decrease in the power of the criminal justice agencies⁹². A popular justice system looks for appropriate personal adjustment by the cooperative of individuals in terms of aiming at establishing psychological parameters focusing on emotions and feelings⁹³. Vogler presented 'unmediated popular justice' and 'mediated popular justice'⁹⁴ in the study of historical transformations and developments in particular European and other legal systems in the 20th century⁹⁵. A lay adjudication system functions differently in different legal traditions. Therefore, it will be reasonable to evaluate the functions of a lay adjudication system in terms of the relationships between lay adjudicators and legal professionals as well as those between popular justice and the adversarial/inquisitorial approaches, if the subjects of relate to those approaches.

What components of criminal justice should be used to examine the success or failure of the criminal justice reform? Stuntz has argued for a focus on the judicial power balance between courts and legislatures in criminal procedure, and emphasised the weak power of the courts for substantive criminal law⁹⁶. Moreover, the significance of procedural regulation has been emphasised by a comparison with the decrease of focus on substantive regulation⁹⁷. In criminal justice reform studies, it is important to examine the procedural and substantive regulations which are essential to enforcement⁹⁸.

In examining criminal justice reform, there is a clearly intrinsic connection between law and society. Cohen *et al* argued that Parsons emphasised the significance of belief

⁹¹R Depew, 'Popular Justice and Aboriginal Communities-Some Preliminary Considerations' (1996) 36 J. Journal of Legal Pluralism 21-67, 23.

⁹²DR Longmire, 'A Popular Justice System: A Radical Alternative to the Traditional Criminal Justice System' (1981) 5 Contemporary Crises 15-30, 25.

⁹³Depew, *supra* note 91, 24.

⁹⁴R Vogler, *supra* note 19, 197.

⁹⁵*Ibid*, part III.

⁹⁶W J Stuntz, 'The Uneasy Relationship between Criminal Procedure and Criminal Justice' (1997) 107 Yale Law Journal 1-76, 68-9.

⁹⁷*Ibid*.

⁹⁸R Pound, 'Law in Books and Law in Action' (1910) 44 American Law Review 12-36.

in legitimacy in his analysis of the foundation of power in social structures⁹⁹. The legitimacy of the rule of law is as 'a significant political weapon' which offers limitations in arbitrary discretion and faces legal concessions by the authorities¹⁰⁰. Both the legitimacy and the effectiveness of the law, in particular the criminal law, depend on 'the moral credibility' achieved by the observations of the citizens¹⁰¹. However, effectiveness is important but not essential for legitimacy, as Bottoms and Tankebe argue¹⁰². Ideally, therefore, democratic states should have a structured 'dialogic' procedural law that establishes the relationship between power-holders, the citizens, and provides procedural justice¹⁰³. The procedural justice leads to the people's satisfaction with the verdict and to their acceptance of the legitimacy of the decisions¹⁰⁴. Criminal justice reform should assess substantive and procedural applicable law and social context to produce the reform as well as traditional legal cultures.

The citizen judge system in the Japanese criminal justice were introduced as a result of the Judicial Reform started in 1999. The next section provides a brief overview of the reform which triggered the introduction.

1.2 The Japanese Judicial Reform 1999

To clarify the role to be played by justice in Japanese society in the twenty-first century, and to examine and deliberate fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, measures necessary for participation by the people in the justice system, measures necessary for ... strengthening the functions of the legal

⁹⁹J Cohen, L Hazelrigg and W Pope, 'Deparsonizing Weber: A Critique of Parsons' Interpretation of Weber's Sociology' (1972) 40 American Sociological Review 229-241, 238.

¹⁰⁰EP Thompson, *Whigs and Hunters: The Origin of Black Art* (Allen Lane 1975; London), 258-9.

¹⁰¹J Fagan, 'Legitimacy and Criminal Justice' (2008) 6 Ohio State Journal of Criminal Law 123-140, 134.

¹⁰²A Bottoms and Justice Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach To Legitimacy in Criminal Justice' (2012) 102 Journal of Criminal Law & Criminology 119-170, 147.

¹⁰³*Ibid.*

¹⁰⁴L Ellis and S S Diamond, 'Race, Diversity, and Jury Composition: Battering and Bolstering Legitimacy' (2003) 78 Chicago-Kent Law Review 1033-1060, 1040.

*profession, and other reforms of the justice system as well as improvements in the infrastructure of that system*¹⁰⁵.

The Judicial Reform Council (JRC) was established by the Prime Minister Keizo Obuchi Diet in July 1999 and the establishment was a part of the Structural Reforms (*Kozo Kaikaku*), which represented the most drastic social reformation in over sixty-years of the post-war history of Japan. As stated in the Judicial Reform Council Establishing Act, referred to above, the reform aimed at enhancing popular justice and the effectiveness in the judiciary system and developing the functions of legal authorities.

Japanese reforms of the administrative and economic structure were necessary because of the financial crisis in 1999. Economic stagnation in Japan started with a sharp share price plunge in 1990, and the following year Japanese stock and real estate markets overheated and collapsed¹⁰⁶. This was the start of the *Heisei* Recession [*Heisei*¹⁰⁷ *Fukyo*]¹⁰⁸. The great Hanshin-Awaji Earthquake occurred in 1995, and there was an Act to aid people affected by the earthquake¹⁰⁹. Consumption tax was raised from 5% to 8%¹¹⁰, and fiscal structural reform began in 1997 with the establishment of the Act on Special Measures Concerning Promotion of Fiscal Structural Reform [*Zaiseikozo Kaikaku no Shuishin ni Kansuru Tokubetsu Secchi Ho*]¹¹¹. The reforms also served as the initial trigger for a series of social changes preparing the ground for judicial reform, such as reforms to the system of administrative guidance and the electoral system in 1994. Four laws, named *Seijikaikaku Yonho* (Political Reform Four Laws), were enacted. They were related to parallel voting¹¹² and party subsidies¹¹³. The JRC recommendation about the

¹⁰⁵Art. 2 of the Justice System Reform Council Establish Act [*Shiho Seido Kaikaku Shingikai Settchi Ho*] Act No. 68 of 1999.

¹⁰⁶S Yasui, 'On the Japanese Long-Term Depression in the Nineties [*Nihon No Fukyojokyo*]' [Japanese] (2002) 2 Onomichi University Economic Information Journal 1–14.

¹⁰⁷*Heisei* is the name of an era in Japan. The first year of Heisei was 1989, so Heisei Recession started from the third year of Heisei.

¹⁰⁸H Akitomi, 'The Speculation of the Heisei Recession and the Structural Reform from the Point of View of Economic History [*Heisei Fukyo toKozokaikaku No Rekishiteki Kosatsu*]' (2007) 61 Aoyama Gakuin Women's Junior Colledge Journal 85–109.

¹⁰⁹Act for Extraordinary Expenditures and Assistance to Cope with Hanshin-Awaji Earthquake, act no. 16 of 1995.

¹¹⁰It was raised in 2015 again from 8% to 10%.

¹¹¹Act no. 109 of 1997.

¹¹²Act about Establishing an Inquiry Committee about the House of Representatives Election Zone, act no. 3 of 1994.

¹¹³For example, one of the laws is the Party Subsidies Act, Act no. 5 of 1994.

criminal justice system was for the 'realisation of a more accessible and user-friendly judicial system, public participation in the judicial system, redefinition of the legal profession and reinforcement of its function.'¹¹⁴ The seven major purposes of the reform were: unification of the legal profession; the introduction of the lay adjudication system¹¹⁵; expansion of the judiciary budget; the expansion of the number of defence attorneys; the organisation of public law firms and legal advice institutions; and reinforcement of administrative litigation procedure¹¹⁶. Therefore, the introduction of a lay adjudication system and the democratisation of the justice system was the target of the 1999 Judicial Reform from the early stages, and this introduction prepared for the reforms of the political system¹¹⁷.

Many Japanese are not familiar with the concepts of democracy in the criminal justice system although some concepts of democracy are guaranteed in the Constitution and in positive laws. Most Japanese people were not familiar with popular justice mechanisms to solve their disputes. This might have historically resulted from the Confucian concept of government, which emphasised their duty 'as teaching their subjects to behave in accordance with certain standards of conduct and morality'¹¹⁸. In spite of the lack of popular justice mechanisms in Japanese criminal procedure, most of the international conceptions of human rights and procedural fairness standards are established in the Constitution and protected by law. For example, the 1945 Constitution guarantees equality before the law¹¹⁹, the fundamental human rights of the citizens¹²⁰, the right to silence¹²¹, the right to be tried by an open court¹²², and freedom

¹¹⁴The Judicial Reform Council, 'Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century' [Japanese] (2001) <http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html> accessed 14 August 2015, Introduction.

¹¹⁵In the recommendation, the details of the lay adjudication system including the name 'citizen judge system' was not determined.

¹¹⁶*Ibid.*

¹¹⁷Z Wang and H Fukurai, 'Popular Legal Participation in China and Japan' (2010) 38 *International Journal of Law, Crime and Justice* 236–260, 237.

¹¹⁸M Dean, 'Trial by Jury: A Force for Change in Japan' (1995) 44 *International and Comparative Law Quarterly* 379–404, 383.

¹¹⁹Art. 14.

¹²⁰Art. 11, 97.

¹²¹Art. 38.

¹²²Art. 37.

from torture¹²³. The presumption of innocence is guaranteed in Article 31 which states the principles of due process: ‘No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.’ In addition, Japan has ratified a series of international treaties such as the Universal Declaration of Human Rights¹²⁴, and the International Covenant on Civil and Political Rights¹²⁵ which establish the requirements for procedural fairness and due process. However, the lack of procedural transparency in the Japanese criminal justice is particularly apparent. This absence seems to be derived from historical and societal background¹²⁶.

There have been two democratisation processes in the history of the Japanese criminal justice system: Taisho Democracy ¹²⁷, and Post-war Democracy [*Sengo Democracy*]¹²⁸. The democratisation in the post war period is often criticised for being introduced because of the intruding pressures from General Headquarters, the Supreme Commander for Allied Powers (GHQ). Moreover, it is suggested that Japanese traditional culture, which valued community mechanisms, was destroyed by the development of democratic and constitutional conceptions as well as by economic growth¹²⁹. In addition, ‘developmentalism’ in the 1990s accelerated Japan towards the collapse of community consensus¹³⁰. There are also distinctive arguments about democracy through the Constitution. It guarantees freedom, human rights, and equality for the citizens, which are universal values shared by the international community. On the other hand, there is an argument that Article 9 of the Constitution, the non-belligerency provision¹³¹, leads

¹²³Art. 38 sec. 2.

¹²⁴For example, Art. 5: freedom from torture, and Art. 7: equality before the law.

¹²⁵For example, Art. 6: the inherent right to life, Art. 9, and 14: equality before the law, procedural fairness and due process.

¹²⁶Johnson examined the secrecy through capital punishment in Japan. See DT Johnson, ‘Japan’s Secretive Death Penalty Policy: Contours, Origins, Justifications, and Meanings’ (2006) 7 *Asian-Pacific Law & Policy Journal* 62–124.

¹²⁷S Giffard, ‘The Development of Democracy in Japan’ (1996) 27 *Asian Affairs* 275–284, 280.

¹²⁸K Kendo, Y Baba, and others, *The Change of Postwar Democracy [Sengo Demokurashi No Henyo]* (Tokyo; Iwanami Shoten 1991).

¹²⁹CA Ford, ‘The Indigenization of Constitutionalism in the Japanese Experience’ (1996) 28 *Case Western Reserve Journal of International Law* 3–62; F Halicioglu, AR Andrés and E Yamamura, ‘Modeling Crime in Japan’ (2012) 29 *Economic Modelling* 1640–1645, 1644.

¹³⁰M Suzuki, M Ito, and others, ‘Individualizing Japan: Searching for Its Origin in First Modernity.’ (2010) 61 *The British Journal of Sociology* 513–38, 533.

¹³¹Art. 9 of the Constitution states that ‘... the Japanese people forever renounce war as a sovereign right of the nation and the threat or use of force as means of setting international disputes.’

to the lack of a sense of the relationship between the State and its citizens. While promoting democracy in the criminal justice system is fundamental as a part of the judicial reform, it is important for Japanese society to acknowledge that citizens obtain guaranteed freedom, human rights, equality, and also, take responsibilities. This may conflict with the traditional culture in society and the criminal justice system. Both analysis of the procedural law and the culture which accept the reform recognises the parameters and challenges within international standards.

It is noteworthy that there are, according to some scholars, serious conflicts between human rights and lay adjudication¹³². For example, lay adjudicators' lack of competence and potential bias could be seen as a violation of the right to be heard by an 'independent and impartial tribunal' as stated in international treaties¹³³. Moreover, an independent jury cannot give a reasoned judgement but merely indicates guilt or innocence, with no explanation. In the case of *Taxquet v Belgium* it was argued that this failure by a jury to give a reasoned judgement explaining the grounds for the conviction, was in itself a breach of the defendant's right to a fair trial¹³⁴. However, the European Court of Human Rights Grand Chamber decision was 'flexible' rather than 'demanding' and did not require formal professional judge instructions¹³⁵. It held that, provided the judgement of the jury was explicable in the context of the trial process as a whole and the defendant could clearly understand the grounds on which he or she had been convicted, there was no breach of Convention rights¹³⁶. Moreover, should the trial by lay adjudicators be regarded as a fundamental constitutional right?¹³⁷ This question will be argued in the following chapters, but the 'flexible' decision of the ECHR seems to give

¹³²See, for example P Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11 Human Rights Law Review 213–235; P Garde, 'The Danish Jury' (2001) 72 *Revue internationale de droit pénal* 87–120, 96; G Daly and R Pattenden, 'Racial Bias and the English Criminal Trial Jury' (2005) 64 *Cambridge Law Journal* 678–710.

¹³³Art. 6 of the European Convention of Human Rights. See K Quinn, 'Jury Bias and the European Convention on Human Rights: A Well-Kept Secret?' 998–1014.

¹³⁴*Taxquet v Belgium* (Application No.926/05), 'European Human Rights Law Review Case Comment Criminal Procedure : Jury Trial - Questions Put to the Jury - Evidence of an Anonymous Witness' (2011) 6 Case Comment 1–4.

¹³⁵Thaman, *supra* note 46, 663.

¹³⁶NS Marder, 'An Introduction to Comparative Jury Systems' (2011) 86 *Chi.-Kent. L. Rev.* 453–466, 460.

¹³⁷In some legal systems, trial by lay adjudicators is a constitutional entitlement, such as in the U.S. and Canada. See, NJ King, 'The American Criminal Jury' (1999) 1 *Law and Contemporary Problems*, 42 ;N Vidmar, 'The Canadian Criminal Jury: Searching for a Middle Ground' (1999) 62 *Law and Contemporary Problems* 141–172, 146.

each lay adjudication system the opportunity to structure respective relationships between democratic justice and human rights process.

In summary, the Judicial Reform 1999 aimed at democratisation in the criminal justice system, and, as part of the democratisation, the citizen judge system was introduced. However, Japan has unique historical developments which mix International/Western and indigenous legal concepts and this has resulted in a deficit of democratic concepts in criminal justice procedures. Introducing a lay adjudication system in criminal trials was one of the most significant changes in the 1999 reform and has been a first step in embracing democratic values in criminal procedure. Research about the citizen judge system will be fruitful in obtaining clear and deep insights relating to a review of the whole criminal justice system.

In addition, it is important for research to be conducted into the citizen judge system which will lead to the improvement of practice. Article 9 of the supplement of the Citizen Judge Act (CJA) declared a review of the system in 2011, and the amendment of the CJA in 2015 extended the review period until 2018. Several committees, such as the Investigative Commission about the Citizen Judge System [*Saiban-in Seido ni Kansuru Kentokai*] in the Ministry of Justice and Discussion Session with Experts on the Citizen Judge System [*Saiban-in Seido no Unyo nado ni Kansuru Yushikisha Kondankai*] in the Supreme Court, were established to discuss the practice of the system. Civil groups, for example, the Network of Citizen Judges [*Saiban-in net*] have held workshops and have monitored citizen judge trials¹³⁸. Updated research regarding the citizen judge system will provide crucial perspectives and impacts on the reviews.

I undertook an extensive review of reports and surveys that have been conducted by the Japanese Supreme Court and the District Courts as well as academic literature on various areas of the citizen judge system, some of which relate to the preparation period for its introduction. These studies have adopted a variety of qualitative and quantitative research techniques and interviews with the former citizen judges of different backgrounds. The following are some reports referred to:

¹³⁸See Saiban-in Net, 'Citizen Judge Net [Saiban-in Network]' <<http://www.saibanin.net/>> accessed 21 June 2016.

- The Supreme Court's 'Implications of the Citizen Judge System' was based on annual statistical surveys between 2009 and 2016¹³⁹.
- The Supreme Courts' 'Questionnaire Data from Former Citizen Judges' collected annual questionnaires between 2009 and 2016¹⁴⁰.
- The Supreme Court's 'Discussion Sessions with Experts on the Citizen Judge System' from 2009 and 2016 discussed the practice of the citizen judge trials 27 times in total¹⁴¹.
- 48 District Courts and a few branches published meeting minutes of conferences in which legal professionals and former citizen judges exchange their opinions. The number of meeting minutes and conferences, which vary depending of the courts, was 453 in total at the end of May 2016¹⁴².

The information from these reports provided valuable evidence relevant to the standards of the evaluative test for the citizen judge system. From my review of this documentary data, I also collated some quantitative data on crime statistics published by the Supreme Court¹⁴³.

A range of academic research and proposals for the reform of the citizen judge system were also reviewed, such as by Oshiro, Taguchi, *et al.* who suggested focusing on citizen judges' mental burden,¹⁴⁴ and Plogstedt's observation research of the citizen judge trials¹⁴⁵. International comparative research between the citizen judge system and other lay adjudication systems, for instance, the American and Korean systems,

¹³⁹The Supreme Court, 'Implementations of the Citizen Judge Trials [Saibanin Saiban Jisshi Jokyo]' <http://www.saibanin.courts.go.jp/topics/09_12_05-10jissi_jyoukyou.html> accessed 3 July 2016.

¹⁴⁰The Supreme Court, 'Each District Court's Meeting for Exchanging Opinions' <<http://www.courts.go.jp/nagasaki/saibanin/index.html>> accessed 3 July 2016.

¹⁴¹The Supreme Court, 'Discussion Session with Experts on the Citizen Judge System' <http://www.courts.go.jp/saikosai/iinkai/saibanin_kondan/> accessed 3 July 2016.

¹⁴²The Supreme Court, *supra* note 140.

¹⁴³N Fielding, 'Mixed Methods Research in the Real World' (2010) 13 *International Journal of Social Research Methodology* 127–138.

¹⁴⁴S Oshiro, M Taguchi, and others, 'Urgent Proposal for the Support for the Citizen Judge's Mental Burden [Saibanin No Shinriteki Futan Ni Tuiteno Saibansho No Taiousakuheno Kinkyuteian]' (Tokyo; 2010).

¹⁴⁵A Plogstedt, 'Citizen Judges in Japan: A Report Card for the Initial Three Years' (2013) 23 *Indiana International and Comparative Law Review* 371–428.

conducted by Fukurai¹⁴⁶, Foote¹⁴⁷, and Miyazawa¹⁴⁸, focused on the Japanese traditional procedural cultures. Vanoverbeke's 'Juries in the Japanese Legal System' traced the history of the lay adjudication system and evaluated the citizen judge system in terms of the establishment of the CJA and the former citizen judges' sentiments about their experience performing adjudicator duties¹⁴⁹.

Hopefully, my research will contribute to the review process by providing useful and illuminating insights into the operation of the current citizen judge system as well as suggesting its possible reform.

1.3 Aim of this Thesis

This thesis is conceptually and analytically concerned with the impact of the introduction of the new Japanese lay adjudication system, in particular of the relationship between the use of the citizen judge system and the injection of democratic values into the criminal justice system. My central research question is: has the citizen judge system been successful? This of course will raise the question: what is a 'successful' citizen judge system? Regarding the aims and expected functions of a lay adjudication and the 1999 Judicial Reform, it seems appropriate to evaluate success in terms of the democratic values that the citizen judge system brings. In addition, an examination of the balance between democratic justice and judicial controls will be conducted to study the impact of current citizen judge functions. In the course of the research, the scope of the roles of citizen judges will be explored by considering the question relating to challenges in the practice of the citizen judge system. In addition, possible suggestions to enhance citizen judges' participation in the criminal trial process will be presented. This research will consider the relevant legislation and its use of the citizen judge system by focusing on citizen judges' participation as well as the increase in democratic values within the criminal trial procedure itself. To sum up this study:

¹⁴⁶H Fukurai, 'The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems : A Cross- National Analysis of Legal Consciousness and the Lay Participatory' (2012) 40 Cornell International Law Journal 315–354.

¹⁴⁷D H Foote (ed), *Law in Japan: A Turning Point* (Seattle: University of Washington Press 2007).

¹⁴⁸H Fukurai, K-W Chan and S Miyazawa, 'The Resurgence of Lay Adjudicatory Systems in East Asia' (2010) 12 Asian-Pacific Law & Policy Journal i–xii.

¹⁴⁹D Vanoverbeke, *Juries in the Japanese Legal System* (New York; Routledge 2015).

1. explores lay adjudication as a tool for providing democratic values within the criminal trial procedure and assesses the standards of a lay adjudication system, namely a lay adjudicators' participation in practicing the system in a democratic society;
2. considers theoretical perspectives of the value of a lay adjudication and develop an evaluative criteria for the practice of the citizen judge system, based on the existing lay adjudication research and *Criminal Justice Assessment Toolkit* in 2006 by the UNODC¹⁵⁰;
3. examines the Japanese criminal trial procedure and the legal traditions that influence the practice of the citizen judge system, the history of the developments of substantive and procedural laws and contemporary challenges that may impact from the introduction of the citizen judge system and therefore the effectiveness of the citizen judge system; and
4. evaluates the Citizen Judge Act and the practice of the citizen judge system, applying the evaluative criteria in order to determine whether the introduction of the citizen judge system has been successful for injecting democratic values into the criminal trial procedure.

Lay adjudicators' participation is a different concept between analytical and political terms. Analytically speaking, those who support the idea of lay adjudication in criminal cases and those who oppose it come from different perspectives. Those who feel that it is irrational to have lay adjudicators in the criminal decision-making process may struggle to trust in lay adjudicators' competence, although they may also distrust legal professionals' competence. On the other hand, political speaking, it is reasonably acceptable that lay adjudicators' participation is 'democratic' within the wider process of a criminal trial ¹⁵¹. Supporters claim that lay adjudicators' participation brings legitimacy, and they prioritise the view of oppressive state power, hence the benefits of citizens' participation in the administration of justice.

My aim in this thesis is not to find any convincing justification for lay adjudication in the Japanese criminal justice system. Rather, it is to explore what this concept of the

¹⁵⁰UNODC, 'Criminal Justice Assessment Toolkit, Court' (Vienna; 2006).

¹⁵¹This will be examined in Chapter 2.

citizen judges' participation might mean, and what kind of restrictions might reasonably be expected in the citizen judge system. It is hoped that this research will give a fresh insight into the citizen judge system reform. There is no simple template for the paradigmatic form of all jurisdictions, but this is an implied question of this research. Ideally, as a result of my research, I also hope to help to foster the motivation to develop and sustain the citizen judge system. The main thrust of this research is to examine the citizen judge system from the aspect of democratic concepts, taking examples from existing lay adjudication systems in other jurisdictions in order to explore the basic idea of what the ideal form of lay adjudication system might be.

The Citizen Judge Act states that:

Where additional investigation into the status of the law's implementation is recognised as necessary three years after the law comes into effect, based on these results, the Government will create the necessary measures so that the system of citizen judges participation in criminal trials can facilitate the lay participation in justice to realise adequately its role as the foundation of our country's judicial system¹⁵².

The clearly necessary measures to evaluate the citizen judge system have not yet been presented. One of the amendments announced in June 2015 was that a case taking an exceptionally long time can be tried by a bench trial¹⁵³. The amendment states again that the system shall be reviewed two years after its promulgation, which is in December 2017. Therefore it is important to analyse the citizen judge system and establish the necessary parameters for these assessments.

Evaluating the citizen judge system can shed light on lay adjudication as a tool for promoting democratic values in the trial procedure in democratic states and contributing to the theoretical understanding of it which has led to an increased respect and belief in the system. Therefore, in this research, I will focus on the citizen judges'

¹⁵²CJA, supra note 3, Supplementary Provisions, art. 8.

¹⁵³Ministry of Justice, 'Revision of the Citizen Judge Act [Kaiseisareta Saibaninho No Gaiyo]' (2015) <<http://www.moj.go.jp/content/001149528.pdf>> accessed 1 June 2015.

function as a democratic institution with a consideration of the impact on criminal procedure and the effects on former citizen judges.

1.4 Definitions

Adequate definitions of terms will be required, especially in a comparative approach. Melossi claimed that there were common difficulties in providing a clear definition of terms and finding uniformity with reference to the nation, system or distinctive issues between countries¹⁵⁴. However, only a firm theoretical basis for the whole of this research will permit the analysis of the citizen judge system from global perspectives. Moreover, a careful and sensitive selection and translation of words, in particular from Japanese to English, will be made.

Lay adjudication trials involve the participation of lay adjudicators in the institution of the decision-making process in criminal matters as a representative panel from local communities¹⁵⁵. Lay adjudicators are normally chosen from the community, and they listen and deliberate over the evidence and the legal and additional information with the support from professional judges and decide the verdict, guilty or not guilty. In some jurisdictions, lay adjudicators also participate in sentencing. As participatory democratic theorists have claimed, citizens' participation in a small part of public life will be the start of promoting civic political participation¹⁵⁶. The direct and indirect forms of civic engagement in the political institutions can be various, such as a voluntary work for local government, and voting as an electoral participation¹⁵⁷. Serving as a lay adjudicator is one of the direct forms of civic participation in the political institution¹⁵⁸. Lay adjudicators as decision-makers especially in criminal cases will produce greater impacts

¹⁵⁴D Melossi, 'The Cultural Embeddedness of Social Control' in Tim Newburn and Richard Sparks (eds), *Criminal Justice and Political Cultures: National and international dimensions of crime control* (Devon; Willian Publishing 2004), 81-2.

¹⁵⁵H Fukurai, 'A Step in the Right Direction for Japan' S Judicial Reform : Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal , Civil, and Administrative Litigation' (2014) 36 Hastings International and Comparative Law Review 517–567, 518.

¹⁵⁶BR Barber, *Strong Democracy: Participatory Politics for a New Age* (Berkeley; University of California Press 1984).

¹⁵⁷RP Adler and J Goggin, 'What Do We Mean by "Civic Engagement"?' (2005) 3 Journal of Transformative Education 236–253.

¹⁵⁸In particular, in the U.S., a right to serve on a jury is considered as an important chance to participate political engagement. See A Amar, 'The Bill of Rights as a Constitution' (1991) 100 Yale Law Journal 1131–1210.

on the verdict, the procedure, the society and the lay adjudicators themselves. The deliberative experience for lay adjudicators will stimulate future civic engagement because of the opportunities to consider public matters¹⁵⁹. Therefore, lay adjudication trials are trials which include ‘an institutionalised citizen deliberation’¹⁶⁰.

Numerous typologies of international lay adjudication systems have been suggested, the content of which varies depending on the research subjects examined. Different researchers have focused on different legal systems and have developed their own particular parameters, thus adding to the confusion¹⁶¹. The cross-national research into lay adjudication systems shows different allocations of actor powers in the procedural rules¹⁶². Researchers have sought to typify different lay adjudication systems with reference to the attributes of these procedural rules. Richert has attempted to reduce the number of basic types by examining the representativeness of the West German lay adjudication system¹⁶³. The types identified are the magistrate, jury, and mixed judge model. A magistrate system has lay volunteers serving as adjudicators for less serious criminal cases and civil cases¹⁶⁴. The magistrates are trained, work fulltime and are paid¹⁶⁵. This minimum typology was expanded by Ivković by adding the lay courts used in the former Yugoslavia for reconciliation to the three types¹⁶⁶. In addition, Jackson and Kovalev divided two models - jury and mixed judge models - into five: the Continental Jury Model, the German Collaborative Court Model, the French Collaborative Court Model, the Expert Assessor Collaborative Court Model, and the Pure Lay Judge Model¹⁶⁷.

¹⁵⁹H Fukurai, ‘Comparative Analysis of Popular Legal Participation in Japan and the US: Differential Perceptions of Actual Jurors and College Students on the System of Lay Participation in Law’ (2009) 33 *International Journal of Comparative and Applied Criminal Justice* 37–41.

¹⁶⁰J Gastil, EP Deess and PJ Weiser, ‘Civic Awakening in the Jury Room: A Test of the Connection between Jury Deliberation and Political Participation’ (2002) 64 *The Journal of Politics* 585–595, 586.

¹⁶¹W Young, N Cameron and Y Tinsley, ‘Juries in Criminal Trials’ (2001), 2, para.1.6.

¹⁶²R Lempert, ‘The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research’ (2007) 40 *Cornell International Law Journal* 477–88, 483.

¹⁶³JP Richert, *West German Lay Judges: Recruitment and Representativeness* (Tampa; University Press of Florida 1983).

¹⁶⁴N Vidmar, ‘Juries and Lay Assessors in the Commonwealth: A Contemporary Survey’ (2002) 13 *Criminal Law Forum* 385–407, 385.

¹⁶⁵SS Diamond, ‘Revising Images of Public Punitiveness: Sentencing by Lay and Professional English Magistrates’ (1990) 15 *Law and Social Inquiry* 191–222, 198.

¹⁶⁶SK Ivkovich, *Lay Participation in Criminal Trials: The Case of Croatia* (Austin and Winfield Publishers; Lanham 1999), 14.

¹⁶⁷JD Jackson and NP Kovalev, ‘Lay Adjudication and Human Rights in Europe’ (2006) 13 *Columbia Journal of European Law* 83–124, 93-9.

In addition, Kovalev presented two major modes in his comparative lay adjudication study focusing on the Russian and the former Republics of the Soviet Union: the jury model and mixed court model¹⁶⁸. He also separated them into two different modes, as the common law/civil law jury model, and the collaborative/mixed court model, respectively, according to the legal traditions and the selection processes.

This research aims to analyse the citizen judge system rather than typify it. In Kovalev's typology, the system appears to be classified within the mixed court model; however, the minimum typology of the lay adjudication systems, the jury model and the mixed judge model, will be focused on in this research in order to give an overview of the existing lay adjudication systems. The jury model, which is also called the 'Anglo-American' model¹⁶⁹, has been adopted in England and Wales and the U.S.¹⁷⁰, while the mixed judge model, which is also called an 'Continental-European' model¹⁷¹, has been adopted in France and Germany. Moreover, the purpose of the international overview is to analyse the Japanese system from a global perspective. The Japanese system is currently only applied in serious criminal cases. Therefore, the role of a magistrate will not be referred to in this research.

I have employed the term democracy in this thesis in a wide sense to relate to the responsibilities of citizens. This is because the lay adjudication system is recognised as a tool to share responsibilities between the state and its citizens. Furthermore, democracy is recognised as a necessary part of normative content in contemporary politics. As Dzur states, democracy can be defined as 'sharing power, breaking up concentrations of

¹⁶⁸NP Kovalev, 2010, *Criminal Justice Reform in Russia, Ukraine and the Former Republics of the Soviet Union: Trial by Jury and Mixed Courts* (Edwin Mellen Press; Lewiston, NY), Ch.2.

¹⁶⁹Dobrovolskaia, *supra* note 2.

¹⁷⁰Other countries which have the jury model are: some African countries (such as, Liberia, Ghana, and Malawi), the Central and South American countries (such as Guyana, Belize and Panama), Canada, Caribbean countries (such as Jamaica, Barbados, and Trinidad, the European countries (such as Belgium, Russia, Ireland, Scotland), Australia and New Zealand, Tonga, Sri Lanka, Hong Kong, and Korea. See, Vidmar, *supra* note 23.

¹⁷¹Other countries which have the jury model are: Austria, Brazil, and Finland. See H Fukurai, 'Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Law Participatory Experience in Japan and the US' (2007) 40 *Cornell International Law Journal* 315–354, 333.

power held by certain families or groups and more equally distributing control, authority, and responsibility regarding collective projects.’¹⁷²

1.5 Methodology

1.5.1 Research Strategy

I began this research project in 2009 in order to explore the issue of whether the introduction of the citizen judge system in Japan might be successful or not. The following are the four key areas of study in order to assess the main question:

1. the targeted democratic principles by which the citizen judge system was set up;
2. the degree to which citizen judges’ participation is obstructed – if at all by the procedural rules;
3. the frequency of the actual use of the citizen judge systems; and
4. the extent to which citizen judges as well as other actors in the criminal proceeding can be considered successful.

The contextual concerns, challenges and constraints in the Japanese criminal justice will lead to the success or failure of the introduction of the new system.

1.5.2 A Socio-Legal Approach

The socio-legal approach is defined by Schiff as the approach which analyses ‘the situation by seeing the part the law plays in the creation, maintenance and/or change of a situation’¹⁷³. This approach was chosen in order to explore the operation of the CJA as well as the impacts of citizen judges. The focus here will be on ‘law in action’, which is a requirement of a social legal approach¹⁷⁴. There are two main reasons why this approach is used: the nature of criminal justice reform and lay adjudication. As Ziegert claimed, ‘the operation of the rule of law cannot be measured on the terms of the legal operations only but must be also observed in the standards and practices that are

¹⁷²AW Dzur, ‘Restorative Justice and Democracy: Fostering Public Accountability for Criminal Justice’ (2011) 14 Contemporary Justice Review 367–381, 378, notes no. 5 .

¹⁷³DN Schiff, ‘Socio-Legal Theory : Social Structure and Law’ (1976) 39 The Modern Law Review 287–310, 287.

¹⁷⁴Ibid.

applied ...¹⁷⁵ As I mentioned earlier, social factors are inevitable in evaluating criminal justice reform. Moreover, the various cultural, economic, and political influences on/by lay adjudicators are essential for an evaluation of the lay adjudication system. Therefore, the socio-legal approach seems to be appropriate for analysing the relationships of the reforms in Japanese society and culture, and the citizen judge system. Munger presented the contextual influence of politics, economics and society on lay participants as decision-makers in the justice system¹⁷⁶.

1.5.2.1 Methods of Data Collection

This research employs a variety of data collection. I have mainly considered the statistical governmental data from Japan and my interview data. Legal and social science methods including some sense of comparative legal method archival research, semi-structured interviews, secondary statistical surveys, and a review of written judgements have been used. Moreover, other data gathering strategies such as analysis of reports of organisations and secondary sources provide a theoretical and initial overview of the issues and challenges of a lay adjudication system and the Japanese criminal procedure. This mixture of methodologies will permit an analysis of the legal system from different angles. For example, the case study approach will lead to an understanding not only of the system itself, but also the relationship between the system and social circumstances that a survey approach would not be able to do¹⁷⁷. In addition, the mixture of methodologies will cover areas in the analysis which the single method approach could not.

1.5.2.2 A Review of Literature and Documentary Data

I undertook an extensive review of research papers and surveys conducted by the governments and academic researchers in the light of lay adjudication systems in various jurisdictions. The literature on lay adjudication is voluminous, and concerns comparative approaches, and it has become greater since international attention has

¹⁷⁵KA Ziegert, 'Systems Theory and Qualitative Socio-Legal Research' in Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Research* (Oxford; Hart Publishing 2005) 49-66, 66.

¹⁷⁶VP Hans, 'Introduction: Citizens as Legal Decision Makers: An International Perspective' (2007) 40 *Cornell International Law Journal* 303-314, 313.

¹⁷⁷M Denscombe, (2010), *The Good Research Guide: For Small-Scale Social Research Project* (4th edn, Open University Press ;Maidenhead), 62.

been paid to new lay adjudication systems in countries, such as Russia, Japan and Korea, as well as concerns about the challenging aspects of lay adjudication.

Firstly, from an archival search of research data over the last years of comparative lay adjudication research and related legislation, an overview will be established in order to analyse the concepts, methodologies, and methods adopted. Secondly, an outline of the existing empirical lay adjudication research was analysed by further archival research of written papers in English or Japanese focusing on the main three phases of the procedures; the selection of lay adjudicators; decision-making procedures in courtroom and the deliberation room; reaching the verdicts.

1.5.2.3 Semi-Structured Interviews

In this research, semi-structured interviews were conducted with both legal professionals, citizen judges, and lawmakers. I interviewed 5 citizen judges, 3 professional judges, 6 defence attorneys, 2 public prosecutors and 2 lawmakers with experience of the citizen judge system.

All interviews were conducted in person. Table 1 confirms the dates of the interviews and their positions.

Table 1: The List of Interviewees

	Positions	Gender	Place	Date	Case
1	Professional Judge	Male	Tokyo	13/05/2011	
2	Professional Judge	Male	Tokyo	14/05/2011	
3	Professional Judge	Male	Osaka	25/05/2011	
4	Citizen Judge	Male	Tokyo	6/05/2011	Homicide
5	Citizen Judge	Male	Tokyo	2/05/2011	Homicide
6	Citizen Judge	Male	Tokyo	13/05/2011	Robbery Resulting in Bodily Injury
7	Citizen Judge	Female	Tokyo	31/05/2011	Rape
8	Citizen Judge	Female	Tokyo	01/06/2011	Counterfeiting currency
9	Public Prosecutor	Male	Tokyo	22/05/2011	
10	Public Prosecutor	Male	Osaka	10/06/2011	
11	Defence Attorney	Male	Tokyo	26/04/2011	
12	Defence Attorney	Male	Tokyo	28/04/2011	
13	Defence Attorney	Male	Tokyo	9/05/2011	

14	Defence Attorney	Male	Tokyo	13/05/2011	
15	Defence Attorney	Male	Osaka	26/05/2011	
16	Defence Attorney	Male	Osaka	26/05/2011	
17	Lawmaker	Male	Tokyo	17/06/2011	
18	Lawmaker	Male	Tokyo	13/06/2011	

I sent emails and letters to the Supreme Court, the Japan Federation of Bar Association, members of the Judicial Reform Council, organisations and academics in Japan to request their cooperation with my research and interviews. Unfortunately, I was not able to gain the support of the Supreme Court. There was not official list or any other way to access people who experienced citizen judge trials, lawmakers or related institutions without governmental support. It was difficult to reach them. However, I received replies from the Japan Federation of Bar Association, the Saiban-in Net, Saiban-in Iranai Undo and members of the Judicial Reform Council, and I asked them to participate in interviews during my fieldwork. Moreover, I asked each interviewee to introduce other possible participants. This is snowball sampling, also called chain-referral sampling, which means that a small initial sample recruits additional research participants, and the sample size grows like a rolling snowball¹⁷⁸. The snowball method is useful in sociological research. According to Voicu and Bobonea, the method is practical to reach ‘vulnerable and more impenetrable social groupings’¹⁷⁹. For example, a snowball sampling technique is often used in research where the subjects are a ‘hidden population’¹⁸⁰, such as gangs, drug users, sex workers or AIDS sufferers¹⁸¹. The main reason for using the snowball method in this research was to explore and build an understanding of direct authentic voices from Japanese society. Snijders claimed that the method can be used to collect ‘a random initial sample’¹⁸². I also expected to develop further insights and discussions by listening to the voices during my fieldwork. As Cohen mentioned, additional advantages of snowball sampling are cost and time

¹⁷⁸ L Goodman, Snowball Sampling, 30 *the Annals of Mathematical Statistics*, 148-170.

¹⁷⁹ M Voicu and A Babonea, ‘Using the Snowball Method in Marketing Research on Hidden Populations’ (2007) 44 *Challenges of the Knowledge Society. Economy* 1341–1351, 1341.

¹⁸⁰ N Cohen and T Arieli, ‘Field Research in Conflict Environments: Methodological Challenges and Snowball Sampling’ (2011) 48 *Journal of Peace Research* 423–435, 427.

¹⁸¹ *Ibid.*

¹⁸² TA Snijders, ‘Estimation on the Basis of Snowball Samples: How to Weight?’ (1992) 36 *Bulletin de Methodologia Sociologique* 59–70.

effectiveness¹⁸³. However, it cannot be denied that there are a few disadvantages of the mentioned as well. One possible disadvantage is uncertain bias or inferences through the chain of referrals. Gyarmathy *et al* point out that there are ‘links’ in various layers between samples since the referrals depend on their social networks¹⁸⁴. This leads to possible non-randomness in the samples. In other words, collected samples could be over- or under-representative of the research subject population. In this research, I tried to collect data as randomly as possible. The selection of interviewees was unbiased and the researcher had no agenda in selecting interview participants; however, probable generalisability of the findings cannot be fully denied. Moreover, the researcher was fully aware of the small sample of data, which is different from statistical data. Research using small samples can illustrate accurate patterns and significant points of research objects as some researchers, such as Krejcie and Morgan claim¹⁸⁵. Therefore, the research results can be a snapshot of the public in Japan and illustrate the reality of the current situation.

One professional judge interviewed for this research was the presiding judge and the other two were co-professional judges. Citizen judges’ backgrounds showed a wide variety. The occupations were mentioned by the respondents included the self-employed, businessmen and women, and a housewife, and the cases which they participated in varied, from homicide to rape cases. Two cases were appealed and three cases were finalised in the total of five cases in which the interviewed citizen judges participated. The defence attorneys who participated in this research had limited experience with citizen judge trials but the professional judges and public prosecutors had acted in several citizen judge trials.

The interviews took approximately 90 minutes each, and all were semi-structured. Each interview was independently conducted in a closed space or public space, which was fairly quiet and private. The aims of the interviews were to examine the activeness

¹⁸³ Ibid, 428.

¹⁸⁴ VA Gyarmathy, LG Johnston, and others, ‘A Simulative Comparison of Respondent Driven Sampling with Incentivized Snowball Sampling - The “strudel Effect”’ (2014) 135 *Drug and Alcohol Dependence* 71–77.

¹⁸⁵ R V Krejcie and W Daryle, Morgan, ‘Determining Sample Size for Research Activities’ (1970) 30 *Educational and Psychological Measurement* 607–610.

of citizen judges, their ability to understand the information provided during the court procedures, the impact of citizen judges on the trial process and the whole criminal justice procedure, and the interviewees' satisfaction with their input and confidence in the citizen judge system after their experiences. Appendix 1, 2 and 3 contains the interview questions.

I began each interview with a presentation of my aims and role as a researcher and the purpose of my research. After that, I started asking each exactly the same questions. However, if necessary, I added an extra questions depending on the interviewees' responses. I adopted the semi-structured format because not only does it help to analyse answers to the same questions, which allows a comparison of their perspectives, but it also leads to open and flexible interview questions, which may develop and discover original factors about the citizen judge system¹⁸⁶. Moreover, the open ended questions were asked after the list of questions, and the expressions and content of the follow-up question varied. I believe that both standardisation and openness were important because the situations will provide deep insights¹⁸⁷ about the citizen judge system.

I tried to interview in a friendly and informal environment because most interviewees worried about the strict and vague confidentiality setting of the CJA, which is a contested feature of the lay adjudication system. The confidentiality will be discussed in Chapter 4 and 5, but for example, in the English jury system, this kind of research is a violation and contempt of court¹⁸⁸. On the other hand, the U.S. system has a relatively lenient confidentiality policy¹⁸⁹. Because of confidentiality, I faced difficulties of access to former citizen judges and legal professionals.

In addition, it should be emphasised that confidential information is fundamental to expand the networks and to gain reliable information from the interviewees. For example, some interviewees emphasised that their interviews were personal, and their

¹⁸⁶T Wengraf, *Qualitative Research Interviewing: Biographic Narrative and Semi-Structured Methods* (London; Sage 2001), 69.

¹⁸⁷M Henn, M Weinstein and N Foard, *A Short Introduction to Social Research* (London; SAGE 2006), 210.

¹⁸⁸The Contempt of Court Act 1981 [England], art. 8.

¹⁸⁹M Chesterman, 'OJ and the Dingo: How Media Publicity Relating to Criminal Cases Tried by Jury Is Dealt with in Australia and America' (1997) 45 *American Journal of Comparative Law* 109–148.

opinions did not represent the views of the institutions to which they belonged. Therefore, before interviews started, the interviewees and I both signed a commitment form referring to the aim of research, confidentiality and I offered anonymity to the interviewees and their detailed information in my thesis was protected.

Records of the interviews were made by an audio-recording device with the consent of the interviewees. However 5 out of the 18 refused to allow audio recording and, therefore I made simultaneous hand written field notes. Both types of record were written up in full after the interviews. The tape and note of the interviews were stored on a locked shelf.

1.5.3 Limitations

The comparative examinations in this thesis will engage with a number of disparate lay adjudication systems and will suggest overarching arguments. The main limitations encountered during the conduct of the research was the restricted access to citizen judges and legal professionals who experienced citizen judge trials. This is because of the existence of confidentiality provisions and the lack of official support from the government. In Japan research of the citizen judge system is strictly regulated by law. The strict confidentiality imposed on the citizen judges prevents direct access to them, and influenced the context of the interview questions. Lay adjudicators cannot talk about the contents of discussion in a deliberation room¹⁹⁰. In addition, there is only very limited access to the administration of justice in Japan. Cost concerns influenced the duration of my time in Japan, the number of interviewees, and access to Japanese materials.

The questions the participants are asked focus on their opinions from their experiences of a citizen judge system. As Matthews, Bridgeman and Briggs illustrated in their research about six English courts, the relationships between satisfaction, confidence and effectiveness are correlated¹⁹¹. These elements are also closely connected to the legitimacy of lay adjudication systems as well as criminal justice systems. Therefore, although this research focuses on considerations of legitimacy in a

¹⁹⁰CJA, supra note 3, art. 108.

¹⁹¹ R Matthews, DL Bridgeman and D Briggs, 'Jurors ' Perceptions, Understanding , Confidence and Satisfaction in the Jury System : A Study in Six Courts System' (London; 2004).

citizen judge system through democratic principles, interview questions were framed to examine the satisfaction of interviewees in this research to measure not only their satisfaction but also confidence and effectiveness. Hough and Roberts suggested the lack of knowledge about crime and criminal justice systems and unrealistically high expectations for a criminal justice system as possible influences on public dissatisfaction in the justice system¹⁹². In addition, Miller and Sloan refer to the existence of unconfirmed factors influencing jurors' satisfaction in their research¹⁹³, while there are two apparent factors: 'perceptions of trial characteristics and by the extent of participation in the jury system'¹⁹⁴. Therefore, it is possible that factors that are not related to a citizen judge system influence participants' satisfaction. In other words, interviewees in this study may be satisfied with their experience despite no impact on/by a citizen judge system.

1.6 Organisation of the Thesis

This thesis is organised into six chapters. In chapter two, I shall explore the relationship between the principles of fair trial and of democracy, and how they are defined in current society. Specifically, I will consider three points related to the fair trial principle: due process, procedural justice, and open justice. These principles are also interrelated with the democratic principles fundamental to lay adjudication in criminal procedures. The purpose of Chapter two is to establish the theoretical criteria within the current democratic society in order to clarify the reasons why lay adjudicators' participation in criminal procedure is aspired to. Moreover, in order to be able to ascertain whether the introduction of the citizen judge system has been successful or not, I will review the existing international lay adjudication research and the UNODC's standard and set evaluative items for the practice of the citizen judge system following an examination of common concerns about lay adjudicators' participation,

¹⁹² M Hough and J V. Roberts, 'Public Confidence in Justice: An International Review' (London; 2004).

¹⁹³ JL Miller and JJ Sloan, 'Perceptions of Jury Duty: Satisfaction and Overall Impression' (1987) 12 American Journal of Criminal Justice 24–44.

¹⁹⁴ Ibid, 24.

In Chapter three, I will turn to the Japanese contemporary criminal trial procedure to discuss the principle of the equality of arms, the jurisprudence principle (e.g. of the European Court of Human Rights) which is part of the right to a fair trial. My main focus in this chapter will be the consequences of the impact of the introduction of the citizen judge system. The evaluation items, which were considered in chapter two, acknowledges that the practice of the lay adjudication system will be affected by the legal cultures which greatly influence the role of actors in the criminal trial procedures. Therefore, evaluating the practice of the lay adjudication system requires an understanding of Japanese traditional attributes. They may restrict lay participations and emphasise elitism and professionalism in the procedure. Although the judicial reform of 1999 claimed to democratise the criminal justice system, traditional attributes may have been restored in the procedure. Whatever the intentional goal of the citizen judge system, this reconceptualization of lay participation is an important evolution in the history of the Japanese criminal procedure. It is the moment at which the equality of arms has emerged as the core principle of the procedure.

In Chapter four, I examine the Citizen Judge Act using textual analysis in the first part to determine whether or not the citizen judge system has been successful in injecting democratic values into criminal procedure. In this chapter, my main focus is to comprehend the citizen judges' responsibilities and duties in the criminal trial procedure. First I shall explore the selection process for citizen judges. Second, I shall turn to the roles of citizen judges in the deliberation and sentencing processes. Finally, this chapter turns to the responsibilities of the actors: citizen judges, professional judges, the prosecution, and the defendant.

In Chapter five, I will look at the practice of the citizen judge system from 2009. This chapter will begin by surveying the practice in the Supreme Court. Secondly, I shall ask what the impact of the citizen judge system has been on the citizen judges themselves, legal professionals and society. Specifically, I shall look here at the growing problem of the self-confidence of citizen judges in terms of their competence as well as their representativeness. Finally, I shall turn to the analysis of written judgements regarding homicide cases in citizen judge trials. This chapter suggests the need for more transparency in the citizen judge system to allow observation, and evaluation for serious

research. This chapter looks at the valuable but limited exercise of the citizen judges' participation and potential possibilities for the shift to more emphasis on active citizen judges' participation.

In conclusion, Chapter 6 draws together the explored issues explored and the findings of the study before providing recommendations for the development of citizen judges' participation in future reforms. Citizen judges should actively participate in criminal trials and independently determine their decisions in cooperation with co-citizen judges and professional judges in order to promote legitimacy in the criminal justice system.

Chapter 2 LAY ADJUDICATION SYSTEMS AND DEMOCRACY

Introduction

The citizen judge system was designed to contribute to the development of Japanese criminal procedure in the twenty first century and to raise public awareness of the judiciary system by introducing lay adjudicators' participation and more adversarial principles. The drafting of the Citizen Judge Act 2002 (CJA) was influenced by Western systems, such as those of the England and Wales, Germany, France and the U.S., rather than the Japanese Jury Act of 1928¹. Moreover, the introduction of the citizen judge system has been considered as the first step to increase lay participation in the criminal justice system owing to the idea that 'Japanese citizens feel that the judiciary system is of little relevance to their lives, however, this has to change and the citizens have to take their share of responsibility for the functions of the judiciary'².

To discover whether the introduction of the citizen judge system has been successful or not, which is the central concern of this thesis, this chapter examines the theoretical perspectives of lay adjudication for promoting democratic values in criminal proceedings, which encourage lay participation. Moreover, relationships between lay adjudication, democratic values, and criminal proceedings are discussed. It is organised into two sections. Section 2.1 seeks to determine why lay adjudication is necessary or desirable in criminal cases in the light of concepts of democracy. A set of important questions may be raised here about the relationship between the concepts of democracy and lay adjudication: why do we need lay participation in the criminal procedure? What do we expect from lay participants as outcomes? In examining the principles underpinning lay adjudication, this section considers the theoretical backgrounds to lay adjudication in criminal cases to study the relationship between the concepts of democracy, a fair trial, and legitimacy. In addition, a comprehensive

¹The Jury Act seemed to be considered as an inappropriate system rather than an exemplary system. The Japanese government organised the observation travel tour about the four legal systems. This will examine in Chapter 3.

²K Sato, M Inoue, and T Morio, *The Judicial System Reform [Shiho Seido Kaikaku]* (Yuhikaku; Tokyo 2002), 332-3.

review of both favourable and critical aspects of lay adjudication systems will be presented by showing what factors should be considered in its evaluation.

Section 2.2 is concerned with the key issues of lay adjudication research in order to point out the common challenges which researchers and governments have considered. This section reviews the literature of international lay adjudication research especially in comparative studies, as well as the UN standards before proposing a useful way of evaluating the citizen judge system.

2.1 Principles of a Fair Trial and Democracy in Criminal Cases

The theoretical perspectives of lay adjudication will help to determine the standards by which to assess whether a lay adjudication system is successful or not. As Denzin suggests, the great importance of a consistent theory, closely related to methodology³, cannot be emphasised enough, in particular, in sociological research in order to comprehend events and predict future events⁴. Rosenfeld also stresses the importance of criminal justice research with reference to the underdeveloped theory behind other policy research because of the emphasis on the relationship between policy and practice⁵. Criminal justice research often appears to be merely descriptive and practical. The functional institutional analyses of society have been developed on the basis of the ideas such as Durkheim's social structures, Ehrlich's social controls, and Parsons' social systems with focusing on the mutual interferences between the law and society⁶. Although Turner points out Durkheim's tendency to focus on societal disintegration and Parsons' functionalism, whereby he perceives society as a system consisting of interconnected parts leading to the conception of consider criminal justice 'as a distributive system in which various inputs are processed and in which outputs could be measured and compared.'⁸

³He shows the arguments which should be more valued, theory or methodology. See K Denzin, *The Research Act in Sociology: A Theoretical Introduction to Sociological Methods* (London; Butterworths 1970), 7.

⁴JH Turner, *The Structure of Sociological Theory* (Homewood, IL; The Dorsey Press 1974), 2.

⁵R Rosenfeld, 'Connecting the Dots: Crime Rates and Criminal Justice Evaluation Research' (2006) 2 *Journal of Experimental Criminology* 309–319, 310.

⁶D Schiff, 'Socio-Legal Theory: Social Structure and Law' (1976) 39 *The Modern Law Review* 287–310, 292.

⁷J Turner, 'A Macro-Level Functional Theory of Societal Disintegration' (1996) 16 *International Journal of Sociology and Social Policy* 5–36, 5-6.

⁸R Vogler, *A World View of Criminal Justice* (Aldershot; Ashgate 2005), 6.

Distributive justice means fairly sharing both benefits and burdens by society. According to Rawls' idea of *behind the veil of ignorance*, lay people, who do not know about the outcomes in evaluating social policies or resource allocations, can be fair⁹, in addition, '[b]asic fairness among people is given by their being represented equally' in the democratic society¹⁰. The concepts of fairness in criminal trials should be a key, immovable foundation and should not be imperceptible to the accused. In addition, fairness is important not only from the perspective of the defendant but also of the society or other people involved. Rawls presents the concepts of 'justice as fairness' with the basic idea that citizens are free and equal¹¹. The concepts are '[e]ach person has an equal right to a fully adequate scheme of equal basic rights and liberties ...'¹² His concepts of fairness and justice is based on the liberal principle of democracy¹³, which values citizens' freedom and equality, and encourages the introduction of the democratic concepts into the criminal justice system and along with respect for lay adjudicators as potentially viable promoters of fairness and justice.

2.1.1 Principles of a Fair Trial and Other Principles

Criminal justice policy is related to the 'practice of political life', which clarifies different levels of relationship in the political arena, such as 'the capacity of a state to regulate the behaviour of its citizens' and the aims and restrictions of governmental institutions¹⁴. The evidence would suggest that the motivation for democratising the criminal justice system by introducing a lay adjudication system is often related to the political shift towards democracy, as historical examples show, such as, the French Revolution and the widespread lay adjudication systems within European countries in the seventeenth century¹⁵. Studies of transitions from authoritarianism to democracy in the democratisation of governmental institutions and practices illustrate the significant shifts towards the emphasis on lay

⁹J Rawls, *A Theory of Justice* (Oxford; Oxford University Press 1999), 118.

¹⁰J Rawls, *The Law of Peoples* (Harvard University Press; Cambridge 1999), 115.

¹¹W Sadurski, 'Law's Legitimacy and "Democracy-Plus"' (2003) 26 *Oxford Journal of Legal Studies* 377–409, 402.

¹²J Rawls, 'Justice as Fairness: Political Not Metaphysical' 14 *Philosophy & Public Affairs* 223–251, 227.

¹³M Clayton, *Justice and Legitimacy in Upbringing* (Oxford; Oxford University Press 2006), 14.

¹⁴A Parkin, 'Liberal Democracy and the Politics of Criminal Justice in Australia' (1998) 44 *Australian Journal of Politics and History* 445–469, 445.

¹⁵JH Langbein, 'The English Criminal Trial Jury on the Eve of the French Revolution' in Antonio Padoa Schioppa (ed), *The Trial Jury in England, France and Germany* (Berlin; Duncker & Humblot 1987) 13–39.

participation in criminal justice¹⁶. This also leads to shifts in the concept of legitimacy in criminal justice, potentially brought about by the introduction of a lay adjudication system¹⁷.

Legitimacy refers to 'a property of an authority or institution that leads people to feel that that authority or institution is entitled to be deferred to and obeyed.'¹⁸ There are two senses of legitimacy: descriptive and normative, as Meyer point out¹⁹. The approval of people belonging to the same group is believed to lead to legitimacy of norms and institutional arrangements in the dominant descriptive sense, while in the normative sense certain specified conditions are believed to lead to legitimacy²⁰. It may be regarded a way to justify political control, for example. Thompson claims that 'the legitimacy of the rule of law provides a significant political weapon' owing to the influences of legitimacy such as the setting of arbitrary discretion and legal values²¹. Legitimacy in criminal justice has a core role in 'cooperative social relations' to define what 'wrong' is²².

Following an examination of legitimacy and criminal justice, Mark Moore noted the interdependent relationship between legitimacy, moral credibility, technical efficiency, fairness, and procedural restrictions²³. Moore concluded that there is a need '[t]o make the criminal justice system more efficient and effective and make it more fair and just.'²⁴ There is a wealth of evidence available to substantiate the claim of need for criminal justice reform to target the maintenance of both fairness and also seek efficiency²⁵. However, fairness in

¹⁶Taman.

¹⁷Ibid, 35.

¹⁸J Sunshine and TR Tyler, 'The Role of Procedural Justice and Legitimacy in Shaping Public Support for Policing' (2003) 37 Law and Society Review 513–548, 514.

¹⁹L Meyer, 'Introduction: Legitimacy, Justice and Public International Law, Three Perspectives on the Debate', *Legitimacy, Justice and Public International Law* (Cambridge; Cambridge University Press 2009), 2.

²⁰In a normative sense, the dominant power of executive power-holders lead to legitimacy. See A Bottoms and J Tankebe, 'Criminology: Beyond Procedural Justice: A Dialogic Approach To Legitimacy in Criminal Justice' (2012) 102 Journal of Criminal Law & Criminology 119–170 Bottoms and Tankebe.

²¹EP Thompson, *Whigs and Hunters: The Origin of Black Art* (London; Allen Lane 1975), 258-9.

²²Bottoms and Tankebe, *supra* note 20, 151-2.

²³MH Moore, 'Notable Speech: Legitimizing Criminal Justice Policies and Practices' (*The Perspectives on Crime and Justice Series*, 1997) <<https://www2.fbi.gov/publications/leb/1997/oct973.htm>> accessed 10 August 2015.

²⁴Ibid.

²⁵They appear to be long-term and ultimate targets for many legal systems in history as well as present. See Ministry of Justice [England and Wales], 'Transforming the Criminal Justice System' (2014) <https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/330690/cjs-strategy-action-plan.pdf> accessed 23 August 2015; The Rt Hon Sir Brian Leveson, 'Review of Efficiency in Criminal

criminal justice must be a higher priority than efficiency. International treaties²⁶ and domestic legislature²⁷ enshrine the right to a fair trial and its requirement are stated therein. For example, the European Convention on Human Rights (ECHR) states:

*In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly but the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society ...*²⁸

In addition, the ECHR article 6, section 3 states, in relation to the minimum rights of the accused, a fair trial should guarantee the following factors: equality of arms of the actors in the trial through the appropriate conditions, such as prompt and understandable information and enough access and preparation to for the defence²⁹. In other words, the ideal form of a fair trial is that of a judgement which is reached by unbiased and unprejudiced persons on the basis of reliable evidence equitably presented in open court³⁰. There is considerable discussion about whether lay adjudication trials fulfil the requirements³¹, moreover, the case law of the European Court of Human Rights, such as in *Taxquet v Belgium*³², provided heated discussions about domestic lay adjudication trial procedures regarding the relationship between the right to a fair trial and a lay adjudicators' decision³³. The requirements of a fair trial are linked to a range of beliefs, for example, the belief in accountability and legitimacy in legal procedures with free access to the courts by the public³⁴. Moreover, legitimacy is closely

Proceedings' (2015) <<https://www.judiciary.gov.uk/wp-content/uploads/2015/01/review-of-efficiency-in-criminal-proceedings-20151.pdf>> accessed 23 August 2015.

²⁶For example, the Article 6 of the European Convention on Human Rights; Article 10 of the Universal Declaration of Human Rights; and Article 14 of the International Covenant on Civil and Political Rights.

²⁷The Sixth Amendment to the United States Constitution; and Section 11 of the Canadian Charter of Rights and Freedoms.

²⁸The European Convention on Human Rights (ECHR) 1950, art. 6, sec. 1.

²⁹Ibid, sec. 3.

³⁰L F Powell, 'The Right to a Fair Trial' (1965) 51 American Bar Association Journal 534-538, 534.

³¹M Coen, "'With Cat-Like Tread": Jury Trial and the European Court of Human Rights' (2014) 14 Human Rights Law Review 107-131.

³²*Taxquet v Belgium* Application No 926/05, Judgment, 16 November 2010.

³³M Hunt, *Using Human Rights Law in English Courts* (Oxford; Hart Publishing 1997), 198.

³⁴K Biber, 'Inside Jill Meagher's Handbag: Looking at Open Justice' (2014) 39 Alternative Law Journal 73-77, 73.

linked to procedural fairness. Therefore, unbiased and unprejudiced public participation could underpin legitimacy in legal procedures and lead to a fair trial.

2.1.1.1 Procedural Fairness and Procedural Justice

The evaluation of legitimacy can be based on procedural fairness³⁵. The current belief in procedural fairness relies on the idea that ‘whether a procedure is fair depends in large part on whether the participants feel satisfied with its fairness or believe it to be fair’³⁶. In other words, in terms of the self-interest of individuals, the outcomes and actual content of policies, the fairness of procedure and the implementation of policies can be evaluated³⁷. This can be criticised because of the subjective psychological perspective of people’s performance. Gibson suggests that if a procedure is perceived to be fair, the decisions are more acceptable³⁸. Procedural justice is also whereby the litigants’ satisfaction is strongly enhanced by the fairness of legal procedures³⁹. Moreover, people are entitled to ‘legitimate expectations’⁴⁰ under established institutional rules⁴¹, as Rawls points out. Procedural justice is the understanding that the fair treatment of citizens overlaps with human rights concerns, as Goldstein points out:

If a procedural system is to be fair and just, it must give each of the participants to a dispute the opportunity to sustain his [or her] position. It must not create conditions which add to any essential inequality of position between the parties but rather must assure [sic] that such inequality will be minimized as much as human ingenuity can do so⁴².

³⁵Sunshine and Tyler, 18, 535.

³⁶RG Bone, ‘Agreeing to Fair Process: The Problem with Contractarian Theories of Procedural Fairness’ (2003) 83 Boston University Law Review 485–552, 506.

³⁷GÓ Erlingsson, J Linde and R Öhrvall, ‘Not so Fair after All? Perceptions of Procedural Fairness and Satisfaction with Democracy in the Nordic Welfare States’ (2014) 37 International Journal of Public Administration 106–119, 107.

³⁸JL Gibson, ‘Understandings of Justice: Institutional Legitimacy, Procedural Justice, and Political Tolerance’ (1989) 23 Law & Society Review 469–496, 472-3.

³⁹Thibaut and Walker, *Procedural Justice: A Psychological Analysis*.

⁴⁰Rawls, *supra* note 9, 72-4.

⁴¹*Ibid*, 77-9.

⁴²AS Goldstein, ‘The State and the Accused: Balance of Advantage in Criminal Procedure’ (1960) 69 The Yale Law Journal 1149-99, 1192.

In short, procedural justice concerns human rights values and the impacts of citizens' evaluations of justice used by the legal authorities and institutions, as Tyler has indicated⁴³. In addition, evaluation can be by the criterion proposed by Thibaut and Walker: the fairness of individual treatment by the legal authorities and institutions⁴⁴. This shows the importance of the relationship between the state and citizens in the judicial decision-making process. Procedural justice and distributive justice, which require a sense of fairness, play an influential role in the level of satisfaction of citizens (including litigants) with the authorities⁴⁵. Moreover Reynolds and Shelley point out that procedural justice includes open access to the authorities, equal representation and unbiased constraints on the legislative and decision making process⁴⁶. Open access to the legal authorities, which is part of procedural justice, seems to be derived from a belief in open justice.

2.1.1.2 Open Justice

Open justice is the requirement of a fair trial. Open justice requires the courts to be open to the public. The openness and transparency to the public as well as each party's interests promote fairness, according to Southgate and Grosvenor⁴⁷. For instance, the classical belief in open justice in England can be found in the provisions of relevant institutions allowing public access to trials and the right of public access to court files⁴⁸. In this respect, open justice requires wide permissible ranges of openness and transparency in courts, including full access to the courts by the public, and the filming and broadcasting of cases, as well as the transparency of criminal proceedings themselves. The modern applications, as well as the arguments about these principles, can be found in the visual and aural elements of the broadcasting of legal proceedings⁴⁹. On the other hand, some room for secrecy will also be valued in the interests of fairness. Secrecy is allowed in a fair trial, for example, by Article 14

⁴³TR Tyler, 'What Is Procedural Justice?: Criteria Used by Citizens to Assess the Fairness of Legal Procedures' (1988) 22 *Law and Society Review* 103–136.

⁴⁴J Thibaut and others, 'Procedural Justice as Fairness' (1973) 26 *Stanford Law Review* 1271-1290; J Thibaut and L Walker, 'A Theory of Procedure' (1978) 66 *California Law Review* 541–566.

⁴⁵J Casper and TS Tyler, 'Procedural Justice in Felony Cases' (1988) 22 *Law and Society Review* 483–507.

⁴⁶DR Reynolds and FM Shelley, 'Procedural Justice and Local Democracy' (1985) 4 *Political Geography Quarterly* 267-288, 285.

⁴⁷P Southgate and T Grosvenor, 'Confidence in the Criminal Justice System - A Qualitative Study' (London; 2000).

⁴⁸J Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford University Press 2002), 1-3.

⁴⁹E Thompson, 'Does the Open Justice Principle Require Cameras to Be Permitted in the Courtroom and the Broadcasting of Legal Proceedings?' (2011) 3 *Journal of Media Law* 211–236.

of the International Covenant on Civil and Political Rights 1966 which declares that secrecy is possible when necessary to protect 'morality, public order or national security' and privacy issues⁵⁰. Moreover, if there was no limit to public assessment of the process of arriving at verdicts, including the evidence and deliberations, this could create confusion about the general propriety of criminal verdicts.

2.1.1.3 Due Process

Jones points out significant aspects of a fair trial which are necessary to protect the rights of the accused⁵¹. A due process system that values human rights includes the rights of the accused⁵². In this respect due process is a safeguard for defendants against unlawful convictions or the prejudicial exercise of judiciary discretion⁵³. Procedural due process requires fair and impartial adjudication. In addition, according to Serio's study, due process is the way to ensure justice in civil liberties⁵⁴ from the principle of the right to a fair trial. Zander and Henderson suggests that lay adjudicators appear to find the legitimacy of the criminal justice system in the adherence to due process⁵⁵. For example, a fair trial consists of due process and its further assessment by the jury in the U.S. courts' recognition⁵⁶. In this sense, the Lisenba case⁵⁷ showed that due process rights equal the right to a fair trial for the protection of innocent persons. Thus, the principle of due process is a part of the concept of a fair trial.

The interdependent relationship between democracy, legitimacy and fairness is also derived from interconnected principles. The following section will explore the concept of lay adjudication in this context, focusing on the principles of democracy.

⁵⁰UN General Assembly, *International Covenant on Civil and Political Rights*, 16 December 1966, United Nations, Treaty Series, vol. 999, p. 171, available at: <http://www.refworld.org/docid/3ae6b3aa0.html> [accessed 19 August 2015], Section 1.

⁵¹I Jones, 'Still Just Rhetoric? Judicial Discretion and Due Process' (2011) 32 *Liverpool Law Review* 251–273.

⁵²HL Packer, 'Two Models of the Criminal Process' (1964) 113 *University of Pennsylvania Law Review* 1, 13–4.

⁵³Jones, *supra* note 51.

⁵⁴H-E Sung, 'Democracy and Criminal Justice in Cross-National Perspective: From Crime Control to Due Process' (2006) 605 *The ANNALS of the American Academy of Political and Social Science* 311, 311.

⁵⁵M Zander and P Henderson, 'The Royal Commission on Criminal Justice: Crown Court Study' (London; HMSO 1993).

⁵⁶SC Serio, 'A Process Right Due? Examining Whether a Capital Defendant Has a Due Process Right to a Jury Selection Expert' (2004) 53 *American University Law Review* 1143–1186, 1159 footnote 100; DJ Zimmerman, 'Civil Contemnors, Due Process, and the Right to a Jury Trial' (2003) 3 *Wyoming Law Review* 205–232.

⁵⁷*Lisenba v. People of the State of California*, 314 U.S. 219 (1941).

2.1.2 Principles of Democracy

The introduction of a lay adjudication system has been considered by many as a symbolic democratising tool underpinning the legitimacy of the criminal justice system⁵⁸. There are a variety of reasons why lay adjudication is considered to legitimate the verdict and the criminal justice system and why support for a lay adjudication system can be justified in terms of democratic values. Therefore, the Japanese judicial reformers may well have expected the same influences on the Japanese criminal justice reforms from the introduction of the citizen judge system. It is helpful to examine the theoretical perspectives relating to the democratic principles introduced into the criminal justice system.

There is no clearly accepted definition of the concept of democracy⁵⁹ because it implies complex measures not only for various kinds of collectives but also of values and rights². Lauth presents a minimal definition of democracy as:

*a form of domination based on the rule of law, which makes possible, for all of the citizens, self-determination in accordance with the notion of the sovereignty of the people, ...*⁶⁰

In addition, he claims this should be achieved by 'free and thus competitive and fair procedures' where there is lay participation in political decision-making⁶¹. In other words, the normative democratic values are citizens' freedom, equality, and rights⁶² in a self-governing society in which the collective of citizens' interests are the main influence, and moreover, these features are protected by legitimate procedures⁶³.

⁵⁸H Fukurai, K-W Chan and S Miyazawa, 'Introduction to the Special Issue: The Future of Lay Adjudication and Theorizing Today's Resurgence of Civic, Legal Participatory Systems in East and Central Asia' (2010) 38 International Journal of Law, Crime and Justice 141–148.

⁵⁹Democracy has 'always questionable identity' in R Foqué, 'Criminal Justice in a Democracy: Towards a Relational Conception of Criminal Law and Punishment' (2008) 2 Criminal Law and Philosophy 207–227, 211.

⁶⁰H Lauth, 'Informal Institutions and Democracy' (2000) 7 Democratization 21–50, 23.

⁶¹Ibid.

⁶²D Held, 'What Should Democracy Mean Today?', *The Polity Reader in Social Theory* (Cambridge; Polity Press 1994).

⁶³S Huntington, 1991, *The Third Wave: Democratization in the Late Twentieth Century* (University of Oklahoma Press ;Norman); N Bobbio, 'The Future of Democracy', *The Polity Reader in Social Theory* (Cambridge; Polity Press 1994).

According to Habermas' discourse theory, equal autonomy should be satisfied through the democratic procedures of the legislation.⁶⁴ He also claims that modern legal systems are construed based on the principle of individual rights with the presumption that human rights legally enable the citizen's practice of self-determination, moreover, he believes the citizens are conferred with basic rights, including the right to act in order to ensure legal protection and the right to equal opportunities to participate in the process of forming an opinion⁶⁵.

Equality and freedom have an ultimately interdependent relationship within liberalism, moreover, libertarians will 'demand equality with respect to an entire class of rights and liberties.'⁶⁶ From this aspect, each citizen should have the opportunity to develop and register their preferences and also have an impact on political preferences from the concept that democracy becomes valued as a result of the liberty freedom of expression or even political equality⁶⁷. Moreover, as a classical socialist, Morris has indicated that society without public consensus, which acts as a tool of action, cannot be a true society, which is also supported by the normative ideal of democracy as collective self-determination⁶⁸. In short, the core interrelated fundamental concepts of citizens' freedom, equality and rights in contemporary democratic societies make citizens, as a collective body, share authoritative power with the governing political authority.

Legitimacy may be regarded as a reflection of 'the appropriate balance between the power holders and its recipients'⁶⁹. On this ground, from the democratic perspective, criminal justice should actively shape the relationship between the state and its citizens, both instrumentally by enforcing rules and roles, and expressively by applying them⁷⁰. In the lay adjudication

⁶⁴J Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Philosophy* (Cambridge; Polity Press 1996).

⁶⁵J Habermas, *Jugen Habermas on Politics and Society* (S Seidman ed, Boston; Beacon Press 1989); M Rosenfeld, 'Can Rights, Democracy, and Justice Be Reconciled through Discourse Theory-Reflections on Habermas's Proceduralist Paradigm of Law' (1995) 17 *Cardozo L. Rev.* 791–824.

⁶⁶R Levitas, 2004, 'Beyond Bourgeois Right: Freedom, Equality and Utopia in Marx and Morris' 9 *The European Legacy* 605–618, 614.

⁶⁷T De Luca, 2007, 'Free Speech, Political Equality, and Campaign Finance Reform: A Paradox for Democracy?' 29 *New Political Science* 145–166, 162.

⁶⁸A Norrie, E Darian-Smith and P Fitzpatrick, 'From Law to Popular Justice: Beyond Antinomism' (1996) 5 *Social and Legal Studies* 383–404.

⁶⁹R Henham, 'Penal Ideology, Sentencing and the Legitimacy of Trial Justice' (2011) 57 *Crime, Law and Social Change* 77–98, 78 footnote 2.

⁷⁰VM Weaver, JS Hacker and C Wildeman, 'Detaining Democracy? Criminal Justice and American Civic Life' (2013) 651 *The ANNALS of the American Academy of Political and Social Science* 6–21, 10.

system, the citizens have the right to engage in the criminal justice process with regard to legitimating both the verdict and the criminal justice system.

2.1.3 Democratic Principles and a Lay Adjudication System

The duty of lay adjudicators is to be present in the courtroom and to express their opinions by attending the criminal procedures as a part of a political institution. The belief in a lay adjudication in criminal cases is anchored not only in the interconnected principles of the right to a fair trial, but also and mainly by democratic principles. The benefits expected by the function of lay adjudication include a safeguard against corruption, and a tool for public scrutiny and the promotion of citizens' trust in the authorities. Foqué shows that the principle of lay adjudication and democracy have a '*co-original* or *equiprimordial*' backbone. His historical analysis of the ancient Athenians' concept of democracy, and its development shows the co-existence of principles of democracy and rule of law⁷¹. In addition, in the classical definition of democracy, decision-making based on direct participation brings consensus, according to Schmitter and Karl⁷². The importance of public consensus as a tool of action cannot be overemphasised in a democratic society. Morris points out that a true society cannot be realised without public consensus⁷³. In short, the core interrelated fundamental concepts of citizens' freedom, equality and civil rights enable citizens, as a collective body, to advocate their preferences and share authoritative power with the political authority.

With respect to democratic principles, therefore, lay people should directly participate in the criminal justice system. Lay adjudication is often considered to be a protection against state power or corrupt officials through the ability to review the application of repressive laws by means of lay adjudicators' common sense and community values, and direct participation in the administration of justice⁷⁴. In a political social study, Yarez defines participatory democracy as institutional social reforms by means of another system of political

⁷¹R Foqué, 2008, 'Criminal Justice in a Democracy: Towards a Relational Conception of Criminal Law and Punishment' 2 Criminal Law and Philosophy 207–227, 221.

⁷²PC Schmitter and TL Karl, 1991, 'What Democracy Is. . . and Is Not' 2 Journal of Democracy 75–88, 77.

⁷³BM Morris, 'Something Upon Which We Can All Agree: Requiring a Unanimous Jury Verdict in Criminal Cases' (2001) 62 Montana Law Review 1–58.

⁷⁴J Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (New York; BasicBooks 1994).

participation, in which representative groups' preferences are presented⁷⁵. In this respect, lay adjudication is regarded as a form of participatory democracy expressing the 'voice of the people'⁷⁶ in the decision-making process of the state, and enforcing popular sovereignty.

2.1.3.1 Participatory Democracy

Participatory democracy involves two main factors: a responsible function to show citizens' self-interests, and the concatenation between citizens in a community⁷⁷. In this sense, as Darbyshire explains, a lay adjudication system is a 'symbol of participatory democracy'⁷⁸. The simple forms of political participation by citizens are voting and attending public hearings and public group activities. These acts promote citizens' political involvement, and educate them as well as administrators. As Weber argues, direct democratic participation brings more human values into political life⁷⁹. Moreover, Wilson points out that citizen participation in the political process creates a fundamental principle leading to their deliberative integration in political arenas as well as in the judiciary⁸⁰. For example, Dzur emphasised the need for lay adjudication in criminal justice in his study of participatory democracy in the American jury system as an institution of government⁸¹. From his 'integrationists' viewpoint, the courtroom is the place where discourse and socio-political values are established, and lay participation in the criminal justice system humanises the highly professionalised and remote politicians and officials by its 'rational disorganisation' attributes⁸². In addition, in a wider sense of the right to political participation, lay adjudication is recognised as promoting civil and political rights through direct participation in the government and application of the law⁸³. Therefore, a lay adjudication panel is regarded as a judicial and political institution. Dzur also contends

⁷⁵CJN Yarez, 2004, 'Participatory Democracy and Political Opportunism : Municipal Experience in Italy and Spain' 28 *International Journal of Urban and Regional Research* 819–838, 820.

⁷⁶J Fishkin, *The Voice of the People* (New Haven CT; Yale University Press 1997).

⁷⁷AW Dzur, 'Participatory Democracy and Criminal Justice' 6 *Criminal Law and Philosophy* 115–129, 120.

⁷⁸P Darbyshire, 'The Lamp That Shows That Freedom Lives—Is It Worth the Candle?' [1991] *Criminal Law Review* 740–52, 745.

⁷⁹Cited in T Shaw, 'Max Weber on Democracy: Can the People Have Political Power in Modern States?' 15 *Constellations* 33–45, 41.

⁸⁰JL Wilson, 'Deliberation, Democracy, and the Rule of Reason in Aristotle's Politics' 105 *American Political Science Review* 259–274, 272.

⁸¹AW Dzur, 'Restorative Justice and Democracy: Fostering Public Accountability for Criminal Justice' 14 *Contemporary Justice Review* 367–381, 374.

⁸²*Ibid*, 376–7.

⁸³JD Jackson & NP Kovalev, 'Lay Adjudication and Human Rights in Europe' 13 *Columbia Journal of European Law* 83–124, 88.

that the close connection between political theories and current criminal justice policies is a long historical discourse for more civic participation on the grounds that democratic criminal justice is more legitimate⁸⁴. Moreover, legitimacy leads to ‘public stability’⁸⁵. In this sense, a lay adjudication panel is considered to be part of government. Devlin describes a lay adjudicator panel (the jury) as a ‘little parliament’⁸⁶, in the sense of law enforcement rather than the enactment of law. Thus a lay adjudicator panel is a democratic governmental institution.

2.1.3.2 Representative Democracy

In contemporary thought, the concept of participatory democracy has developed on the basis of two other concepts of democracy: representative and deliberative democracy. As Henry points out, participatory democracy is regarded ‘as having inherent value, which complements that of representative democracy’⁸⁷. Representative democracy is based on the idea that the rule of law should be governed⁸⁸ by all of the people in the legal domain⁸⁹. This is the idea that protects the individuals - including minority rights and freedoms – against the will of the majority⁹⁰. From this perspective, lay adjudication could be considered as the function of protecting the rights and freedoms of citizens, including those of minorities, although it is evident that the inclusion of minorities in a lay adjudicator panel has been a central issue of the system in most countries. In addition to minorities, ethnic and linguistic diversion has led to a lack of homogeneity in the society⁹¹. This has gathered attention since 1970s in the U.S.⁹², and much research about the representation of minorities in a lay

⁸⁴Dzur, *supra* note 81.

⁸⁵LP Devlin, *The Judge* (Oxford University Press; Oxford 1981), 127.

⁸⁶*Ibid.*

⁸⁷S Henry, ‘Shaping and Delivering Peace at the Local Level - Learning from the Experience of Peace II’, *Shaping and Deliberative Peace at Local Level?: Learning from the Experience of Peace II. Learning from Peace II* (Community Relations Council; Belfast 2005), 11.

⁸⁸T Eisenberg & T Wells, ‘Trial Outcomes and Demographics: Is There A Bronx Effect?’ 80 *Texas Law Review* 1839–1876, 1842.

⁸⁹G Casper and H Zeisel, ‘Lay Judges in the German Criminal Courts’ (1972) 1 *The Journal of Legal Studies* 135–191.

⁹⁰F Zakaria, *The Future of Democracy at Home and Abroad* (New York; Norton 2003).

⁹¹Taman, *supra* note 16, 38.

⁹²See M Cammack, ‘In Search of the Post-Positivist Jury’ 70 *Indiana Law Journal* 405–489; SJ Adler, *The Jury Worth Saving? The Jury: Trial and Error in the American Courtroom* (Times Books; New York 1994), 218.

adjudication panel has been conducted in England⁹³, and in the U.S.⁹⁴ Gender discrimination in the process of selecting lay adjudicators⁹⁵ and the effects of lay adjudicators' gender⁹⁶, age⁹⁷, geographic location⁹⁸, economic status⁹⁹ and level of legal knowledge¹⁰⁰ have been found to influence the sentence.

An increase in representative democracy in the criminal justice system has led to the plurality of assignments and issues influenced by diverse interests presented by each concerned party, such as the state (authoritative institutions: police, the prosecution, the professional judges), the defence, the victim, and the public. Hence, a representative democracy requires the equal participation of its citizens and respect for the opinions of all members of the community. The extent of the institutions of representative democracies can be the measure of the quality of a democracy¹⁰¹.

2.1.3.3 Deliberative Democracy

Lastly, the principle of deliberative democracy, greatly developed by Jürgen Habermas¹⁰², is formulated as the procedures which stimulate rational and moral issues as a consequence of

⁹³See such as: S Anwar, P Bayer and R Hjalmarsson, 'A Fair and Impartial Jury? The Role of Age in Jury Selection and Trial Outcomes' (2012) 17887 NBER working paper series 1–25.

⁹⁴See such as: DC Baldus, G Woodworth, and others, 'Use of Peremptory Challenges in Capital Murder Trials: A Legal and Empirical Analysis, The' 3 University of Pennsylvania Journal of Constitutional Law 3–179; LTJ Brown, 'Racial Discrimination in Jury Selection: Professional Misconduct, Not Legitimate Advocacy' 22 Review of Litigation 209–318; SR Sommers & M Norton, 'Race-Based Judgments, Race-Neutral Justifications: Experimental Examination of Peremptory Use and the Batson Challenge Procedure' 31 Law and Human Behavior 261–273.

⁹⁵MR Rose, 'The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County' (1999) 23 Law and Human Behavior 695–702.

⁹⁶Chesterman.

⁹⁷L Bifulco, 'Citizen Participation, Agency and Voice' (2013) 16 European Journal of Social Theory 174–187; R Boatright, 'Generational and Age - Based Differences in Attitudes Towards Jury Service' (2001) 19 Behavioral Sciences & the Law 285–304.

⁹⁸VP Hans and CM Germain, 'The French Jury at a Crossroads' (2011) 86 Chicago-Kent Law Review 737–768, 749; D Wheelock, 'A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia' (2011) 32 Justice System Journal 336–359.

⁹⁹WJ Bowers, M Sandys and BD Steiner, 'Foreclosed Impartiality in Capital Sentencing: Jurors' Predispositions Guilt-Trial Experience and Premature Decision Making' (1997) 83 Cornell Law Review 1476–1556.

¹⁰⁰R Finkelstein and M Bastounis, 'The Effect of the Deliberation Process and Jurors' Prior Legal Knowledge on the Sentence: The Role of Psychological Expertise and Crime Scene Photo' (2010) 28 Behavioral sciences & the law 426–41.

¹⁰¹L Morlino, 'What Is a "Good" Democracy?' (2004) 11 Democratization 10–32, 13.

¹⁰²J Habermas, *The Philosophical Discourse of Modernity* (Cambridge; Polity Press 1987).

‘reflection, argumentation, public reasoning and reaching consensus.’¹⁰³ This concept stresses ‘discussion, reflection, and consideration’¹⁰⁴, which is the evaluation of procedures by means of including everyone in reasoned discussions and other-regarding attitudes¹⁰⁵. This idea supports the belief that legitimacy in law and politics is established through both formal and informal public discussion¹⁰⁶. In this respect, the meaning of legitimate law in the deliberative democratic principle is provided by a fundamentally participatory democracy. As Benhabib argues, deliberative democracy is necessary to gain legitimacy from collective decision-making processes as the result of rational, fair, and collective deliberation between free and equal individuals¹⁰⁷. Hence, the concepts of participative, representative, and deliberative democracy, which underpin the principle of a fair trial, also bring one of the most considerable benefits of lay adjudication, which is the legitimacy of the verdict, laws, and legal system¹⁰⁸.

The practice of these principles, which are integrated with each other in a fair trial in a democratic society will be seen to balance other principles in criminal justice. The international consensus on the issue of how to balance the right to a fair trial - in particular, for the accused - and democratic values for the participation and representativeness of the community, and appropriate deliberation is contested. Should the accused from a racial minority be tried with a lay adjudication panel which includes persons from the racial minority? Or should the panel be composed of lay adjudicators randomly selected from the community, even though the panel might not contain anyone from the accused’s background? The examination of the balance, such as the ‘balancing test’ between costs and benefits and the ‘balancing-of-interest’ approach between liberty and order suggested by Meares and Harcourt illustrates a clear and explanative analysis of the issues involved in criminal procedures¹⁰⁹. Moreover, Kumm argues that balancing principles is an appropriate

¹⁰³D Kellner, ‘Habermas, the Public Sphere, and Democracy: A Critical Intervention’ [2000] *Perspectives on Habermas* 259–288, 267.

¹⁰⁴H Raisio, K Valkama, & E Peltola, ‘Disability and Deliberative Democracy: Towards Involving the Whole Human Spectrum in Public Deliberation’ 16 *Scandinavian Journal of Disability Research* 77–97, 79.

¹⁰⁵Z Chappell, ‘Justifying Deliberative Democracy: Are Two Heads Always Wiser than One?’ 10 *Contemporary Political Theory* 78–101, 81-2.

¹⁰⁶J Maskivker, ‘Participation and Rights in Athenian Democracy: A Habermasian Approach’ 15 *The European Legacy* 855–870, 865.

¹⁰⁷S Benhabib, ‘Toward a Democratic Model of Democratic Legitimacy’, *Democracy and Difference: Contesting the Boundaries of the Political* (Princeton University Press; Princeton 1996), 69.

¹⁰⁸Ellis and Diamond.

¹⁰⁹TL Meares and BE Harcourt, ‘Foreword: Transparent Adjudication and Social Science Research in Constitutional Criminal Procedure’ (2000) 90 *The Journal of Criminal Law and Criminology* 733–798.

method for examining the relationship between the government and the law¹¹⁰. Spigelman analyses the balance between freedom of speech and the right to a fair trial by broadcast media¹¹¹. Thus examining the relationship between the principles of criminal justice is important to analyse the degree and level of democratic value within the procedure.

2.1.4 Theoretical Perspectives on Arguments for and against Lay Adjudication

Owing to the interconnectedness of such principles, there has been long-standing admiration for lay adjudication systems, in particular, in Western European countries and the U.S. since the 19th century¹¹². This has expanded to other parts of the world, such as Eastern Europe, Latin America, and the Asia Pacific Countries¹¹³, although there were controversial arguments against lay adjudication systems and in some legal systems they were abolished or reformed in history¹¹⁴. Legitimacy is entrenched in two elements in particular: first, lay adjudication is considered to be the way to find the consensus among the community; and second, it benefits from lay adjudicators' diverse knowledge and experience. These two elements derived from democratic values seem to support a lay adjudication system; on the other hand, other elements of a lay adjudication system derived from other values may not support a lay adjudication system. For example, the stress on consistency, coherence and predictability throughout decision making process in the criminal courts in doctrinal formality will not be compatible with the democratic values. Arguments for and against lay adjudication depend on the balance between the subjects focused on principles.

¹¹⁰M Kumm, 'The Jurisprudence of Constitutional Conflict: Constitutional Supremacy in Europe Before and After the Constitutional Treaty' (2005) 11 *European Law Journal* 262–307.

¹¹¹J Spigelman, 'The Principle of Open Justice: A Comparative Perspective' 29 *University of New South Wales Law Journal* 147–166, 158–61.

¹¹²Huntington, *supra* note 63.

¹¹³See Vidmar, *World Jury System*.

¹¹⁴ For example, in the German (in 1924), French, and Indian systems, they abolished the jury model of lay adjudication systems. Moreover, in the 1970s reforms of lay adjudication systems were conducted. For example, there were introductions of one day trial jury duty (in 1974), scientific juror selections, unanimous votes (in 1978) in the U.S., and discussions for written instructions by judges for juries were started in 1970, in England. See, W Perron, 'Lay Participation in Germany' (2001) 72 *Revue internationale de droit pénal* 181–195; F Gorphe, 'Reforms of the Jury-System in Europe: France and Other Continental Countries' (1936) 27 *Journal of Criminal Law and Criminology* 155–168; K Ramnath, 'The Colonial Difference between Law and Fact: Notes on the Criminal Jury in India' (2013) 50 *Indian Economic & Social History Review* 341–363; A Cleary, 'Scientific Jury Selection: History, Practice, and Controversy' (2005) 28 *Concept* 1–17; P Darbyshire, 'Jury Reform in England and Wales - Unfinished Business' (Taipei, Taiwan; Unpublished 2014).

The first element of lay adjudication is the direct influence of the consensus of the community in criminal justice procedures. Direct lay participation will increase public support for the criminal procedure¹¹⁵. A lay adjudicator is expected to bring common sense and diverse knowledge and community values into criminal procedures and the application of the rule of law¹¹⁶. A lay adjudicator panel is normally composed of more people than on a bench panel. The greater number of people in an adjudicator panel may provide broader perspectives in their discussions. Lay adjudicators may understand the situation and social background of the defendant and case better than professional judges, because the latter tend to be of a different social class from that of lay adjudicators. In this respect, lay adjudicators can be considered good fact-finders. In addition, it is better for a judgement related to 'moral blameworthiness' in a criminal sanction, which is considered as *malum in se*¹¹⁷, to be the consensus of the community. The establishment and practice of the standard by which to judge 'right or wrong' by consensus is essential in order to gain not only public support for the criminal justice system but also for its effectiveness in practice¹¹⁸. It has been argued that lay participation is 'a necessary condition for a legitimate conviction in any democratic state'¹¹⁹. This principle is derived from the democratic values of lay adjudication: participation and representativeness, as mentioned above. In this fashion, lay adjudication is a means of direct participation by the community, which is one of the key democratic values.

The second element of lay adjudication is the education of the public. Alexis de Tocqueville pointed this out in relation to early nineteenth century American juries.

Juries ... instil some of the habits of the judicial mind into every citizen, and just those habits are the very best way of preparing people to be free.

*The jury is both the most efficient way of establishing the people's rule and the most efficient way of teaching them how to rule*¹²⁰.

¹¹⁵P Roberts & AA. Zuckerman, *Criminal Evidence* (Oxford University Press; Oxford 2004), 64.

¹¹⁶N Vidmar, *supra* note 113, 1.

¹¹⁷J Gobert, *Justice, Democracy and the Jury* (Aldershot; Aldershot 1997), 2.

¹¹⁸Roberts and Zuckerman, *supra* note 115, 64.

¹¹⁹T Hörnle, 'Democratic Accountability and Lay Participation in Criminal Trials' in Antony Duff and others (eds), *The Trial on Trial, Volume 2, Judgment and Calling to Account* (Hart Publishing; Oxford 2006), 150.

¹²⁰A de Tocqueville, *Democracy in America* (JP Mayer and Max Learner eds, Doubleday; New York 1969), 254.

In short, lay adjudication is considered as the best way to educate citizens about the administration of justice, including its procedures and laws. This is also an opportunity to learn how to understand complicated evidence and laws¹²¹, discuss and express opinions with other co-lay adjudicators in a group.¹²² Therefore, lay adjudication is a way of educating lay participants not only in legal-related skills, such as understanding evidence and the law as well as the procedures, but also in non-legal related skills, such as the capacity to read and understand complicated written documents, to listen to oral presentations, and the skills to participate in group discussions. These educational benefits will develop the sense of playing a part in a self-governing society.¹²³

The major factor for lay adjudication is legitimacy. Mark E. Warren, a participatory democracy theorist, has claimed that the favourable outcomes of citizen participation in institutions are more tolerance towards differences, more sensitivity in cooperation, more engagement with morality and judgements, and more quests for the citizens' political preferences¹²⁴. In this respect, legitimacy is the key component of lay adjudication. Lay adjudicators are able to play a role to save the community from state oppression by means of voting for an acquittal or nullification if they do not approve the application of a law or recognise a repressive government's power in an investigative or prosecution procedure. As Rawls argues, the use of the rule of law to ensure individual liberty and protect it against administrative coercive power is a key concept of liberal thought¹²⁵. The use of lay adjudicators brings legitimacy to verdicts¹²⁶ and the criminal justice system¹²⁷. However, nullification by lay adjudicators can raise the question of their legitimacy because of doubts about the lay adjudicators' competence in understanding and applying the law for three reasons. Firstly, lay adjudicators are likely to be influenced by either sympathy for or bias or

¹²¹J Iontcheva, 'Jury Sentencing as Democratic Practice' 89 Virginia Law Review 311–383.

¹²²NJ Finkel, *Commonsense Justice: Jurors' Notions of the Law* (Cambridge; Harvard University Press 1995).

¹²³M Lombardi, 'Reassessing Jury Service Citizenship Requirements' 59 Case Western Reserve Journal of International Law 725–765, 727.

¹²⁴ME Warren, 'Can Participatory Democracy Produce Better Selves? Psychological Dimensions of Habermas' S Discursive Model of Democracy' 14 Political Psychology 209–234, 209.

¹²⁵Rawls, *supra* note 10, 235–9.

¹²⁶P Roberts, 'Does Article 6 of the European Convention on Human Rights Require Reasoned Verdicts in Criminal Trials?' (2011) 11 Human Rights Law Review 213–235.

¹²⁷Taman, *supra* note 16.

prejudice against the accused¹²⁸. Secondly, representativeness in a lay adjudication panel is a serious issue¹²⁹, although Thomas illustrates the representativeness of the jury according to their ethnic background in the UK¹³⁰. To sum up, the key benefit of lay adjudication can be considered as relating to the legitimacy of the verdicts and the criminal justice system as a whole and enhancing democratic principles. Nevertheless there are concerns about lay adjudication that can raise doubts about whether democratic principles are truly practised.

There are also other concerns about lay adjudication related to the competence of lay adjudicators to understand the law and evidence. Although the lay adjudicators' lack of a legal background is regarded as advantageous, stemming from their different characteristics to those of professional judges, there are also concerns about the lay adjudicators' abilities as decision-makers. Much of the literature discusses lay adjudicators' competence¹³¹. There are arguments against lay adjudication, in particular from empirical research. For example, Penny Darbyshire tends to be sceptical of lay adjudication (the English jury system) throughout her research. She argues that 'the symbolic function of the jury far outweighs its use' because the jury has been already replaced by the magistracy¹³², and she raises doubts as to the jury's function as a safeguard for citizens' civil liberties because of procedural inadequacy¹³³. In addition, her collaborative research with Maughan and Stewart reveals thirty two issues concerning the jury system including the lack of representation of some groups of women and minorities and some types of occupations; public resistance to serving as a juror; and concerns about the jurors' competency to judge the truthfulness of a witness and to understand and remember information including the evidence and the law¹³⁴. There are also

¹²⁸A Kalunta-Crompton, 'The Prosecution and Defence of Black Defendants in Drug Trials' (1998) 38 *British Journal of Criminology* 561–591.

¹²⁹D French and M Laver, 'Participation Bias, Durable Opinion Shifts and Sabotage through Withdrawal in Citizens' Juries' (2009) 57 *Political Studies* 422–450.

¹³⁰C Thomas, 'Exposing the Myths of Jury Service' (2008) 6 *Criminal Law Review* 415–430.

¹³¹T Honess, 'Juror Competence in Processing Complex Information: Implications from a Simulation of the Maxwell Trial' 11 *Criminal Law Review* 763–773; G Mitchell, 'Asking the Right Questions About Judge and Jury Competence' (2004) 32 *Florida State University Law Review* 519–528.

¹³²P Darbyshire, 'An Essay on the Importance and Neglect of the Magistracy' [1997] *Criminal Law Review* 627–643, 627.

¹³³Darbyshire, *supra* note 78, 745.

¹³⁴P Darbyshire, A Maughan and A Stewart, 'What Can the English Legal System Learn from Jury Research Published up to 2001?' [2002] *Research Paper in Law* 1–84.

cost and efficiency-concern. A lay adjudication system is often time-consuming and expensive¹³⁵.

The strong need for democratic values in criminal justice, as well as the drawbacks which raise questions about lay adjudicators' attention (such as the doubts about the lay adjudicators' activeness and competence) often lead to a lay adjudication system being regarded as having 'symbolic' status rather than practical value¹³⁶. Conversely, the theoretical backgrounds to the lay adjudication is supported by their active participation, which is based on democratic principle.

The arguments for and against lay adjudication can be complex. However, my point here is the fundamental point that lay adjudicators' participation in criminal cases is the foundation for making the criminal justice system a democratic institution. The perspective of the value of lay adjudication being its participation in the legal process to an evaluation of whether a lay adjudication system functions appropriately or not, although the appropriateness varies depending on the legal systems and the criminal justice policies. However, the appropriateness can be studied in the relationships between lay adjudicators' participation and legal professionals in criminal procedures with an understanding of both the favourable and controversial factors of a lay adjudication. In addition, the examination of a lay adjudicators' responsiveness and competence helps to evaluate the degree of lay adjudicators' participation.

2.2 Evaluations of Lay Adjudication Systems

2.2.1 Lay Adjudication System Research

The belief that lay adjudication promotes democratic values in a democratic society appears to be undeniable; however, the practice of lay adjudication systems and their functions have been the subjects of considerable academic debates started after the

¹³⁵S Lloyd-Bostock and C Thomas, 'The Continuing Decline of the English Jury' in Neil Vidmar (ed), *World Jury Systems* (Oxford; Oxford University Press 2000) ch2 53-91.

¹³⁶Darbyshire, *supra* note 132, 627.

introduction of lay adjudication into different legal systems concerning the complexity of trials¹³⁷, the plurality of social classes¹³⁸, and the spread of information due to the internet¹³⁹.

Lay adjudication research appears to be conducted from four major perspectives, divided into four types of analysis. First, a procedural-focused analysis, focuses on the specific stages of the procedures, such as the selection of lay adjudicators¹⁴⁰; second, a personnel-focused analysis looks at the roles of the personnel involved in a lay adjudication trial procedure, such as the role of lay adjudicators¹⁴¹ and of professional judges¹⁴²; thirdly, the concern-focused analysis focuses on issues such as the competence of lay adjudicators¹⁴³ and the representativeness of certain minorities in a lay adjudicator panel¹⁴⁴; and lastly, the reform-focused analysis, addresses comparisons between the mixed judge and jury models¹⁴⁵. These different approaches reflect the researchers' interests and the aims of the research as well as financial and geographical restrictions. The researchers' interests are often related to pointing out or rejecting criticisms of the system, and/or suggesting reforms or support for the system.

The Auld Report by Sir Robin Auld in 2001 examined the criminal courts of England and Wales. He gauged jury responsiveness and competence on the basis of the 'partnership' between professional judges and the lay adjudicators (jury) in the English/Welsh jury system with consideration of the various problematic factors throughout the jury procedure, from

¹³⁷IA Horowitz and KS Bordens, 'The Effects of Jury Size, Evidence Complexity, and Note Taking on Jury Process and Performance in a Civil Trial' (2002) 87 Journal of Applied Psy 121–130.

¹³⁸C Thomas, 'Judicial Diversity and the Appointment of Deputy District Judges' (London; 2005).

¹³⁹G Asquith, 'Criminal Procedure: Jury Deliberations - Jury Irregularities - Use of Internet (Case Comment)' (2011) 16 Coventry Law Journal 67–73.

¹⁴⁰MJ Frank, 'Challenging Peremptories: Suggested Reforms to the Jury Selection Process Using Minnesota as a Case Study' (2010) 94 Minnesota Law Review 2075–2102; M Jimeno-Bulnes, 'Jury Selection and Jury Trial in Spain: Between Theory and Practice' (2011) 86 Chicago-Kent Law Review 585–612.

¹⁴¹D Rolph, 'Are Juries Necessary? The Role of Juries in Defamation Trials' (2009) 92 Sydney Law School Research Paper 10–14; R Wilson, 'Free Speech V. Trial By Jury: The Role of the Jury in the Application of the Pickering Test' (2008) 18 George Mason University Civil Rights Law Journal 389–416.

¹⁴²WJ Bowers and others, 'The Decision Maker Matters: An Empirical Examination of the Way the Role of the Judge and the Jury Influence Death Penalty Decision-Making' (2006) 63 Washington and Lee Law Review 931–1743; FR Julian, 'The Role of the Judge and Jury in Complex Trials' (University of London, Queen Mary 2008).

¹⁴³Matthews, Bridgeman and Briggs.

¹⁴⁴D Wheelock, 'A Jury of One's "Peers": The Racial Impact of Felon Jury Exclusion in Georgia' (2011) 32 Justice System Journal 336–359; C Thomas, 'Are Juries Fair?' (London; 2010).

¹⁴⁵JH Langbein, 'Mixed Court and Jury Court: Could the Continental Alternative Fill the American Need?' (1981) 6 American Bar Foundation Research Journal 195–219; Lempert, 'The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research'.

selecting the jury to reaching a verdict. He believes that the 'law should be declared, by status if need be, that juries have no right to acquit in defiance of the law or disregard of the evidence',¹⁴⁶ while he recognises the 'value role' of the jury in bringing a reflection of the community into the administration of justice¹⁴⁷. The absolute power the state should have over the jurors, in his belief, can be found in his recommendation for an 'enquiry by professional judges and/or the Court of Appeal (Criminal Division) into alleged impropriety by a jury'¹⁴⁸. Archival Research, such as that conducted by the Royal Commission on Capital Punishment (1949-53), used multiple approaches: theoretical, historical, and statistical¹⁴⁹, from Home Office statistics because of their research interest and importance¹⁵⁰. Much of the academic literature following Auld's report has been concerned with the challenges and targets for reform specifically as well as a thorough understanding of the overall criminal procedure and the jury system. To some extent, disagreement over greater judicial control and the maintenance of strict secrecy, including the restrictions over research, reflect the conflicting perspectives of the efficiency of the lay adjudication process¹⁵¹. Auld's procedural analysis of the jury system emphasised democratic principles. In order to retain these principles, he comments that 'jury trial is a hallowed institution and a citizen's right in all serious cases which necessarily include serious and complex frauds'¹⁵². He raises specific concerns in four stages; pre-trial procedure; the selection of the lay adjudicators; decision-making process in the courtroom and the deliberation room; and after the trial, which are paid attention in other legal systems.

In 2010, Cheryl Thomas offered a perspective on the fairness of a jury panel in the English jury system based on multi-method research, a nationwide large scale project, evaluating 478 jurors in 41 juries, 551,669 charges between 2006 and 2008, and 668 jurors in 62 cases. Multi-method research was used to simulate the jury process, but with real juries, in large-scale quantitative research using actual jury verdicts, and post-trial surveys¹⁵³. Each method was

¹⁴⁶A Auld, 'Review of the Criminal Courts of England and Wales' (London; 2001), 176.

¹⁴⁷*Ibid.* 140.

¹⁴⁸*Ibid.* 173.

¹⁴⁹*Ibid.* 136.

¹⁵⁰M Zander, 'Lord Justice Auld's Review of the Criminal Courts' (2001), 8.

¹⁵¹J McEwan, M Redmayne and Y Tinsley, 'Evidence, Jury Trials and Witness Protection - the Auld Review of the English Criminal Courts' (2005) 163 *The International Journal of Evidence & Proof* 163-177, 163.

¹⁵²Auld, *supra* note, 146, 202.

¹⁵³Thomas, *supra* note 144, 7.

used to find answers to different but related questions. The simulation studies examined whether jurors' racially discriminated against defendants as well as the jurors' abilities to understand judicial instructions. The quantitative research studied the consistency of the jurors' verdicts, while the post-trial survey elaborated the relationship between publicity about the trial and the jurors. The three different methods led the author to examine the fairness of a jury trial in terms of the jury's deliberation from three related aspects: the internal influence of other jury members, the outcome, and the external influences from the media. By examining the jurors' efficiency and ability to understand the evidence and law from the judges' instructions, the racial influence on verdicts, and the substantial impact from recalling media publicity and the impact of internet information on jurors, she claimed there was fairness in jury trials.

Since the international movement towards the introduction of lay adjudication systems started in the late twentieth century, comparing lay adjudication system research has been carried out extensively with the increasing popularity of comparative criminal justice studies. The introduction of the new lay adjudication system in Russia¹⁵⁴ and Spain¹⁵⁵ stimulated the comparative lay adjudication studies of European countries. For example, Jack Jackson and Nikolai Kovalev carried out an extensive comparative lay adjudication study in *Lay adjudication and Human Rights in Europe* in 2006¹⁵⁶ using a theoretical approach. They examined 46 different lay adjudication systems, within the focus on their civil law jurisdiction based on the international standard of human rights. They analysed the degrees of professional judges' involvement and/ lay adjudicators' independence, the methods used to select lay adjudicators, and experts' involvement in the system. Moreover, they studied the implications of the system by challenging issues in the lay adjudication procedures - the selection, decision-making and appeal processes. The concern-focused approach on

¹⁵⁴See SC Thaman, 'The Resurrection of Trial by Jury in Russia' (1995) 31 Stanford Journal of International Law 61–141; SA Pashin, 'The Reasons for Reintroducing Trial by Jury in Russia' (2001) 72 Revue internationale de droit pénal 253–257; I Dline and O Schwartz, 'The Jury Is Still out on the Future of Jury Trials in Russia' (2002) 11 East European Constitutional Review 104–110.

¹⁵⁵See SC Thaman, 'Spain Returns to Trial by Jury' (1997) 21 Hastings International and Comparative Law Review 241–537; C Gleadow, 'Spain's Return to Trial by Jury: Theoretical Foundations and Practical Results' [2001] St. Louis-Warsaw Transatlantic Law Journal 57–74; M Jimeno-Bulnes, 'Lay Participation in Spain: The Jury System' (2004) 14 International Criminal Justice Review 164–185.

¹⁵⁶Jackson and Kovalev, *supra* note 83.

international human rights standards demonstrates the flexibility of lay adjudication system research within certain theoretical settings shared by the contemporary international society.

Ivkovic presented the three different characteristics between the mixed judge and jury models in *Lay Participation in Criminal Trials: The Case of Croatia*. A fundamental feature of the existing jury model, which tends to have a common law origin, is the independence of the decision-making process¹⁵⁷, while an essential feature of the mixed judge model, which tends to have a civil law tradition, is the joint decision-making between lay adjudicators and professional judges¹⁵⁸. In this respect, the question may arise: Is it possible that the joint decision-making process make a lay adjudicator panel function as a democratic institution? The considerable differences between the two models are those which divided the common law system and the civil law system, notably an adversarial procedure and an inquisitorial procedure, and guidance regarding justiciable law¹⁵⁹. These differences may lead to an incapacity to mix the two models effectively in various elements of the lay adjudication systems. For example, Thaman has pointed out the difficulty of adopting 'self-legitimizing popular juries' into the Belgium and the Continental European continent systems which have a civil law tradition, because of the nature of professional judges' roles and formal rules of evidence¹⁶⁰. On the other hand, in his analysis of the *Rechtsstaat*, Hertogh argued for the integration of the two approaches in order to evaluate the relationship between the principle of formal equality and legal consciousness¹⁶¹. Thaman pointed out, in his study of the nineteenth century's introduction of the jury model into the Continental European systems, three incompatible principles of the civil law traditions: the duty of the State (public prosecutor and professional judges) to find the truth, the legal reasoning of the verdicts, and

¹⁵⁷P Lowe, 'Challenges for the Jury System and a Fair Trial in the Twenty-First Century' [2011] *Journal of Commonwealth Criminal* 175–208, 181.

¹⁵⁸SK Ivković, 'Satisfaction with the Actual Experience: Croatian Lay Judges on Their Experience in Mixed Tribunals' (2001) 25 *International Journal of Comparative and Applied Criminal Justice* 25–48, 25.

¹⁵⁹DF Henderson, 'Security Markets in the United States and Japan: Distinctive Aspects Molded by Cultural, Social, Economic, and Political Differences' (1990) 14 *Hastings International and Comparative Law Review* 263–301, 300;

¹⁶⁰SC Thaman, 'Should Criminal Juries Give Reasons for Their Verdicts?: The Spanish Experience and the Implications of the European Court of Human Rights Decision in *Taxquet v. Belgium*' (2011) 86 *Chicago-Kent Law Review* 613–668, 614–5.

¹⁶¹D Nelken, 'Eugen Ehrlich, Living Law, and Plural Legalities' (2008) 9 *Theoretical Inquiries in Law* 443–471, 448.

the principle of mandatory prosecution¹⁶². He also claimed that there were six adversarial principles developed by lay adjudicator trials, which are the presumption of innocence, the privilege against self-incrimination, the equality of arms, the right to a public and oral trial, the accusatory principle, and the professional judges' independence from the executive or investigative agency¹⁶³. Moreover, he emphasised four principles in the trial: 'the principles of orality, immediacy, presumption of innocence and the evidentiary standard of *intime conviction*', which are expected to be developed by the introduction of the citizen judge system¹⁶⁴. In addition O'Reilly, in his study of the transition of the English system, contrasted the separate features as legal traditions concerned with judicial activity, priority of written evidence, secretive proceedings, and institutional trust in state officials¹⁶⁵. Hence, it is likely that there are some inevitable incompatible adversarial principles in introducing a lay adjudication system into the civil law tradition system.

*Democracy in the Courts*¹⁶⁶ by Marjike Malsch in 2009 also made a considerable contribution to the research, by studying comparative lay participation in court procedures from procedural observation, and interview research with legal professionals from the democratic perspective in five different European legal systems: the Netherlands, Denmark, Germany, England and Wales, and Belgium. In her research, the implications of lay participation in domestic principles, namely participation, representativeness, and deliberation were the main focus, rather than issues in common in the respective countries' criminal procedures, which Jackson and Kovalev concentrated on. As a result, the ways and levels of lay people's involvement throughout the legal procedure were examined. For instance, the analysis of England and Wales in the study explored the roles of the courts including the examination of the building and courtroom architectures, and the advantages and disadvantages of lay participation, in both the Magistrates' Courts and the Jury trial

¹⁶²SC Thaman, 'Questions of Fact and Law in Russian Jury Trials : The Practice of the Cassational Courts under the Jury Laws of 1864 and 1993' (2001) 72 *Revue internationale de droit pénal* 415–450.

¹⁶³SC Thaman, 'Europe's New Jury Systems: The Cases of Spain and Russia' (1999) 62 *Law and Contemporary Problems* 233–259, 233.

¹⁶⁴Thaman, *supra* note 154, 90.

¹⁶⁵G O'Reilly, 'England Limits the Right to Silence and Moves Towards an Inquisitorial System of Justice' (1994) 85 *The Journal of Criminal Law and Criminology* 402–452.

¹⁶⁶M Malsch, *Democracy in the Courts: Lay Participation in European Criminal Justice Systems* (Surrey; Ashgate 2009).

Courts¹⁶⁷. Malsch concluded there were diverse advantages regarding the lay participation mentioned in the five legal systems mentioned above. For example, England and Wales emphasis community involvement, avoidance of routine, the education of the public, the numerous advantages of a lay panel, and the openness and comprehensibility of the criminal justice system, while the Netherlands stressed filling gaps in the panel, different perspectives, expertise, input from outside, and avoidance of routine¹⁶⁸. Malsch presents in conclusion different disadvantages of lay participation such as time-consumption and lack of representativeness in England and Wales, and less input, lack of knowledge, and the impractical characteristics of lay people involvement in the Netherlands¹⁶⁹. Malsch's approaches in this study demonstrates how the democratic principles in the court procedures of the various countries practices have different values.

Much of the literature in English regarding the historical background of existing systems and descriptions of them in comparative studies has been traditionally widely available, in particular, the English jury system and other systems¹⁷⁰. Comparative studies have been actively conducted using the same model, such as between the English and American systems¹⁷¹ and the systems of former British colonies¹⁷². Additionally, many studies of the French and German lay adjudication system reported in English have been also undertaken¹⁷³. Comparative lay adjudication studies seem to recognise that the lay adjudicator procedure can be separated into four stages: pre-trial procedure; the selection of the lay adjudicators; decision-making process in the courtroom and the deliberation room; and after the trial. The current major concern seem to be the attentiveness and competence of lay adjudicators. To sum up, multi-method research from various approaches will provide more comprehensive and in-depth analysis of the lay adjudication system. Moreover, one of key points in lay

¹⁶⁷Ibid. ch.9.

¹⁶⁸Ibid, 204.

¹⁶⁹Ibid, 206.

¹⁷⁰W Forsyth, 'Chapter IX. Jury in Criminal Cases' (1875) 159 *History of Trial by Jury* 159–177.

¹⁷¹C Davies and C Edwards, "'A Jury of Peers': A Comparative Analysis' (2004) 68 *Journal of Criminal Law* - London- 150–159.

¹⁷²See Vogler, *supra* note 19, Ch.11; N Vidmar, 'The Jury Elsewhere in the World' in Neil Vidmar (ed), *World Jury Systems* (Oxford; Oxford University Press 2000) 421-448.

¹⁷³See NT Wolfe, 'An Alternative Form of Law Participation in Criminal Adjudication: Lay Judge Courts in the Federal Republic of Germany' in CB Fields and RH Moore (eds), *Comparative Criminal Justice: Traditional and Nontraditional Systems of Law and Control* (1996); VP Hans and CM Germain, 'The French Jury at a Crossroads' (2011) 86 *Chicago-Kent Law Review* 737–768.

adjudication system research is to set a clear focus for the research and consider the challenges and targets by considering different values depending on criminal procedures as well as on the whole criminal procedure.

2.2.2 Evaluations of Lay Adjudication Procedures: A Literature Review and Research Methodologies

An evaluation of the lay adjudicators' attentiveness and competence is a key topic in the extensive literature. This area of study is dominated by simulated mock trials in philosophical and particular behavioural studies. For example, the classical study of the American jury by Harry Kalven and Hans Zeisel shows high levels of agreement: three-quarters of the time, professional judges agreed with the jurors' verdict in their observations of mock trials¹⁷⁴. It is hard to research the attentiveness and competence of lay adjudicators in decision-making processes because of the changing parameters through which to evaluate their performance. The common parameters evaluating their level of attentiveness are firstly how many times they talked or questioned witnesses and/or co-lay adjudicators and professional judges at the hearing or in the deliberation room¹⁷⁵, and/or how they participated during the hearing and deliberation in the courtroom and in the deliberation room. The latter method is also used in evaluate their competence.

Arguments have arisen about questioning by adjudicators, especially of witnesses. The three major criticisms against the questioning of witnesses are that the questions may violate the adversarial nature of the criminal procedure which is valued in a lay adjudication procedure with an active role of lay adjudicators; the questioning can lead to presenting improper, biased, inadmissible evidence to lay adjudicators; the questioning can be considered as supporting the prosecution in prevailing over 'the reasonable doubt burden of proof in criminal trials', thus threatening due process rights¹⁷⁶. In addition, lay adjudicators' questioning can be totally meaningless in contested arguments and time-consuming in the

¹⁷⁴H Kalven and H Zeisel, *The American Jury* (Chicago; University of Chicago Press 1966).

¹⁷⁵NS Marder, 'Answering Jurors' Questions: Next Steps in Illinois' (2009) 41 *Loyola of Los Angeles International and Comparative Law Review* 727–752; B Cappello and J Strenio, 'Juror Questioning: The Verdict Is in' (2000) 36 *Trial* 44–46.

¹⁷⁶*United States v. Johnson* in D Senger, 'The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation' (2011) 2 *University of Illinois Law Review* 741–774, 759.

procedure¹⁷⁷. Thus, submitting written questions to professional judges can be used and judges can act as doorkeepers to make sure relevant questions are asked. However, lay adjudicators' questioning can be vital to clear their doubts or confusion and for their understanding of the situation. In addition, questioning encourages lay adjudicators to engage with the proceedings. This also leads to their satisfactions, which is related to the legitimacy of the verdicts and the criminal justice system. These vital benefits suggest that questioning should not be restricted at any part of the proceedings¹⁷⁸.

Most research regarding the practice of a lay adjudication system has been conducted on the assumption that lay adjudicators' actively wish to participate, although reluctance to be a lay adjudicator has been considered¹⁷⁹. Evaluating their participation through the frequency with which lay adjudicators say something may not necessarily reflect their attentiveness because of the expected functions of a lay adjudicator panel as a decision-maker. An example of this would be a lay adjudicator who did not frequently question witnesses or legal professionals, especially in the courtroom or even in the deliberation room, but who asked questions that were relevant and constructively discussed issues, deliberating with full-understanding of the evidence and law. On the other hand, another lay adjudicator might speak more frequently to witnesses or legal professionals but about irrelevant or inadmissible issues for deliberation, showing inadequate understanding of the evidence and law. It is obvious that the first lay adjudicator's contribution is desirable, whereas that of the second one is not. Thus, frequency is not an adequate measure for evaluating their attentiveness. In other words, the evaluation of the lay adjudicators' attentiveness to the issues under consideration should be an examination of how the lay adjudicators' exercise their role and their competence in doing so. For example, behavioural research on the communication between lay co-adjudicators and legal professionals should reveal lay adjudicators' attitudes to their role¹⁸⁰. However, lay

¹⁷⁷*Ibid*, 760.

¹⁷⁸K Lundy, 'Juror Questioning of Witnesses: Questioning the United States Criminal Justice System' (2001) 85 *Minnesota Law Review* 2007–2040, 2020.

¹⁷⁹ See Southgate and Grosvenor, *supra* note 47; Matthews, Bridgeman and Briggs, *supra* note 143; Thomas, *supra* note 144.

¹⁸⁰WM Steele and E Thornburg, 'Jury Instructions: A Persistent Failure to Communicate' (1988) 67 *North Carolina Law Review* 77–115.

adjudicators' attentiveness is often excluded as a research subject in the course of the practice of lay adjudication¹⁸¹.

In the evaluation of lay adjudicators' competence, Baldwin and McConville, for instance, conducted research in the UK by asking trial participants, including lay adjudicators, professional judges, prosecutors and defence attorneys for feedback on the trial. An example of their actual questions is: 'Did the participants think, for instance, that the jury had returned a verdict in accordance with the weight of evidence?'¹⁸² As they also asked whether all the participants agreed with the verdict reached by the jury¹⁸³, another parameter is more commonly used in evaluating their competence which is professional judges' standards. In this sense, if the lay adjudicators' verdict agrees with that of the professional judges', it means the lay adjudicators' performance is appropriate. Methods of this kind have been traditionally popular. However, if lay adjudicators are expected to function as professional judges, the question arises as to why lay adjudicators are necessary in criminal procedure. If their verdict is different from the one expected from a professional judge, does that mean lay people do not function appropriately as adjudicators? Although it is important to observe them carefully from different perspectives, such as lay adjudicators' satisfaction with or confidence in their work in order to evaluate their democratic role, however, their satisfaction can be derived from recognition by the legal professionals and public – as giving the appropriate verdict. In this respect, the agreement of legal professionals with the verdicts of lay adjudicators is important but not an essential requirement, in particular, from the procedural fairness perspective.

Other questions to be asked are: What factors influence lay adjudicators in the decision-making process? How do lay adjudicators discuss in the deliberation room? The analysis to answer these questions tend to be of the psychological type, in order to observe the practice of the targeted lay adjudication system or to develop legal tactics for legal professionals¹⁸⁴.

¹⁸¹See for example, Matthews, Bridgeman and Briggs, *supra* note 143.

¹⁸²J Baldwin and M McConville, *Jury Trials* (Oxford; Clarendon Press 1979), 20.

¹⁸³*Ibid.*

¹⁸⁴See, for example, G Winship, 'Jury Deliberation: An Observation Study' (2000) 33 *Group Analysis* 547–557.

2.2.2.1 Understanding of the Facts and Evidence

The major area of empirical research is lay adjudicators' understanding of evidence. This research shows that lay adjudicators do not find it difficult to understand the evidence. Home Office research in Australia revealed that only 4% of jurors 'reported the trial evidence was not presented in a clear and easily coherent manner'¹⁸⁵. This area of research was popular in England and Wales in the 1980s and 1990s, when there were arguments as to whether complex fraud cases should be exempt from trial by jury. The research was often conducted through post-trial interviews or/and simulation studies using psychological analysis of the lay adjudicators' understanding and its relationship to the way the evidence was presented. It is evident that lay adjudicators find it easier to understand the evidence with visual aids, as some research has shown. Honess conducted a simulation trial research relating to a complicated fraud trial in England: the Maxwell case. In the research 50 mock jurors were interviewed after watching a video of the evidence presented over 6 hours, and obtaining the documentary evidence¹⁸⁶. Honess made two suggestions from the results: that evidence such as a summary of the key points should be presented with the help of visual aids; and that a 'story-like' structure should be used¹⁸⁷. His results have shown the high level of competence of lay adjudicators in understanding the evidence. Roskill's study examined the jurors' ability to understand complex evidence in a simulation study by testing the judges' instructions with, providing summaries, rearranging vital points and the chronology of events in the information¹⁸⁸. Following this study, Levi highlighted the importance of the use of a list of keywords, such as legal terminology, in the instructions, taking into consideration the different social classes jurors belong to and their possible lack of familiarity with some of the key-word concepts¹⁸⁹.

2.2.2.2 Understanding Law

The results of empirical research into lay adjudicators' understanding of the law including legal terminology differ depending on whether they understand the relevant laws in the case or not. Lay adjudicators found difficulty understanding the laws as well as the language used at the trial and in

¹⁸⁵J Goodman-Delahunty, N Brewer, and others, 'Practices , Policies and Procedures That Influence Juror Satisfaction in Australia, No.87', vol 2007 (2007), 10.

¹⁸⁶Honess, *supra* note 131, 764.

¹⁸⁷*Ibid*, 772.

¹⁸⁸EW Roskill, *Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies by the MRC Applied Psychology Unit* (London; Her Majesty's Stationery Office 1986).

¹⁸⁹M Levi, 'The Investigation, Prosecution, and Trial of Serious Fraud' (London; 1992).

the judicial instructions. Results from governmental research conducted by the Home Office in Australia¹⁹⁰, using post-trial questionnaires or interview research along with research done in England and Wales¹⁹¹ show that jurors did not have difficulty understanding the law. However, there were exceptions where jurors were confused about legal terminology and needed clarification¹⁹². Lay adjudicators often did not have difficulty understanding the concepts in legal terminology such as ‘beyond reasonable doubt’¹⁹³, ‘consent’, and ‘intent’¹⁹⁴, ‘insanity’¹⁹⁵, or ‘aggravating’ and ‘mitigating’¹⁹⁶. It is important for professional judges to give proper and efficient instruction to lay adjudicators in order to enable them to fulfil their democratic function¹⁹⁷. Clear descriptions of legal terminology appear to be national projects in countries which have a lay adjudication system; for instance the Plain English campaign in the UK¹⁹⁸, or the Legal Terms Glossary in the U.S.¹⁹⁹

From a behavioural perspectives, lay adjudication research regarding the instructions for lay adjudicators, in particular the American jury system, appears to focus on how to help lay adjudicators to understand the evidence, laws and arguments. Elwork, Sales and Alfini claim improvements are necessary and written instructions for the jury to help them understand the law and deliberate appropriately on the evidence. They conducted empirical research focusing on psycholinguistic factors: vocabulary, grammar, and organisation in American jury instructions²⁰⁰. Steele and Thornburg studied the relationship between the instructions to the jury and verdicts in actual trials and simulated tests to compare the verbal and written

¹⁹⁰Goodman-Delahunty and others, *supra* note 176.

¹⁹¹Matthews, Bridgeman and Briggs, *supra* note 143.

¹⁹²*Ibid*, 37-8.

¹⁹³JS Carroll, NL Kerr, and others, ‘Free Press and Fair Trial: The Role of Behavioral Research’ (1986) 10 *Law and Human Behavior* 187–201.; P Ellsworth, ‘Some Steps between Attitudes and Verdicts’ in Reid Hastie (ed), *Inside the Juror: The Psychology of Juror Decision Making* (Cambridge; Cambridge University Press 1993), 61.

¹⁹⁴P Duff, ‘Criminal Law Review the Defendant’s Right to Trial by Jury: A Neighbour’s View’ (2000) *FEB Criminal Law Review* 85–94.

¹⁹⁵Ellsworth, *supra* note 184.

¹⁹⁶M Costanzo and S Costanzo, ‘Jury Decision Making in the Capital Penalty Phase’ (1992) 16 *Law and Human Behavior* 185–201, 188.

¹⁹⁷PC Ellsworth, ‘One Inspiring Jury’ (2003) 101 *Michigan Law Review* 1387–1407.

¹⁹⁸The A to Z Guide to Legal Phrases is available at the Plain English website:
<https://www.plainenglish.co.uk/files/legalguide.pdf>.

¹⁹⁹A glossary of legal terms is available at the website of the Office of the United States Attorneys:
<http://www.justice.gov/usao/justice-101/glossary>.

²⁰⁰A Elwork, BD Sales and JJ Alfini, ‘Juridic Decisions - In Ignorance of the Law or in Light of It?’ (1977) 1 *Law and Human Behavior* 163–189.

instructions. Thus, they found that written instructions increased jurors' understanding²⁰¹. Research into the difficulty with oral instructions for lay adjudicators has largely been conducted about actual trials by post-trial questionnaire research²⁰². The Honourable B. Michael Bann suggested clearer and shorter instructions were preferable; the first and final timing of the instructions of when the instructions were given was important; written instructions were important; and helpful responses to the lay adjudicators' questions during their deliberations were useful²⁰³. The influence of extra-legal factors on the verdicts given by lay adjudicators were also one of the concerns regarding lay adjudicators' competence. However, empirical research has tended to show that lay adjudicators are not disproportionately influenced by their emotions or other legally irrelevant considerations²⁰⁴.

When they understand the evidence, the law and the arguments, it is assumed that lay adjudicators experience satisfaction and confidence in their work and in the criminal justice system. The relationship between jurors' perceptions, understanding, confidence and satisfaction in relation to the English six courts system was studied by interview research²⁰⁵. In the findings, jurors' confidence was influenced by their treatment and their understanding of the procedures and their previous experience²⁰⁶; some jurors were confused by the evidence, law and legal terminology²⁰⁷; jurors' confidence was dependent on 'the fairness in the process, the adherence to due process and the efficiency and professionalism of the court staff'²⁰⁸; and whether jurors were satisfied with the information provided²⁰⁹.

Interview research can provide in-depth descriptions of lay adjudicators' experiences, although there are drawbacks to interviews, such as the distortion of memory and the influence of personal bias²¹⁰. The other negative points of interview research are that it is

²⁰¹Steele and Thornburg, *supra* note 171.

²⁰²A Reifman, SM Guisick and P Ellesworth, "Real Jurors" Understanding of the Law in Real Cases' (1992) 16 *Law and Human Behavior* 539–554.

²⁰³The Honourable Dann.

²⁰⁴Baldwin and McConville, *supra* note 182, 20.

²⁰⁵Matthews, Bridgeman and Briggs, *supra* note 143.

²⁰⁶*Ibid*, 6.

²⁰⁷*Ibid*, 7.

²⁰⁸*Ibid*, 8.

²⁰⁹*Ibid*, 8-9.

²¹⁰Costanzo and Costanzo, *supra* note 196, 191-2.

time-consuming²¹¹, and the results can be variable because ‘people tend to lie about their behaviour’²¹². However, this kind of research helps to discover what actually happened in a lay adjudication trial and the interviewer is able to look for correlations between case factors and the verdict²¹³.

2.2.3 Evaluations of Lay Adjudication Procedures: Proposed Criteria

Evaluations of lay adjudication system in terms of the challenges faced by lay adjudicators’ participation have revealed mixed results and various factors influences them. Inspired from the four research mentioned above, namely the Auld Report, the Thomas’ study, Jackson and Kovalev’s research, and Malsch’s work referred to in section 2.2.1. Based on their findings I intend to propose specific criteria for evaluating the citizen judge system in this research. In addition, the criminal justice evaluation standard suggested by United Nations Office on Drugs and Crime as suggested in the *Criminal Justice Assessment Toolkit* in 2006²¹⁴ was also studied. The structure of the toolkit covers policing, access to justice, custodial and non-custodial measures, and cross-cutting issues in order to integrate UN standards and clarify the practical targets of criminal justice reform. In the access to justice section 9.3: lay assessors propose the questions used to evaluate the lay adjudication system²¹⁵.

What emerges from evaluative studies of the lay adjudication system is the emphasis on democratic values. Success or failure is connected to practical concerns about the lay adjudicators’ participation, their responsibilities and duties during the procedures, how far they are representative of the community, and their abilities to serve as decision-makers in order to operate the procedures according to the system. Therefore, the evaluation of a lay

²¹¹N Vidmar, ‘The Performance of the American Civil Jury: An Empirical Perspective’ (1998) 40 Arizona Law Review 849–900, 857.

²¹²E Kahn, ‘Restore the Jury-or Reform-Reform-Aren’t Things Bad Enough Already-IV’ (1992) 109 South African Law Journal 666–79, 673.

²¹³C Thomas and N Balmer, ‘Diversity and Fairness in the Jury System’, vol 24 (London; 2007).

²¹⁴UNODC, supra note 150.

²¹⁵The 8 sets are: Under the law, who may serve as a lay adjudicator in a criminal case? Who within the court is responsible for convening a list from which lay adjudicator may be chosen? ; What efforts does the court system make to ensure that the lay adjudicator list drawn from all parts of the community? ; Are lay assessors representative of the community? Do women and ethnic/religious minorities serve as lay adjudicators? ; How are lay adjudicators notified of their obligation to serve? Are they personally served? Does the court encounter problems with a substantial percentage of people disregarding their summonses? If so, has the court taken any action to enforce compliance with a jury summons? ; On what basis are lay adjudicators chosen to sit on a case? ; How and for what expenses are they compensated? ; How long do lay adjudicators serve?

adjudication system should be receptive to the wider context of legal traditions, political, and social concerns. Taking this into consideration, I suggest there is a fundamental question to be addressed. To what extent the legislation related to a lay adjudication trial procedure imposes a restriction on lay adjudicators' participation? In other words, does it achieve an equitable balance between the concepts of democracy, a fair trial, and legitimacy?

In considering various international adjudication studies and UNODC standards, I decided that the most suitable evaluation items would entail examining four key areas in order to assess whether or not the introduction of the citizen judge system had been successful. These were:

1. the targeted democratic principles by which the citizen judge system was set up;
2. the degree to which citizen judges' participation is obstructed - if at all - by the procedural rules;
3. the frequency of the actual use of the citizen judge system; and
4. the extent to which citizen judges as well as other actors in the criminal justice proceedings satisfy the citizen judge system.

The issue of the 'practice' of a citizen judge system is connected to the manner in which the system is exercised. The choice of appropriate performance indicators for assessing the exercise of the system will depend on the subjective views of the actors; the citizen judges, the prosecution, the defendant, the professional judges, victims, or even all the citizens involved in the community. Objective performance indicators such as the numbers of prospective citizen judges who appear when summoned, the number of citizen judge trials, the ratio of citizen judges who come from certain minority backgrounds, and acquittal rate can be important for assessing the manner in which lay adjudicators' participation operates²¹⁶. These quantitative variables are informative; however, they are dependent on large-scale projects which are often conducted by governments. A key factor in assessing the practice of a lay adjudication system seems to be gauging the manner in which the lay adjudicators' participate to the maximum, from the participative democratic perspective, and whether they gain satisfaction from their work from the procedural fairness perspective. In evaluating the

²¹⁶M Dean, 'Legal Transplants and Jury Trial in Japan' (2011) 31 Legal Studies 570–590, 589.

fairness of outcomes according to participants, their satisfaction is closely related ²¹⁷. Moorhead *et al* noted that satisfaction with the justice system influences the perceived legitimacy of the system owing to the effect on the views of the administrative institutions²¹⁸. The legitimacy of criminal justice depend on their satisfaction.

The legitimacy of the criminal justice system is more valued and considered meaningful and appropriate by citizens, if lay people are involved in the criminal justice procedure. Tyler suggests that citizens' satisfaction with the outcomes and evaluations of procedural justice come from their experiences²¹⁹. The more satisfied lay adjudicators are with their treatment by the professional judges and the court staff, the more likely it is that lay adjudicators are satisfied with the lay adjudication system overall ²²⁰. This resonates with the democratic arguments that the success of a lay adjudication system is tied up in the extent to which the community deems it worthy of its practice for educating the public. This also connects with the work of Fukurai and Krooth on 'the willingness to serve on lay adjudicators' in the U.S. and Japan²²¹. The study argues that the sense of civic duty or obligation to serve as a lay adjudicator is no longer significant; however, the lay adjudicators' satisfaction with their experience enhances their willingness for future service²²².

This strand of the proposed criteria for a lay adjudication system advocates democratisation in the Japanese criminal procedure. In line with democratic principles on the value of lay adjudication in the criminal procedure, the legitimacy of the criminal justice system, which is justified through the citizen users, will have an improved prospect of being successful if it is considered satisfactory and the justice system. The criminal justice system includes the police, prosecutors, and professional judges. The more satisfied lay adjudicators are in the lay adjudication system, the more satisfied legal professionals will be. It will be important to gauge - as far as possible -the extent to which citizen judges are satisfied with their work throughout the citizen judge trial procedure. It is likely that this will be largely conditioned by the degree to which they are compatible with the criminal procedure

²¹⁷R Moorhead, M Sefton and L Scanlan, 'What Drives Public and Participant Satisfaction with Courts and Tribunals' (London; 2008), 18.

²¹⁸*Ibid*, 1.

²¹⁹Tyler, *supra* note 43.

²²⁰Matthews, Bridgeman and Briggs, *supra* note 143.

²²¹Fukurai and Krooth, *supra* note 9.

²²²*Ibid*, 204, 213-4.

restrictions as regards the legal requirement to provide a fair trial in the Japanese criminal justice system. The more lay adjudicators involved in the procedure, the more likely they may have a sense of achievement about their work. This resonates with the findings of both Lewis²²³ and Kahn's²²⁴ studies that advocate a close approximation between lay adjudicators' satisfaction and that of legal authorities. It is essential to consider the citizen judge system closely within the context of the citizen judges' satisfaction.

Ensuring their satisfaction may not provide sufficient classical democratic values, which are also important factors in evaluating whether the citizen judge system is successful or not. It is also necessary to consider the objectives of and the extent to which the system has brought changes. The objectives may be discerned from the principles of a fair trial within a country's legal traditions. If the administration of justice chooses to rely on a citizen judge system as a mechanism for democratising the criminal justice system, it is reasonable to assume that there are specific challenges which it is believed the new system can influence. An assessment of these identifiable objectives and the extent to which the new system can influence them allows the consideration of legal traditions with which the actors in the trial are faced.

These proposed criteria suggests that a lay adjudication is evaluated within its socio-legal context. They acknowledge that Japanese legal history, traditions, and social structure will inform the extent to which the introduction of the citizen judge system may be regarded as meaningful and appropriate and that democratisation of the criminal trial proceedings can potentially influence its objectives, in particular, as the introduction is recognised as the start of democratisation by the authorities. Lay adjudicators' participation will influence legal professionals, legal institutions, and the public. Legal professionals are directly influenced by the introduction of the citizen judge system in terms of their roles and the ways they work. For example, lay adjudicators will evaluate both the prosecution's and defendants' evidence as well as their work²²⁵. Professional judges will play a role in instructing lay adjudicators by

²²³C Lewis, 'Crime and Justice Statistics Collected by International Agencies' (2011) 18 *European Journal on Criminal Policy and Research* 5–21, 9.

²²⁴E Kahn, 'Restore the Jury-or Reform-Reform-Aren't Things Bad Enough Already-III' (1992) 109 *South African Law Journal* 307–18, 311-2.

²²⁵WC Thompson, 'Are Juries Competent to Evaluate Statistical Evidence?' (1989) 52 *Law and Contemporary Problems* 9–41.

explaining and defining information including legal terminology²²⁶. Employers will accept their employees need a leave of absence from work to fulfil their duty of being a lay adjudicator. In addition, the expected influence will revise lay peoples' attitudes to political activities. As Schiff claims, there are three approaches to understanding the law within a society; the relationship between specific interests in society and the law; the expected efficacy of the regulations; and the law in action research, which can target specific categories in detail, as Stone suggested²²⁷. It will not be possible to cover all possible categories; therefore, this study will focus on the legitimacy which lay adjudicators' bring based on their democratic function.

The introduction of the citizen judge system was expected to promote social changes related to not only the legal authorities, including the courts,²²⁸ but to also be consciousness-raising for citizens and influence society to accept, understand, and operate using these democratic concepts. This prospect, envisaged by the Judicial Reform Council, has had a sceptical reception from the citizens. Changes are more likely to occur after the introduction of lay participation. The perception that it is being imposed by the government can increase opposition from citizens. Coercion by the law-making authorities and the scepticism of citizens may lead to their opposition against the government, rather than a consensus for promoting the rule of law with lay participation and a sense of self-governing. In this respect, a lay adjudication system may highlight and increase a sense of distrust in the authorities. Miller suggests that the development of legal systems can be multi-faced, and offers five typologies of 'legal transplant'²²⁹, which Japan used repeatedly as a tool for the judicial reform²³⁰.

The restrictions to lay adjudicators' participation in the procedures according to the legislature have implications for their expected responsibilities and duties. The desire to

²²⁶M Fujita and S Hotta, 'The Impact of Differential Information between Lay Participants and Professional Judges on Deliberative Decision-Making' (2010) 38 *International Journal of Law, Crime and Justice* 216–235.

²²⁷DN Schiff, 'Socio-Legal Theory : Social Structure and Law' (1976) 39 *The Modern Law Review* 287–310, 295–6.

²²⁸Criminal justice reform has to be evaluated from the various aspects in the rules and institutions which will get an impact by the reform. For example, Macfadyen suggested the form of the model court in Scotland in terms of judicial case management to enhance efficiency. See RHL Macfadyen, 'The Model Court of the Future', *The 19th International Conference of the International Society for the Reform of Criminal Law* (Edinburgh, Scotland; 2005).

²²⁹JM Miller, 'Explain the Transplant Process A Typology of Legal Transplants : Using Sociology , Legal History and Argentine Examples to Explain the Transplant Process' (2010) 51 839–885, 842.

²³⁰This will be studied in Chapter 3.

introduce a lay adjudication system can promote the democratisation of the criminal justice system but can also risk triggering feelings of oppression in citizens. Without taking consideration of these consequences, a lay adjudication system may not actually be put into practice as intended. These issues also demand analysis in the context of my proposed evaluative criteria.

This analysis comes from an original test designed to clarify the balance between various democratic principles as the result of the introduction of a lay adjudication system in democratic countries which aim to enhance the democratic values within their criminal procedures as means of developing an ideal lay adjudication system within a legitimacy of the criminal justice system espoused by contemporary democratic society.

The success of the introduction of the citizen judge system will be gauged by taking an overall perspective. The proposed criteria in this thesis will be divided into two major parts: procedural testing and practical testing in terms of lay adjudicators' participation. Moreover, in order to evaluate the level of participation, their satisfaction with their participation, and their competence will be also evaluated with consideration of the historical developments and the challenges of the existing Japanese criminal procedure. For example, a Prosecutorial Review Commission (PRC) [*Kensatsu Shinsakai*] existed before a citizen judge as other forms of lay participation in the Japanese criminal justice system to review prosecutors' work. The PRC consists of 11 lay people who are randomly chosen from electronic registers, and serving duration is six months²³¹. This is another form of lay adjudication in the Japanese criminal justice system. The role of the committee is to challenge prosecutorial discretion, which appears to be a cause of related issues such as high conviction rates²³².

Conclusion

This chapter has given an overview of the theoretical relationship between democratic principles and lay adjudication in criminal cases. Its focus has been the legitimacy of the

²³¹Art. 4 and 14 of Prosecution Review Committee Act (act no. 147 of 1948).

²³²The characteristics and challenges will be discussed in Chapter 3.

procedures involved, areas where democratic values can be brought or enhanced by lay adjudication. The basis of the number and variety of principles within concepts of democracy underline are the requirement a fair trial after the sensible balance of the evidence by peers. Moreover, the overwhelming emphasis on lay participation in the political institutions of democratic societies demonstrates the popularity of lay adjudication.

By analysing the arguments for and against lay adjudication in criminal cases, this chapter has identified two sides to the argument; two camps of opinion. There is a distinctive line between the belief in democratic values, but distrust of lay adjudicators. Supporters of lay adjudication in criminal cases expect lay adjudicators to actively participate and trust in lay adjudicators' competence, while their opponents distrust lay adjudicators' competence. But in the practice of a lay adjudication system, the distrust should not be the basis for evaluation. This does mean that the expectation of lay adjudicators is that they function actively to fulfil their duties, and are able to understand the law and evidence, although instructions should be provided to support their understanding and competence. On the other hand, it also appears that the degrees or levels of lay adjudicators' participation are restricted at each stage of the trial procedure in order to ensure a fair trial.

A lay adjudication system is not the only way of establishing the legitimacy of the procedures. In addition, there is the question of public 'conscience' in the current pluralistic society. The doubts about the representativeness of a lay adjudicator panel is a common way of presenting arguments in opposition to a lay adjudication system.

The contrasting idea to lay adjudicators' participation is that ideal democratic values and distrust in lay adjudicators put a firm barrier between active and non-active participation. In this sense, lay adjudicators' participation and democratic values seem to have been associated for almost as long as lay adjudicators have been part of the legal process' and their competence trusted. But it is very difficult to respond to the claim that this balance is fragile and a precarious base for the political status of democracy.

Lay adjudication studies and the proposed standards imply that it is important to consider a lay adjudication system in the light of lay adjudicators' participation in the four major stages of the lay adjudication procedure: pre-trial procedure; the selection of the lay adjudicators;

decision-making process in the courtroom and the deliberation room; and after the trial. In order to examine the degree of lay adjudicators' participation, the representativeness of a lay adjudicator panel, and their competence are necessarily concerned, moreover, the consideration of the representativeness in a lay adjudication panel and lay adjudicators' satisfaction will show the degree and the level of the lay adjudication system.

CHAPTER 3 JAPANESE CRIMINAL PROCEDURE AND AN INTRODUCTION TO A LAY ADJUDICATION SYSTEM

Introduction

I suggested in Chapter 2 that, while a lay adjudication system underpins the democratic values which bring legitimacy to the criminal justice system, it is debatable whether the success or failure of the introduction of the lay adjudication system can be assessed solely from the procedural and practice aspects, and the perceived balance between the principle related concepts of democracy, fair trial and legitimacy. However, some measure of success can be obtained by reference to what might restrict a lay adjudicators' participation, the representativeness of a lay adjudicator panel, and the active participation of lay adjudicators based on lay adjudicators' performance. These variables in turn will be affected by substantive legal and social issues. As a consequence, understanding the criminal justice system into which the lay adjudication system is introduced and is enforced is indispensable to evaluating the lay adjudication system. Moreover, this leads to an understanding of the targets of introducing the lay adjudication system and its practice in the criminal justice system. This chapter aims to examine the social and procedural challenges resulting from implementing the citizen judge system in the Japanese criminal justice. This chapter is organised in three sections. Section 3.1 explains the characteristics of Japanese society, which may cause difficulties in the development of the principle of democracy. Section 3.2 explains the historical developments of criminal procedure in Japan by tracing the external foreign pressures and influences particularly by Germany and the U.S. Section 3.3 provides a summary of the Japanese criminal justice procedure and the roles of the major actors, public prosecutors, professional judges, defence attorneys and defendants. This chapter aims to clarify the attributes of the Japanese criminal procedure and examine the social and procedural characteristics, which have been expected by implementing the citizen judge system in the Japanese criminal justice system.

3.1 Japanese Society

Japan consists of 6,852 islands including four main islands on the Pacific coast of East Asia¹. It is divided into 47 prefectures which have a municipal organisation². Japanese society appears to be racially, culturally, linguistically, and religiously homogenous. Japan is geographically isolated, and this leads to the belief that there is a purity and uniformity of ethnicity, culture, language and religion³. Many scholars have argued that homogeneity is a myth, for example, Ryang points out the diversity of minority groups including an indigenous race, the Ainu, and the multicultural Japanese governmental policy which supports minority languages and cultures⁴. The JRC recognised the necessity for diverse legal professionals in both the civil and criminal justice systems⁵. According to a statistical survey, 98.5% of the population is ethnic Japanese⁶. The official language is Japanese. There are many dialects and eight dialects in the Okinawa prefecture were classified as languages in danger of extinction by UNESCO⁷. However, the number of dialects has decreased over the last 40 years and the public Japanese language, called 'common Japanese' [*Hyojun Go*], is recognised nationally⁸. Therefore, in general, Japan appears to be a homogenous country.

The national traits of the Japanese people are often referred to as giving priority to the group rather than any individual member and to be obedient to authority⁹. However, Fujita claims that these are not important factors when arguing about the success of the

¹Statistics Japan, 'Japanese Land'[Japanese] <<http://www.stat.go.jp/data/chouki/01.htm>> accessed 8 September 2015.

²Local Autonomy Act, act no. 67 of 1947, art. 2 states the local governments.

³B Brody, *Opening the Door: Immigration, Ethnicity, and Globalization in Japan* (New York; Routledge 2002), 28-32.

⁴S Ryang, *Japan and National Anthropology: A Critique* (New York; Routledge 2005), ch.2. See, M Weiner, *Japan's Minorities: The Illusion of Homogeneity* (London; Routledge 2008).

⁵The Judicial Reform Council (JRC), 'Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century' (2001) <http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html> accessed 14 August 2015, ch. II, part 1. and 2.

⁶Public Survey about Foreign Population in Japan, 2014, <<http://www.e-stat.go.jp/SG1/estat/List.do?lid=000001133760>> accessed 14 August 2015.

⁷UNESCO, 'Atlas of the World's Languages in Danger' <<http://www.unesco.org/languages-atlas/index.php>> accessed 8 September 2015.

⁸M Yoneda, 'Language Q&A' (*National Institute for Japanese Language and Linguistic*, 2004) <http://www.ninjal.ac.jp/publication/catalogue/kokken_mado/20/06/> accessed 8 September 2015.

⁹M Fujita, 'The Analysis of the Citizen Judge System from Historical Perspectives [Nihon Ni Okeru Baishin Seido No Rekishi Karamita Saibanin Seido]' in Yokada, M Fujita and M Naka (eds), *The Citizen Judge System and Legal Psychology* (Tokyo; Gyosei 2009), 31.

citizen judge system, according to his study, which suggests that those traits do not influence the verdicts¹⁰. The immature Japanese social, political, and legal consciousness epitomises collectivism and authoritarianism, and was one of the major concerns before the introduction of the citizen judge system¹¹. Moreover, the sense of elitism brings doubts about the citizen judges' attention to their function.

Elitism in Japanese society as well as the judiciary is often related to arguments about the hierarchical and professionalised characteristics¹² of the Japanese judiciary. The Japanese government structures, including the judiciary, are powerful bureaucracies which recruit graduates from the top universities and the Japanese business sphere is also dominated by those graduates. Moreover, the strong power links between the government, business and universities, is called 'an iron triangle'¹³, according to Feeley, in the light of their great influence on Japanese society, culture and the economy¹⁴. Lee points out the nature of elitism in Japan, which permeates throughout the political decision-making structure, which resonates with Helmann's theoretical hypothesis about its functioning as a democratic opposition¹⁵. Judicial authority being restricted to a particular social elite is one of the undesirable tendencies of a professional judiciary,¹⁶ without open and competitive recruitment¹⁷. Rule by an elite has repeatedly triggered debates in Japan with reference to corruption scandals¹⁸. This led to allegations that

¹⁰Ibid, 32.

¹¹I Weber, 'New Japanese Jury System: Empowering the Public, Preservation Continental Justice, The' [2009] *East Asia Law Review*, 125–176, 157-60.

¹²M Feeley, 'The Bench, The Bar, and the State: Judicial Independence in Japan and the United States' in M Feeley and S Miyazawa (eds), *The Japanese Adversary System in Context* (New York; Palgrave Macmillan 2002) 67-88, 80.

¹³ Ibid, 82.

¹⁴ This is not only for Japan, and other societies also have the same attributes. See WC Samuels, *The Economy as a System of Power* (New Brunswick, NJ; Transaction Books 1979).

¹⁵T Lee, 'Review: Japan: Conservative Politics' (1971) 33 *The Review of Politics* 593–596, 595.

¹⁶Other undesirable tendencies are: dependence of the judiciary on the executives and public opinion; the routines and case hardening by judges; over-bureaucracy of the judiciary; a judicial formalism. See, K Ida, 'USJP Occational PFaper: Introducing Citizen Participation in Japanese Courts: Interaction with Society and Democracy from the Perspective of the American Jury System' (Cambridge; 2006), 13.

¹⁷SF Mandiberg, 'Why Sentencing by a Judge Satisfies the Right to Jury Trial: A Comparative Law Look at Blakely and Booker' (2009) 40 *McGeorge Law Review* 107–148, 143-4.

¹⁸J McCurry, 'Scandal-Hit Japan PM Preparing for Snap Election' (*Guardian*, 2014) <http://www.theguardian.com/world/2014/nov/13/japan-shinzo-abe-election-tax?CMP=tw_t_gu> accessed 11 September 2015.

Japan has a 'dysfunctional democracy'¹⁹. On the other hand, Goto points out the strong characteristic of professionalism in the Japanese modern criminal justice system, which puts it above respect for public opinion and encourages the maintenance of reasonable justice and the autonomy of the law²⁰. Japanese society tends to favour professionalism rather than inexperienced and lay work. As Kiss explained Japanese society is characterised as 'hierarchical' and Japanese people prefer to being convinced by 'those above the people', not by 'their fellows'. Thus he concluded that Japanese people prefer a trial by a professional judge rather than by lay people²¹. Noda stated that there is a gap between the legal structure and the actual lives of people²², as people consider the law as 'undesirable' or even 'detestable'²³. Moreover, the professionalism of the judiciary is regarded as one of the factors contributing to why Japan has maintained relatively low crime rates²⁴. These low rates are linked to the 'uniformity and consistency in the judiciary'²⁵.

The dependence and emphasis on elitism and professionalism in the Japanese judiciary has been criticised from a democratic perspective. The perfectibility of human nature in Confucian belief, leads to high expectations from the legal profession²⁶. However, there is a decrease in trust and public confidence in public institutions²⁷. The lack of communication between the judiciary and the public, which could lead to a more binding awareness of public responsibilities, has been considered a problem²⁸. In order to find the solutions to these concerns, the democratisation of the criminal procedure

¹⁹K Hirata, 'Civil Society and Japan's Dysfunctional Democracy' (2004) 20 *Journal of Developing Societies* 107–124, 107.

²⁰A Goto, 'Citizen Participation in Criminal Trials in Japan' (2014) 42 *International Journal of Law, Crime and Justice* 117–129.

²¹LW Kiss, 'Reviving the Criminal Jury in Japan' (1999) 62 *Law and Contemporary Problems* 261–283, 269.

²²Y Noda, *Introduction to Japanese Law* (Tokyo; University of Tokyo Press 1976), 8.

²³*Ibid*, 159–60.

²⁴N Komiya, 'A Cultural Study of the Low Crime Rate in Japan' (1999) 39 *British Journal of Criminology* 369–390, 370.

²⁵H Shigemura, 'Independence of Judicial Power and Problem Concerning Judicial System Reform in Our Country' (2010) 3 *Research Reports in Kinki University Technical College* 81–96, 86.

²⁶P Roberts, 'On Method: The Ascent of Comparative Criminal Justice' (2002) 22 *Oxford Journal of Legal Studies* 539–561, 551.

²⁷T Inoguchi, *Values and Life Styles in Urban Asia* (Tokyo; University of Tokyo Press 2005), 34.

²⁸JRC, *supra* note 5, ch.I, part 3, 3.

by lay participation was considered to be essential in Japan to enhance transparency and public confidence in the criminal justice system²⁹.

It is important to review the notion of democracy in Japan. The use of the word 'democracy' is confusing in Japan, in particular, in the Japanese translation of the meaning. As Yamamoto and Komuro have demonstrated, there is a mismatch between the concepts of democracy in Japan and in Western countries³⁰. The Japanese concept emphasises a balance between conflicting subjects, which are not certain, while in the Western concept, the subjects are certain³¹. For example, authority and responsibility are clearly articulated³². In their religious study, Yamamoto and Komuro claimed that the emphasis is on '*anima*' [kuki] in Japanese society, but there is no concept of theocracy³³. Although theocracy is perceived as a threat to democratic international political and legal order, as Fortman explains that, changes from theocracy to democracy, through the legitimation, of authority have been taken place³⁴. The lack of both concepts of theocracy and democracy in the Japanese society may make it difficult to develop the concept of democracy.

On 30 November 1945 Matsumoto Jichiro, the first vice chairman of the House of Councillors, said 'the basic principle of democracy is the establishment of human rights' and stressed the significance of equality before the law³⁵. Local governments function as a mechanism for direct, immediate, and representative democracy in Japan³⁶. Direct activism in local government can be seen to some extent in Japanese society; however, it seems to be a 'soft authoritarian' society which has 'the subtle form of authoritarianism through which it operates even in ostensibly democratic' concepts³⁷.

²⁹Z Corey and VP Hans, 'Japan's New Lay Judge System: Deliberative Democracy in Action' (2010) 12 Asian-Pacific Law & Policy Journal 72–94, 87.

³⁰H Yamamoto and N Komuro, *Sociology of Japanese Religion [Nihonkyo No Shakaigaku]* (Tokyo; Kodansha 1981).

³¹*Ibid.*

³²*Ibid.*

³³*Ibid.*

³⁴BDG Fortman, 'Theocracy, Democracy and Secularization: Is There Room for Compromise?' (2008) 2 Sociological Analysis 57–68.

³⁵Cited by I Neary, 'Matsumoto Jiichiro and the Making of Democracy in Postwar Japan' (2007) 19 Japan Forum 217–238, 217.

³⁶Y Takao, 'Participatory Democracy in Japan's Decentralization Drive' (1998) 38 Asian Survey 950–967.

³⁷J Clammer, 'Globalisation and Citizenship in Japan' in Wayne Hudson and Steven Slaughter (eds), *Globalisation and Citizenship* (Oxon; Routledge 2007), 36.

Borton expected the development of democracy in Japan after the Second World War to be driven by the focus on citizens' rights because of opposition against the occupying force³⁸. However, the result was the domination of a homogenous-elitist group within the modernisation model for procedural and technical developments. The stalling of this situation resulted in the necessity for civic participatory democracy, namely deliberative democracy³⁹. Neary suggests the three central elements of peace, human rights and popular sovereignty are necessary to develop democracy in Japan⁴⁰. In this respect, it is reasonable to enhance lay adjudicator participation in the criminal procedure to democratise the system in Japan.

3.2 Historical Developments of Japanese Laws and the Jury System

According to some commentators, Japanese developments in the late nineteenth and early twentieth century exemplified the Watsonian theory of legal transplantation⁴¹. Because of its background as a 'recipient'⁴² or an adopter of foreign laws, the Japanese legal system is considered a 'hybrid'⁴³ or mixed⁴⁴ legal system. Consequently, the first stage of the Judicial Reform in 1999 did not get beyond establishing an abstract target; 'the judicial system for the twentieth first century'⁴⁵. The mixture of both a civil law and a common law tradition is the result of efforts to create a modernised legal system. Moreover, the significance of the modernised system in Japanese indigenous culture has affected the practice of the criminal justice system. This has resulted in an adherence to the principle of the rule of law⁴⁶, democracy derived from stressing the public interests

³⁸H Borton, 'Past Limitations and the Future of Democracy in Japan' (1955) 70 *Political Science Quarterly* 410–420, 420.

³⁹Y Ishikawa, 'Calls for Deliberative Democracy in Japan' (2002) 5 *Rhetoric and Public Affairs* 331–345, 340.

⁴⁰I Neary, 'Matsumoto Jiichirō and the Making of Democracy in Postwar Japan' (2007) 19 *Japan Forum* 217–238, 236–7.

⁴¹See M Dean, 'Legal Transplants and Jury Trial in Japan' (2011) 31 *Legal Studies* 570–590.

⁴²*Ibid.*, 573.

⁴³MJ Wilson, 'Prime Time for Japan to Take Another Step Forward in Lay Participation: Exploring Expansion to Civil Trials' (2013) 46 *Akron Law Review* 641–674, 648.

⁴⁴See A Katsuta, 'Japan: A Grey Legal Culture' in Esin Örüçü, Elspeth Attwooll and Sean Coyle (eds), *Studies in Legal Systems: Mixed and Mixing* (The Hague; Kluwer Law International 1996).

⁴⁵Law Concerning Establishment of Judicial Reform Council [*Shiho Seido Kaikaku Shingikai Secchi Ho*], Act No. 68 of 1999, para. 1.

⁴⁶K Sato and A Yoshimitsu, 'A Review of the Judicial Reform [*Shiho Kaikaku Shingikai Wo Furikaeru*]' (2001) 1208 *Jurist* 10–24, 17–8.

[*Kokyo no Kukan*]⁴⁷, and, globalisation, which was the aim of the Judicial Reform in 1999. Two distinctive legal traditions have shaped current Japanese criminal procedures: civil law and common law traditions, which influenced the Japanese legal system because of its unique historical developments. This section will trace the historical developments in the light of two historical crossroads for the Japanese legal system.

3.2.1 Historical Developments

There were two turning points in the developments of the Japanese legal system before 1999. There are represented by the judicial reform from the end of the eighteenth century to the early nineteenth century, and the post-war reforms after the Second World War. The Japanese civil law tradition developed from a need to modernise the legal system after the collapse of the *Tokugawa* Shogunate Regime and the birth of the Meiji Regime at the end of the eighteenth century in order to amend the unfair treaties concluded with American and European countries⁴⁸. The coordination of a modern code of law and the judicial system was essential in Japan's progress to becoming a sovereign nation with equal rights within the international community. This judicial reform was conducted by introducing the Continental European civil law tradition which blended French and Prussian codified laws, drafted under mainly French Scholar, Boissonade's supervision⁴⁹. In addition, there was a significant German impact on various parts of Japan, in 'science, government, law, education, and military organisation' exerted by the Iwakura mission from 1871-1873⁵⁰. Noda points out that '1881 can be characterized as a watershed at which the waning influence of French law

⁴⁷I translated the word *Kokyo no Kukan* into public interests; however, the word is used as an inclusive expression which can include a nuance for enhancing the Japanese citizens' conscious towards their responsibilities and duties in a self-governing society. See, Ibid, 19.

⁴⁸The Japanese government signed the unfair treaties, derived from the Treaty of Nanking [*Nankin Joyaku*] and its affiliated treaty, with Britain (*Nichiei Dōmei* in 1854), the U.S. (*Kanagawa Jōyaku* in 1854), Russia (*Nichiro Tsuko Joyaku* in 1855), France (*Nichifutsu Shuko Tsusho Joyaku* in 1858), the Netherlands (*Nichiran Shusho Tsusho Joyaku* in 1858), Prussian, (*Nichifu Shusho Tsusho Joyaku* in 1860), and Italy (*Nichii Shusho Tsusho Joyaku* in 1866). Regarding the transition in the period, see T Aruga, 'The Declaration of Independence in Japan: Translation and Transplantation, 1854-1997' (1999) 85 *The Journal of American History* 1409-1431; Japan Centre for Asian Historical Records, 'Timeline Search [Nenpyo Kensaku]' (*Treaties and Legislation in Modern Japanese History*) <<http://www.jacar.go.jp/goshomei/>> accessed 25 February 2016.

⁴⁹GE Boissonade, 'Opinions about the Jury System and Answers to the Questions in the Congress', *Legal Arguments: about the jury system* (Tokyo; Mukenshoya 1927), 37.

⁵⁰R-H Wippick, 'Infected with German Measles: Meiji Japan under German Cultural Influence' (1995) 20 *History of European Ideas* 399-403, 400.

was imperceptibly superseded by German law.⁵¹ For example, during the reform, the Meiji Constitution⁵², Civil Law⁵³, Civil Procedure Law⁵⁴, the Commercial Law⁵⁵, the Criminal Law⁵⁶, Code of Criminal Procedure [*Chizaiho*]⁵⁷, and the Attorney Act⁵⁸ were established by German influence. They became the fundamental basis of the Japanese legal system.

The other turning point was the democratisation of the political, governmental and legal systems of Japan after the Second World War. Across the political spectrum, from authoritarianism to democracy, the nature of the various systems was transformed. Under the supervision of the Supreme Commander for the Allied Powers (SCAP), a wide range of reforms were introduced, but a lay adjudication system was not contemplated⁵⁹. The SCAP's occupational objectives were three: 'Japan's demilitarization and democratization; the purging of war criminals; and Japan's economic resuscitation'⁶⁰. As a result, there was not only governmental reconstruction, but also reform of the educational system and agricultural land reform. Because these reforms reconstructed

⁵¹Y Noda, 'Comparative Jurisprudence in Japan: Its Past and Present [*Nihon Ni Okeru Hikaku Ho No Hatten to Genjo*]' in H Tanaka and MDH Smith (eds), *The Japanese Legal System* (Tokyo; University of Tokyo Press 1976) 194-228, 203.

⁵² The Meiji Constitution [*Dainihon Teikoku Kenpo*] was promulgated in 1889 and enforced in 1890. Disputes over Civil Codes [*Minpoten Ronso*], which are the debates whether the Codes should be postponed or enforced, arose between 1889 and 1890. See A Fujikawa, S Imai and S Oe, *Basic Knowledge about the Modern History of Japan [Kindai Nihon Shi No Kiso Chisiki]* (Tokyo; Yukikaku 1972). The Meiji Constitution was strongly influenced by the German model.

⁵³Act no. 89 of 1892.

⁵⁴Act no. of 1890. It was drafted by German Scholar Eduard Hermann Robert Techow. See, I Kitamura, 'The Judiciary in Contemporary Society: Japan' (1993) 25 Case Western Reserve Journal of International Law 263-275, 263.

⁵⁵ Act no. 48 of 1899.

⁵⁶ Act no. 36 of 1880. The disputes regarding Civil Codes triggered the one regarding Criminal Codes but they were not amended. The first amendment was accepted in 1907, which is based on the current laws.

⁵⁷Act of 37 of 1880.

⁵⁸No. 205 of 1893, which was amended in 1933 (no.53) and 1949 (no.205).

⁵⁹However, in Okinawa in Japan, which was occupied by the U.S. from 1945 to 1952, the jury system was introduced under the two political bodies: the United States Civil Administration of the Ryukyu Islands and the Government of the Ryukyu Islands. See A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010) 12 Asian-Pacific Law & Policy Journal 1-23, 17-21.

⁶⁰S Carpenter, *Why Japan Can't Reform: Inside the System* (Basingstoke, GB; Palgrave Macmillan 2008), 57.

the social and governmental structures as well as the ideologies contained in the 1947 Constitution, Japan has been viewed subsequently as a liberal democratic country⁶¹.

The 1947 Constitution consists of 99 articles, 10 of which provide regulations relating to criminal justice procedure. For instance, that 'sovereign power resides with the people', and the '[g]overnment is a sacred trust of the people, the authority for which is derived from the people, and the powers of which are exercised by the representatives of the people, and the benefits of which are enjoyed by the people.'⁶²The Constitution is called the 'Post-war Constitution'⁶³ and the 'Peace Constitution'⁶⁴ from its three fundamental principles: the sovereignty of the people, respect for fundamental human rights, and pacifism.

Moreover, the 1947 Constitution was followed by amendments to the Criminal Law⁶⁵ and the Code of Criminal Procedure (CCP)⁶⁶. Regarding the Japanese developments of the CCP, the major amendments were made in 1890, 1922, and 1948. The amendment of 1922 was influenced by the German Code of Criminal Procedure, but drafted by Japanese scholars⁶⁷, and the amendment led to the introduction of the jury system. The considerable influence of German Law on the Japanese Code of Criminal Procedure in 1922 was present also in the content of the law, as well as in the concepts of litigation and conditions of lawful prosecution, such as prosecutorial legal principles. Moreover, it is considered that the inquisitorial principle [*Tojisha Shugi*] and the principle of substantial truth [*Jittateki Shinjitsu Shugi*]⁶⁸, are derived from German influences⁶⁹.

⁶¹S Hirowatari, Y Oide, and others, *The Overview of Democratic Legal Studies and Criminal Studies [Minshushugi Hougaku Keijihougaku No Tenbo]* (Tokyo; Nihon Hyouron Sha 2005).

⁶²The Constitution, a preamble.

⁶³E Hisata, *Japanese Constitutional History: The Development and Change of the Consciousness of the Post-Constitution [Nihon Kenposhi: Sengokenpo Ishiki No Tenkai to Henkan]* (Tokyo; Horitsu Bunkasha 1959).

⁶⁴S Koseki, *The Depth of the Peace Constitution [Heiwa Kenpo No Shinso]* (Tokyo; Chikuma Shobo 2015).

⁶⁵Act no. 124 of 1947.

⁶⁶Act no. 131 of 1948.

⁶⁷H Matsuo, 'The Developments of the Criminal Procedure Law in Japan from a Comparative Law Perspective [Nihon Ni Okeru Keijisoshouhou No Hatten, Hikakuhou No Shiten Kara]', *A Japanese Law Study in a Comparison and History [Hikaku to Rekishi no nakano Nihonhōgaku]* (Tokyo; Waseda University Comparative Law Research Institute 2008), 324.

⁶⁸S Ono, *Fundamental Theories in the Criminal Procedure Law [Keijisoshouhou No Kisoriron]* (Tokyo; Japanese Criminal Law Study Committee 1953), 923,

⁶⁹*Ibid.*

The profound German influences on the Japanese legal systems were the result of mutual political interests and cooperation. The German influences started in 1870s, as a result of the German minister's efforts to send German physicians and scholars into the Meiji government because of his interest in Japanese concepts of modernisation⁷⁰. Japan also regarded German policy as an example because of the German military victory over France as well as the existence of the German federal system⁷¹. The long historical influences from the German system still have deep roots in the current CCP, although it was amended in 1947 because of American pressure. This is because the amendment was based on the previous code in 1890. Therefore, current Japanese criminal procedure retains a German influence in spite of strong general American influences in the Japanese legal system⁷².

As a result, these two major principles, the inquisitorial principle and the principle of substantial truth, have been the theoretical foundations of Japanese criminal procedure up to the current period⁷³. The Inquisitorial procedure has remained, in particular, at the investigation phase in, the initial powers of the police and the public prosecutors⁷⁴. In addition, Matsuo has suggested that the characteristic of Japanese criminal procedures are of a careful and detailed judicial administration [*Seimitsu Shiho*] based on the belief in the principle of substantive truth achieved by an elaborate investigation⁷⁵.

In the post-war reform, the CCP was amended under American influences and four major principles and rights were introduced. The principle of the warrant is that no one shall be apprehended without a warrant issued by a competent judicial officer which specifies the offence with which the person is charged, unless he is apprehended for the offence being committed⁷⁶. Others are a guarantee of the right to silence⁷⁷, the support

⁷⁰Wippick, *supra* note 50, 400.

⁷¹*Ibid.*

⁷²M Noguchi, 'Criminal Justice in Asia and Japan and the International Criminal Court' (2006) 6 *International Criminal Law Review* 585–604, 599.

⁷³Ono, *supra* note 68, 923.

⁷⁴DT Johnson, 'Prosecutor Culture in Japan and the USA' in David Nelken (ed), *Contrasting Criminal Justice: Getting from here to there* (Aldershot; Ashgate 2000).

⁷⁵K Matsuo, 'Japanese Characteristics of the Criminal Procedure [*Keijisoshō Niokeru Nihonteki Tokushoku*]' (1994) 46 *Hōsō Jihō* 1249–1278, 1264.

⁷⁶The Constitution, art. 33 and 35.

⁷⁷CCP, art. 291, 311.

of a court-appointed defence attorney⁷⁸, and the protection of many fundamental procedural rights of suspects and defendants. In addition, the introduction of adversarial proceedings, and the neutrality of the court were important reforms⁷⁹. See points out that the Japanese '[c]riminal procedure was changed from an inquisitorial towards an accusatory system with the Anglo-American emphasis on the right of the accused.'⁸⁰ The 1948 CCP⁸¹ is organised into seven parts containing 507 articles in total. The principles of the application of the law are: the principle of adjudication based on evidence⁸²; in *dubio pro reo*⁸³; the prohibition of hearsay evidence⁸⁴; and probative value of the credibility of confession⁸⁵. However, the fundamental concept underlying these principles is the careful and detailed judicial administration.

3.3 Criminal Justice Procedure in Japan

This section provides an overview of the current situation of crime statistics and the criminal justice procedure in Japan. As Stuntz has argued, there is a crucial dependent relationship between criminal procedure rules and the entire criminal justice system⁸⁶. He explains that the rules should be examined by how they work in the 'dynamic' whole system⁸⁷. Within the criminal justice system, there are a number of challenges in operating the criminal justice system in Japan that may affect the application and reception of a citizen judge system in force. Thus, this section captures the picture of the Japanese criminal justice system in the light of the considerable challenges, particularly the lack of protection of the suspect's/defendant's rights. What procedures does the Japanese criminal justice system pursue in its investigations and decision-making? The above will be examined in relation to the types of crimes reported and

⁷⁸The Constitution, art. 37(3), *ibid*, art. 289(1), 316(29), 350(9)

⁷⁹H Matsuo, *Criminal Procedure Law* [Keiji Sosho Ho] (Tokyo; Kobundo 1999).

⁸⁰H See, 'The Judiciary and Dispute Resolution in Japan: A Survey' (1982) 10 Florida State University Law Review 339–344, 358.

⁸¹CCP, Act no. 131 of 1948.

⁸²*Ibid*, art. 317.

⁸³*Ibid*, art. 336.

⁸⁴*Ibid*, art. 321.

⁸⁵*Ibid*, art. 319(2).

⁸⁶Stuntz, *supra* note 96.

⁸⁷*Ibid*, 4.

brought to the Japanese criminal justice system and reported in the domestic and international crime statistics published by the Ministry of Justice in Japan and the United Nations Office on Drugs and Crime (UNODC). After that, the flow of the Japanese criminal justice procedure and the involved actors will be studied.

3.3.1 Crimes and Crime Statistics

Although Japan has a long history of authorising local communities to supervise their own safety⁸⁸, this does not override government responsibilities. There were disruptions⁸⁹ and collapse of local communities in 1990s⁹⁰. As a result, the Japanese government adopted an active role in the administration of justice for the whole country. There is a clear separation of legislative, executive, and judicial functions of the government in Japan, as the 1947 Constitution states. Only the Parliament holds the legislative function⁹¹. The executive function is performed by the Cabinet,⁹² and the judicial function is performed by the Supreme Court and the inferior courts⁹³. The Constitution declares that the Executive must not establish extraordinary tribunals and that all judges shall be independent in the exercise of their conscience and only the Constitution and the laws shall bind the judges⁹⁴.

Crimes in Japan can be divided into two; *Keihohan* which comes under the 1907 Criminal Law⁹⁵, and *Tokubetsuhohan* which is dealt with the special criminal laws, such as the 1964 Road Traffic Law⁹⁶, the 1951 Stimulant Control Law⁹⁷, the 1953 Narcotics and Psychotropic Control Law⁹⁸, the 1956 Anti-Prostitution Law⁹⁹, the 1947 Antimonopoly

⁸⁸D Leonardsen, 'Crime in Japan: Paradise Lost?' (2006) 7 Journal of Scandinavian Studies in Criminology and Crime Prevention 185–210, 199; Komiya, *supra* note 24.

⁸⁹M Young, 'Judicial Review of Administrative Guidance: Governmentally Encouraged Consensual Dispute Resolution in Japan' (1984) 84 Columbia Law Review 924–983, 931.

⁹⁰T Shimada, M Suzuki and Y Harada, 'Fear of Crime and Perceived Risk [*Hanzai Fuan to Higai Risuku Chikaku*]' (2004) 29 Japanese Association of Sociological Criminology 51–64.

⁹¹The Constitution, art. 41. There are two exceptional cases in establishing rules about pertaining to disciplines of members of Houses (art.58 (2)), and in establishing rules that the Supreme Court determines the rules of procedures and internal disciplines of the courts and the administration of judicial affairs (art.77).

⁹²*Ibid*, art.65.

⁹³*Ibid*, art 76.

⁹⁴*Ibid*.

⁹⁵Act no. 45 of 1907.

⁹⁶Act no. 105 of 1964.

⁹⁷Act no. 252 of 1951.

⁹⁸Act no. 14 of 1953.

⁹⁹Act no. 118 of 1956.

Act¹⁰⁰, the 1948 Financial Instruments and Exchange Act¹⁰¹, and so on. The 1948 Code of Criminal Procedure (CCP) and the 1948 Rule of Criminal Procedure (RCP)¹⁰² lay down the principle of legality – *nullum crimen, nulla poena sine lege*¹⁰³. The criminal justice procedure depends on the nature of the suspected offences and the relevant punishments. The CCP and the RCP distinguish three forms of criminal process: the regular criminal process, the summary criminal process [*Ryakushiki Tetsuzuki*]¹⁰⁴, and the juvenile criminal process [*Shonen Shinpan*]. The summary criminal process is used when the prescribed sanction is either a fine or up to ¥1,000,000 (approximately £7232)¹⁰⁵. The juvenile criminal process applies to offenders who are aged younger than 20, and the juvenile cases go to the Family Courts¹⁰⁶. If the offender, who has deliberately committed homicide, is over 16 years old, the case is sent to the public prosecutor¹⁰⁷. This section will focus on the regular criminal process because the cases dealt with by the citizen judge system only involve the regular criminal process¹⁰⁸.

The White Paper on Crime [*Hanzai Hakusho*]¹⁰⁹, is annually collected and reported by the Ministry of Justice, while reported crime statistics are collected by the National Police Agency [NPA] [*Keisatsu Cho*]. The 2015 White Paper on Crime reflects the fluctuations in offending in recent Japanese history¹¹⁰. The number of recognised crimes increased to approximately 1,600,000 in 1947 and 1948 from 1,400,000 in 1946, but it decreased over the next four years¹¹¹. Since then, the number has generally kept

¹⁰⁰Act no. 54 of 1947.

¹⁰¹Act no. 25 of 1948.

¹⁰²Act no. 32 of 1948.

¹⁰³The Constitution, act. 99.

¹⁰⁴CCP, ch.6.

¹⁰⁵*Ibid*, 462(1). £1 = ¥138 at the rate of 17/07/2016.

¹⁰⁶The Juvenile Law, act no. 68 of 1948, art. 2-3.

¹⁰⁷*Ibid*, art. 20.

¹⁰⁸More details about the subject cases are examined in Chapter 4.

¹⁰⁹Each year-White Papers on Crime from 1960 is available on the website of the Ministry of Justice (http://www.moj.go.jp/housouken/housou_hakusho2.html). The Ministry of Justice takes five types of statistics: criminal offences [*Keihohan*], offences against special laws [*Tokubetsuhohan*], traffic offences [*Kotsuhohan*], finance and fiscal offences [*Zaiseikeizaihanzai*], and cyber offences [*Saibahanzai*]¹⁰⁹, and the NPA maintains statistics on five types of crimes; dangerous offences [*Kyoakuhan*], violent offences [*Sobohan*], Intellectual offences [*Chinohan*], moral offences [*Fuzokuhan*], and others. Special laws include such as firearms and sword control law, laws for regulating business that affects public morals, anti-prostitution laws, anti-organised crime laws, and road traffic laws.

¹¹⁰*Ibid*, table 1-1-1-1.

¹¹¹*Ibid*.

increasing and it peaked in 2002 at 3,693,928¹¹². Thefts and traffic offences dominated 87% of total number of recognised crimes in 2002¹¹³. Subsequently, the number of recognised crimes has decreased until 2014. The total number of recognised crime in Japan in 2014 was 1,762,912, and it has decreased since 2002¹¹⁴. The number of each type offence in January and February has decreased between 2012 and 2016, apart from intellectual property offences¹¹⁵. The major offences are dangerous driving, thefts, frauds, criminal assaults, and embezzlement in 2014¹¹⁶.

The number of reported crimes started to decrease since 2002. Moreover, the incarceration rate has declined since 2007¹¹⁷. The prison population in 2006 had the highest record since 1956 with 81,255 inmates, but the number of the 2014 prison population was 60,486¹¹⁸. The number of newly accepted cases by public prosecutors was 1,238,057¹¹⁹, and 1,243,019 cases¹²⁰ were completed by criminal processes in 2014. The regular criminal process had 90,840 cases, and 286,699 cases went to the summary criminal process¹²¹. In short, there are declining statistics in relation to the number of recognised crimes and the prison populations, and the smaller ratio of prison sentences. However, the crime-arrest ratio was at its lowest in 2001, and after that went up. Nevertheless, the ratio was far lower than before 1980¹²². The ratio used to be about 70% in 1950, but it was 52.3% for criminal law offences and 30.6% for offences against special laws¹²³. Although these figures may not directly reflect the criminal situation in Japan, they can produce a sense of distrust in the administration of justice, especially in the police.

¹¹²Ministry of Justice [Japan], 'An Overview of the 2003 White Paper on Crime [Heisei 15 Nen Ban Hanzaihakusho No Aramashi]' (2003) <http://www.moj.go.jp/housouken/houso_2003_hk1_1.html#1-1> accessed 22 March 2016.

¹¹³Ibid.

¹¹⁴Ministry of Justice, *supra* note 109, table 1-1-1-1.

¹¹⁵National Police Agency, 'Crime Statistics [Hanzai Hakusho]' (2016) <<http://www.e-stat.go.jp/SG1/estat/List.do?bid=000001069540&cycode=0>> accessed 20 March 2016.

¹¹⁶Ministry of Justice [Japan], *supra* note 109, table 1-1-1-2.

¹¹⁷Ibid

¹¹⁸Ibid, table 2-4-1-1.

¹¹⁹Ibid, table 2-2-1-1.

¹²⁰Ibid, table 2-2-3-1.

¹²¹Ibid, table 2-2-3-1.

¹²²Ibid.

¹²³Ibid, table 1-1-1-2.

In short, the Japanese governmental statistics show an overall recent downward trend in reported crimes and prison population, and the police clearance rate has also declined, although the statistics also illustrates increases in the past. It is important to note however, that the crime rates in Japan have been low and steady¹²⁴ compared to other countries.

It is often said 'globally'¹²⁵ that crime level in Japan has remained low¹²⁶. According to statistic by the UNODC, the homicide rate of Japan was lower than 1 per 100,000 population in 2011¹²⁷, and it has decreased since 1955, when it was 2.4¹²⁸. The area that has the highest homicide rate is the Americas at 29.3, and South Africa also has one of the highest homicide rates in the world¹²⁹. For example, the rate of homicides in the U.S. (New York), the U.K. (England and Wales), Germany, and France is 6.3, 1.3, 1.0, and 1.8, respectively¹³⁰. However, the statistic brings into questions the validity of valuating the criminal level in countries because of the various related factors and methodologies which influence the statistics¹³¹. It is obvious that there are considerable differences in the number of recognised crimes between the countries. For example, Chapter 4 of the 2015 White Paper on Crime in Japan shows incompatible statistics for the number of recognised crimes, crime rates, and the clear-up rate in Japan, France, Germany, the U.K., and the U.S between 2009 and 2013¹³². The number of recognised crimes in 2013 were 1,314,483 in Japan, 3,480,978 in France, 5,961,662 in Germany, 3,718,043 in the U.K. (England and Wales), and 9,795,658 in the U.S., while the clear-up rates were 30.0% in Japan, 54.5% in Germany, and 23.1% in the U.S.¹³³ Although comparisons of statistics, in particular, taken by different methodological criteria between countries are

¹²⁴S Miyazawa, 'The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy' (2008) 10 *Punishment & Society* 47–77, 74.

¹²⁵H Lu and B Liang, 'Introduction: Public Participation and Involvement in the Criminal Justice System in Asia' (2011) 6 *Asian Journal of Criminology* 125–130, 126.

¹²⁶F Halicioglu, AR Andrés and E Yamamura, 'Modeling Crime in Japan' (2012) 29 *Economic Modelling* 1640–1645.

¹²⁷UNODC, 'Global Study on Homicide' (Vienna; 2013), 34.

¹²⁸*Ibid*, 37.

¹²⁹*Ibid*, 13, 33

¹³⁰*Ibid*, 145–9.

¹³¹The UNODC illustrate the data challenges, see *Ibid*, ch.6.

¹³²*Ibid*, table 1-4-1-1.

¹³³*Ibid*. The French and British rates were not mentioned.

questionable, international crime research will be fruitful in understanding the background and influences that produce these statistics.

In Japan, the rise of public concern about criminal justice does not always correlate with an increase in the crime rate. In other words, although these categories of offences are those which concern the public, they are not necessarily those with the highest crime rates¹³⁴. The low and decreasing criminal rate does not attract public attention because of an extensive focus on specific crimes by the media. For instance, there is growing public concern about crimes carried out by elderly suspects¹³⁵ and targeted at elderly people, because of the advent of the aging society¹³⁶. Steele points out a continuing increase in the number of offences committed by those aged more than 65 years old between 1992 and 2011 in Japan¹³⁷. In fact, the number was 18.8% of arrested criminal offenders, and it was the second largest number following by offenders aged younger than 20 years old in 2014¹³⁸. Moreover, media coverage of drug-related crimes committed by famous or foreign people tend to cause the public concern¹³⁹. An increase has been seen in drug-related offences involving criminal gangs and foreign criminal organisations¹⁴⁰; minor drug-related offences, usually by small-scale dealers and addicts; and minor offences such as thefts¹⁴¹, many which are drug-related and violent juvenile crimes¹⁴². The number of stimulant drug cases decreased, but the number of cannabis

¹³⁴ The three kinds of crimes are often mentioned as major crime problems. Dammer et al. presented the major crimes, crime rates, and outlines of the legal systems of England, France, Germany, China, Japan, and Saudi Arabia. See, RH Dammer, E Fairchild and JS Albanese, *Comparative Criminal Justice System* (3rd edn, Belmont: Thomson Learning 2006), ch.4.

¹³⁵ T Izumaru, 'Current Issues on Collaboration between Criminal Justice and Welfare [*Keijishiho to Ukushi No Renkeini Kansuru Genjo to Kadai Ni Tsuite*]' (2014) 39 Japanese Journal of Sociological Criminology 24–36.

¹³⁶ Shimada and others, *supra* note 90.

¹³⁷ S Steele, 'Proposal to Reform the Japanese Saiban' in Seido (Lay Judge System) to Exclude Drug-Related Cases: Context and Complexities from the Chiba District Court High Frequency of Drug-Related Cases Heard by Chiba District Court: Geographical and Physical Co' (2015) 16 Australian Journal of Asian Law 1–19.

¹³⁸ Ministry of Justice, *supra* note 112, table 1-1-1-6.

¹³⁹ E Ohba, 'Crime Waves in Japanese News Media: Why Is Declining Crime Not Newsworthy?' (2013) 38 Japanese Journal of Sociological Criminology 97–108.

¹⁴⁰ HR Friman, 'Informal Economies, Immigrant Entrepreneurship and Drug Crime in Japan' (2001) 27 Journal of Ethnic and Migration Studies 313–333.

¹⁴¹ F Halicioglu, AR Andrés and E Yamamura, *supra* note 126, 1644.

¹⁴² K Shikata, 'Yakuza – Organized Crime in Japan' (2006) 9 Journal of Money Laundering Control 416–421, 416.

drug cases increased from 2013 and 2014¹⁴³. Japanese social and economic stability and the country's hierarchical and collective culture tend to be considered as the reasons for the relatively low crime rate. For example, the UNODC report raised five reasons for the low homicide rate in Japan: a low gun ownership in the population, a high clearance rate by the police force, the rejection of violence because of the Second World War experience, economic affluence, and the cultural stigma towards crimes in Japanese society¹⁴⁴. An analysis of low violent crime rate in Japan by Roberts and Lafree reveals a Japanese social control mechanism arising from effective social organisation and lowered economic stress between 1955 and 2000¹⁴⁵. They also show the importance of the unique Japanese culture which is the intimate bonding between individuals and respect for group values¹⁴⁶. Moreover, Komiya recognises more oppressive rules, such as 'strong informal social control' as well as an original culture, which leads to strong self-control, imposed on Japanese citizens through crime control, in a way which is very different to the situation in other Western countries¹⁴⁷. Furthermore, it is generally considered that the obedience of Japanese citizens to the criminal justice mechanism is derived from reverence for central administration¹⁴⁸. Japan has rarely suffered ethnic or tribal affiliations or conflict¹⁴⁹. Northrop argued that rebellion is triggered in response to established normative legal norms¹⁵⁰. However, as a result of the lack of conflicts there are strong hierarchical structural social organisations in Japan. A Japanese criminal justice system is under the strong control of a central administration.

In contrast, as Upham has pointed out, the existence of polarisation between the central administration and local administrations in Japan cannot be denied because of 'the frequency of injunctions against local governments' by the national government¹⁵¹.

¹⁴³ Ministry of Justice [Japan], *supra* note 112, table 4-4-1-4.

¹⁴⁴ *Ibid.* Although Japan keeps low homicide rate, but the report points out the serious problem about violence from intimate partner, such as spouse, in Japan. See, *Ibid.*, 56.

¹⁴⁵ A Roberts and G Lafree, 'Explaining Japan' S Postwar Violent Crime Trends' (2004) 42 *Criminology* 179–209.

¹⁴⁶ *Ibid.*, 180.

¹⁴⁷ N Komiya, *supra* note 24, 388.

¹⁴⁸ JO Haley, *The Spirit of Japanese Law* (University of Georgia Press).

¹⁴⁹ M Hane, *Modern Japan: A Historical Survey* (Boulder, Colo.; Westview Press 2001), 296.

¹⁵⁰ FSC Northrop, 'The Comparative Philosophy of Comparative Law' (1960) 45 *Cornell Law Quarterly* 617–658.

¹⁵¹ FK Upham, 'Political Lackeys or Faithful Public Servants? Two Views of the Japanese Judiciary' (2005) 30 *Law and Social Inquiry* 421–455, 427.

Moreover, he claimed that there were strong political and bureaucratic influences on the Japanese judiciary with the recognition of possible corruptible individual judges at the local courts and local governments' involvement in the practice of the judiciary system¹⁵². It is noteworthy to mention conflicts between American military bases in Japan and the local communities. There are seven major military bases in Japan including Okinawa prefecture, in the south island of Japan, because of the 1960 Treaty of Mutual Cooperation and Security between the U.S. and Japan¹⁵³. There are seven ongoing civil and administrative cases related to noise problems caused by the take-off and landing of Air Self-Defence Forces' and American Military jets¹⁵⁴. Various related complications, not only the noise problems, but also crimes¹⁵⁵ and accidents¹⁵⁶, have occurred. There has been intractable struggles involving municipal governments and citizens in provisional areas against the coercive oppressions of the central administrations. Hoshino has examined the sense of denial of the Japanese government regarding these problems in Okinawa and the voice of local communities in Okinawa¹⁵⁷. Nevertheless, there is a propensity in Japan for provincial governments and citizens to comply with the power of central government.

Komiya categorised four elements as reasons: environmental (demographic and geographic), progress (economic and educational), justice (legal and administrative) and cultural factors¹⁵⁸. As mentioned above, there are no race-related conflicts owing to

¹⁵² Ibid.

¹⁵³ Treaty no.6.

¹⁵⁴ Ministry of Justice [Japan], 'Litigations Related to Military Bases [Kichikankei Soshō]' (2016) <http://www.moj.go.jp/shoumu/shoumukouhou/shoumu01_00028.html> accessed 22 March 2016. Regarding the arguments, see, T Kobayashi, 'A Claim for Right to Live in Peace Regarding Okinawa Military Base Noise Problem Case [Okinawa Beigunkichibakuon Soshoniokeru Heiwatekiseizonken No Shucho]' (2014) 199 Aichi University Law Department Bulletin Paper 191–240.

¹⁵⁵ There are sexual assaults and rape cases committed by American soldiers in Japan were constantly recognised, according to Miyagi. She also points out that 83% of the filed cases involved by American soldiers were not indicted between 2001 and 2008. See, H Miyagi, 'A Report from Okinawa [Okinawa Karano Hokoku]' (2011) 23 Ritsumeikan Linguistic Culture Research 179–182.

¹⁵⁶ Statistics show that number of accidents related to the American military and military bases were 80 and 78 in 2014 and 2015. See Okinawa Prefectural Government, 'Statistic Materials: U.S. Military and Military Bases in Okinawa' (2015) <<http://www.pref.okinawa.jp/site/chijiko/kichitai/toukeisiryousyu2703.html>> accessed 22 March 2016, 2. cases and accidents, 101.

¹⁵⁷ E Hoshino, 'U.S. Military Bases in Okinawa and Security Guarantee [Okinawa No Beigunkichimondai to Ningen No Anzenhoshō]' (2013) 15 Ryukoku Law Review 23–59.

¹⁵⁸ N Komiya, 'A Cultural Study of the Low Crime Rate in Japan' (1999) 39 British Journal of Criminology 369–390, 370. He listed 11 elements mentioned by students, such as the cultural/philosophical

Japan's environmental characteristics, high literacy rates and low unemployment rates due to its economic stability, and there is serious concern about shame about crime in communities¹⁵⁹ resulting in a low crime rate. Haley also claimed that the low rate in Japan seems to be primarily caused by the Japanese 'traditional values' that are based on the Confucianism heritage, and 'social controls' leading to strong judicial control¹⁶⁰. He also discussed issues related to strong control, in particular 'conservative' judges' decisions focusing on supporting the rule of law¹⁶¹. This means professional judges tend to adhere to precedent rather than community consensus; on the other hand, professional judges play 'a central role in the formation and development of law'¹⁶². Moreover, Haley's extensive research illustrated political controls over the judiciary and collectivism existing throughout Japanese legal as well as societal culture¹⁶³. Further, these elements also lead to the emphasis on crime prevention and restorative justice, revealed in the approaches of police, prosecutors, and judges¹⁶⁴. The reasons for the low crime rate appear to show doubts about the independence of the judiciary, which is against the principles of a fair trial and democracy.

3.3.2 Japanese Criminal Justice

Foote claims that the Japanese criminal justice system is 'the due-process model'¹⁶⁵. The Japanese criminal justice system consists of major three phases: criminal investigation, trial, and execution of the decision. Firstly, an arrest warrant is issued and the suspect is arrested¹⁶⁶. The police and public prosecutor interrogate the suspect to collect evidence. After the public prosecutor indicts the suspect, the secondly, the

context, and 10 elements referred by Japan's Ministry of Japan, such as good social control networks in local communities.

¹⁵⁹ I Weber, 'The New Japanese Jury System: Empowering the Public, Preservation Continental Justice', [2009] East Asia Law Review 125–176, 146.

¹⁶⁰ JO Haley, 'Why Study Japanese Law?' (2010) 58 American Journal of Comparative Law 1–14, 11.

¹⁶¹ JO Haley, 'Constitutional Adjudication in Japan: Context, Structures, and Values' (2011) 88 Washington University Global Study Law Review 1467–1491, 1489.

¹⁶² JO Haley and DH Foote, 'Judicial Lawmaking and the Creation of Legal Norms in Japan : A Dialogue' in John O Haley and Toshiko Takenaka (eds), *Legal Innovations in Asia Judicial Lawmaking and the Influence of Comparative Law* (Cheltenham; Edward Elgar Publishing 2014), 78.

¹⁶³ Ibid.

¹⁶⁴ Ibid, 12.

¹⁶⁵ DH Foote, 'The Benevolent Paternalism of Japanese Criminal Justice' (1992) 80 California Law Review 317–390, 332.

¹⁶⁶ CCP, art. 198(1).

criminal trial procedure starts by sending the case file to the court¹⁶⁷. The verdict is determined at the court, and lastly, the verdict is executed¹⁶⁸. As a Flowchart of a Japanese Crime (see Appendix 4), illustrates, there are ten steps from beginning to end in the Japanese criminal justice procedure. The following part of this section will examine the criminal justice procedure with its actors and organisations and consider its challenges.

Luna defined that an adversarial approach towards criminal procedure as involving recognised opponents, a public prosecutor on behalf of the state against the defendant, and maybe a public defender or private criminal defence attorney before a presumably impartial decision maker in the guise of a judge or jury¹⁶⁹. The equal responsibility for the investigation and selection and presentation of the evidence is placed on the two opposing parties¹⁷⁰. In addition, the principles of orality and immediacy tend to be emphasised in the trial procedure¹⁷¹. Therefore, the judge tends to play a passive or reactive role as a 'judicial umpire' in order to reach decisions through the adversarial contest between the two parties¹⁷². On the other hand, in an inquisitorial approach, there is a separation of responsibilities between the pre-trial and trial procedures. The investigation responsibility lies on the police and prosecution, and in the trial procedure the responsibilities shift to the judge¹⁷³. Adjudication in an inquisitorial approach tends to be based upon a definitive judicial inquiry revealing the truth and achieving accurate verdicts. No system has a definitively adversarial or inquisitorial approach because of the mixtures and deviations in the historical development of different legal systems¹⁷⁴.

¹⁶⁷ Ibid, art. 247.

¹⁶⁸ Ibid, art. 471.

¹⁶⁹ E Luna and ML Wade, 'Introduction' in Erik Luna and Marianne L Wade (eds), *The Prosecutor in Transnational Perspective* (Oxford: Oxford University Press 2012), 179.

¹⁷⁰ JS Hodgson, 'The Future of Adversarial Criminal Justice in 21st Century Britain' (2010) 35 *North Carolina Journal of International Law and Commercial Regulation* 319–362, 320,

¹⁷¹ Ibid.

¹⁷² Ibid.

¹⁷³ K Ambos, 'International Criminal Procedure: "adversarial", "inquisitorial" or Mixed?' (2003) 3 *International Criminal Law Review* 1–37, 4.

¹⁷⁴ Council of Europe, 'The Role of Public Prosecution in the Criminal Justice System' (2000), 2; R Vogler, *A World View of Criminal Justice* (Aldershot; Ashgate 2005), ch.1.

3.2.2.1 Criminal Investigations

The four investigation authorities discover and register a criminal offence through investigations¹⁷⁵, when they consider whether there is reasonable suspicion that crime was/has been committed¹⁷⁶. The authorities are the police¹⁷⁷, special judicial officers¹⁷⁸, public prosecutors¹⁷⁹, and public prosecutors' assistant officers¹⁸⁰. They can find out about alleged crime through information from the public, such as reports from victims¹⁸¹ or witnesses¹⁸², and voluntary surrenders¹⁸³.

The Japanese National Police Agency (NPA) [*Keisatsu Ch*] was established in 1954 according to Police Law¹⁸⁴, and it is administered by the National Public Safety Commission of the Cabinet Office. The Metropolitan Political Department [*Keishi Cho*] is one of the police forces responsible for Tokyo. The NPA consists of 8 bureaux including the Commission-General and Imperial Guard Headquarters, and a Regional Bureau¹⁸⁵. While the function of the first two organisations is planning and research on the police system¹⁸⁶, the Regional Bureau contains prefectural police organisations, which undertake actual police duties, such as criminal investigations¹⁸⁷. They are there to protect individual lives, persons, and property, carry out crime prevention, arrest suspects, maintain traffic safety and maintain public safety and order, according to the Police Act¹⁸⁸.

At the criminal investigative phase, the police and prosecutors have the right to carry out compulsory investigations [*Kyo sosa*]¹⁸⁹, which could restrict the liberty of the

¹⁷⁵ CCP, art. 189(2).

¹⁷⁶ Ibid, art. 189(2), 191(1).

¹⁷⁷ Ibid, 189.

¹⁷⁸ Ibid, art. 190. They are such as Japan Coast Guard Officers, drug control officers and labour standard inspectors.

¹⁷⁹ Ibid, art. 191(1).

¹⁸⁰ Ibid, art. 191(2).

¹⁸¹ Ibid, art. 230.

¹⁸² Ibid, art. 239(1).

¹⁸³ Ibid, art. 245.

¹⁸⁴ Act no. 162 of 1954.

¹⁸⁵ National Police Agency, 'The Structure of the Police' (2014)

<<http://www.npa.go.jp/koho1/sikumi.htm>> accessed 11 September 2015.

¹⁸⁶ Police Law, art. 15.

¹⁸⁷ See National Police Agency, 'About Investigations'

<<http://www.npa.go.jp/sousa/index.htm#torishirabe>> accessed 27 March 2016.

¹⁸⁸ Ibid.

¹⁸⁹ CCP, act no. 74 of 2011, art. 197.

individual. Criminal Investigation in the Japanese criminal justice system can be divided into two parts: compulsory investigations and investigations with voluntary cooperation. Compulsory investigation, including arrest, search, and inspection, can be conducted against the subjects' consents to the investigations¹⁹⁰. The other can be conducted with the subjects' consent to the investigations. There are arguments about the compulsory investigations because of the prohibitions on deprivation of life or liberty¹⁹¹ and the violation of suspects' rights by the police and a prosecutor¹⁹². In order to prevent violation, Article 197(1) states that compulsory investigation without appropriate criminal proceedings is a violation of law [*Kyosei shobun hoo* 197(1) *shugi*]. Professional judges have a right to investigate the reasons and necessity for compulsory investigation, and if it is inappropriate, professional judges can dismiss the request for an arrest warrant¹⁹³.

In addition, the lack of protection of the suspects' rights during criminal investigations in order to obtain confessions as evidence is a serious violation of citizens' individual rights and damages the concept of democracy. For the pre-indictment investigation, the police can request a person's voluntary attendance at the police station for compulsory questioning. The police must decide whether to release or refer a suspect to the prosecutors within 48 hours after his/her arrest and they may be interrogated without the presence of a defence attorney. The defendant may not be allowed to refuse to be interrogated in practice because Article 198 (1) of the CCP allows a public prosecutor, public prosecutor's assistant officer or judicial police official to ask any suspect to appear in their office and they can interrogate him/her if they consider it necessary. Moreover, prosecutors have an additional 24 hours to decide whether to release the suspect or seek a warrant for his/her detention. Therefore, the suspect can be detained for 72 hours in total without charge or trial and without access to a defence attorney. Moreover, the police can request a 10 day- extension request up to two times if the police recognises that 72 hour custody is not enough. In addition, prosecutors can apply

¹⁹⁰ Ibid.

¹⁹¹ The Constitution, art.31, Criminal Investigation Rules, art. 99.

¹⁹² A Soldwedel, 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' (2010) 41 Vanderbilt Journal of Transnational Law 1417–1474, 1430.

¹⁹³ Rules of the Supreme Court, act no. 32 of 1948, art. 143 (3).

to the court for pre-trial detention. The initial detention warrant authorises detention for 10 days and the person can be detained for 23 days in total from the time of arrest. As Shinomiya contends, suspects are in a 'hostage' position because of the reluctance to grant bail or disclose prosecution evidence¹⁹⁴.

Evidence is admissible under the rule of evidence¹⁹⁵, and it must be relevant to the charge or defence. Confessions have been the most common and dominant evidence in Japanese law enforcement practice¹⁹⁶ not only in criminal but also in civil cases. Therefore, police and public prosecutors focus on obtaining confessions in secretive investigation, and rely on this doubtful secretive procedure where the human rights of the defendant may be violated. This may happen because of the relative strength of the police in investigation and of public prosecutors in indictments as well as the over-acceptance of confessions by professional judges¹⁹⁷.

The possible solution for this secretive environment could be the introduction of video- and audio-recording of full investigation interviews in order to enhance transparency in the procedure. The video and audio recording of investigation interviews was introduced for the citizen judge cases in May 2016¹⁹⁸. The new technology will bring four main advantages: to prevent coercive confessions; to guarantee access to the materials by defence attorney; to provide reliable interrogation materials rather than handwritten ones; to review the materials for research use¹⁹⁹.

When the investigation is completed, the police pass the case file to the Public Prosecutor's Office²⁰⁰. The prosecutor has full discretionary power in regard to bringing

¹⁹⁴S Shinomiya, 'Adversarial Procedure without a Jury: Is Japan's System Adversarial, Inquisitorial, or Something Else?' in Malcolm m Feeley and Setsuo Miyazawa (eds), *The Japanese Adversary System in Context* (New York; Palgrave Macmillan 2002), 115-8.

¹⁹⁵ CCP, sec.4.

¹⁹⁶ This is heavily related to the prosecutorial policy.

¹⁹⁷ Please see e.g. Kenneth L Port, *Comparative Law: Law and the Legal Process in Japan* (Durham, N.C.: Carolina Academic P, 1996), at 163; Kiss, *supra* note 21, 265. However, article 38 of the Constitution, all persons are protected from being compelled to testify against themselves.

¹⁹⁸M Honma, 'Problems for the Visualisation of Investigation Interviews' (2016) <<https://thepage.jp/detail/20160602-00000007-wordleaf?page=1>> accessed 3 July 2016.

¹⁹⁹ Regarding the discussions about video- audio-recording in the Japanese criminal justice, please see; M.J. Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time', *Fordham International Law Journal*, 33 (2010), 487-572.

²⁰⁰ CCP, art. 246.

the indictment²⁰¹. The prosecutor makes the indictment and sends it to the trial court²⁰². The prosecutor has to follow the form determined by the law and to describe the basis for reasonable suspicion and evidence against the accused²⁰³. If necessary, the prosecutor will contact the police to collect the missing pieces and obtain sufficient information to make a decision on whether or not there is an adequate basis for indictment²⁰⁴. If there is no sufficient ground for suspicion, if the accused's guilt is of a minor nature, or there is no public interest in prosecution, the prosecutor drops the case²⁰⁵. By request of the public prosecutor, the case can go to two other different criminal procedures, apart from the regular criminal procedure, depending on the prescribed penalty. These are a summary order procedure [*Ryakushiki tetsuzuki*]²⁰⁶, or a speedy trial procedure [*Sokketsu saiban*]²⁰⁷.

3.2.2.2 Criminal Trials

Once the indictment has been declared valid, the court, which is assigned to try the case, will determine the date for the beginning of the trial and summon the defendant, witnesses, and victims,²⁰⁸ in spite of contested or uncontested case. Criminal cases will get their initial hearing at any of the courts depending on the offence.

The current Japanese regular criminal trial procedures are organised into five stages. Firstly, the trial procedure starts with an opening procedure which contains four processes; personal identification questions²⁰⁹, a reading of the indictment²¹⁰ an announcement of the accused's rights, and a statement opportunity for the defendant²¹¹. Secondly, the public prosecutor and defence attorney present evidence on the grounds

²⁰¹ Ibid, art. 247.

²⁰² Ibid, art. 262.

²⁰³ Ibid, art. 256.

²⁰⁴ Ibid, art. 193.

²⁰⁵ Ibid, art. 248.

²⁰⁶ Ibid, art. 461-470. The summary court may impose a fine up to 1,000,000 yen, and the court can suspend the sentence, order a confiscation or take other supplementary measures.

²⁰⁷ Ibid, art. 350. If a prosecutor deems the case is clear and minor, he/she can request a speedy trial procedure, but if the case is punishable by the death penalty, life imprisonment, imprisonment with/without labour for not less than one year, a speedy trial procedure shall not be applied.

²⁰⁸ Ibid, art. 271.

²⁰⁹ CCP, art. 196.

²¹⁰ Ibid, art. 291(1).

²¹¹ Ibid, art. 291(2)

of the principle that ‘a suspect’s guilt must be proved beyond reasonable doubt’²¹², followed by the third procedure, whereby the prosecutor states the punishments he/she thinks appropriate, and the defence attorney presents a final argument. The defendant is given the opportunity to make a final statement to give his/her point of view. Fourthly, the judges deliberate on the evidence presented during the hearing and reach a verdict. Lastly, the professional judges make a written judgment of their views and any penalty and the judgment will be accepted by the court.

The public prosecutor or the defendant/defence attorney may appeal²¹³ by submission of application for appeal to the District Court within 14 days after the judgement was declared²¹⁴. In addition, the statement of reasons for appeal must be submitted²¹⁵. Article 384 of CCP restricts an appeal only to the existence of at least one of the grounds in the provisions of Article 377 through 382 and Article 383 of CCP. For example if there was a violation of laws and regulations in the court proceedings and it is clear that this violation has affected the judgment, or facts which appear in the case records and evidence examined by the appeal court²¹⁶. If an appeal is not made by the public prosecutor or the defence, the decision is finalised.

3.2.2.3 Executions

There are a range of penalties in the Japanese criminal justice system. The five major penalties are the death penalty, imprisonment with labour, imprisonment without labour, penal detention, and fines²¹⁷. The execution of penalties is directed by a public prosecutor²¹⁸. However, a death penalty is executed by the order of the Minister of Justice²¹⁹ under the observations of a public prosecutor, a public prosecutor’s assistant officer, and the head of a penal institution²²⁰. According to the 2015 White Paper on Crime, the number of death penalty sentences decreased from 13 to 2 from 2005 to

²¹² EB Rasmusen and JM Ramseyer, ‘Why Is the Japanese Conviction Rate So High?’ (2001) 30 *Journal of Legal Studies* 53–88, 56.

²¹³ CCP, art. 351, 355.

²¹⁴ *Ibid*, art. 373.

²¹⁵ *Ibid*, art. 386.

²¹⁶ *Ibid*, art. 379.

²¹⁷ Penal Code, art. 9.

²¹⁸ CCP, art. 472.

²¹⁹ CCP, art. 475.

²²⁰ CCP, art. 477.

2014, and during this period, the number of life imprisonments also decreased from 119 to 23. The number of inmates in prisons increased from 1993 and 2002, but decreased from 2005 to 2014²²¹. The prison rate in 2014 was 67.1 in 2014²²². The rate of inmates released on expiration of their prison term was 43.5%, or 10,726, in 2014²²³. Probation is one of the alternative criminal sanctions, if a defendant satisfies the conditions²²⁴. In addition, suspension of execution of the sentence can be applied for a period of not less than one year but not for more than five years, if a defendant satisfies the conditions²²⁵. For instance, this occurs when a person has been sentenced to imprisonment with or without labour for not more than three years or a fine of not more than 500,000yen, if a person was not previously sentenced to imprisonment without labour or a severe punishment²²⁶. The number of persons released from prisons in 2014 was 25,905 including 298 who died in prisons, 43.5% was the percentage of people who fulfilled his/her prison service, and 56.5% for those who were released on parole²²⁷.

The Correction Bureau and the Rehabilitation Bureau are dependent on the Ministry of Justice. There are eight Regional Correction Headquarters which supervise the correctional institutions including penal institutions, such as prisons, juvenile prisons, and detention houses, and juvenile correctional institutions, such as juvenile training schools and classification homes²²⁸. It is necessary to guarantee that these institutions provide appropriate living conditions and hygienic and health management for inmates²²⁹. By the reforms of the 1908 Prison Law²³⁰ in 2006 and 2007, the treatment of inmates were improved, guaranteeing such inmates' right to meet with visitors, acts related to religions, and access to books and magazines²³¹.

²²¹ Ministry of Justice [Japan], *supra* note 112, table 2-4-1-2.

²²² *Ibid.*

²²³ *ibid*, table 2-4-1-8.

²²⁴ Penal Code, ch.4.

²²⁵ *Ibid*, art. 25.

²²⁶ *Ibid*, art. 25.

²²⁷ *ibid*, table 2-4-1-8.

²²⁸ Ministry of Justice [Japan], 'Organisations and Duties of Correction Bureau' <http://www.moj.go.jp/kyousei1/kyousei_kyousei02.html> accessed 29 March 2016.

²²⁹ *Ibid.*

²³⁰ Act no. 28 of 1908.

²³¹ Ministry of Justice [Japan], 'The Reform of Prison Law [Kangokuho Kara Keijishuyo Oyobi Hishuyosha Nado No Shoguni Kansuru Horitsu]' <<http://www.moj.go.jp/content/000057393.pdf>> accessed 29 March 2016.

3.3.3 Actors in a Criminal Trial Procedure: Public Prosecutors, Professional Judges, Defence Attorneys, Defendants

The major actors in the criminal trial procedure in Japan are public prosecutors, judges, defence attorneys, and defendants. The relationship between the two legal enforcements; the public prosecutor office and the courts tend to be regarded as very intimate because of their close and secretive working routine concerning criminal procedure²³². All legal professionals, public prosecutors, judges, and defence attorneys must be law school graduates following the judicial reform in 1999 and must pass the bar exam²³³. The number of public prosecutors, professional judges, and attorneys in 2014 was 1,877, 2,944, and 35,045, and the percentages of women were 23.1%, 21.4%, and 18.1%²³⁴. The figures shows a male-dominated tendency in the legal professionals.

3.3.3.1 Prosecutors

Prosecutors have a broad fact-finding authority in the Japanese system. They have the sole power to initiate and suspend prosecutions. In addition, the prosecutor compiles the evidence dossier and the professional judge relies heavily on the dossier throughout the trial. The Japanese prosecutors have a perfect track record of convictions for all cases brought to trial, and this leads to careful screening of cases by the prosecutors²³⁵. The Public Prosecutor's Office is an attached organisation, administered by the Ministry of Justice. The Office consists of the Supreme Public Prosecutors' Office, 8 High Public Prosecutors' Offices with 6 branches, 50 District Public Prosecutors' Offices with 203 branches, and 438 Local District Public Prosecutors' Office²³⁶. They aim at maintaining national security and their motto is *impartiality, fairness, and respect for human rights*²³⁷. The public prosecutors and public prosecutors'

²³² DT Johnson, *The Japanese Way of Justice: Prosecuting Crime and Japan* (Oxford; Oxford University Press 2002), 50-71.

²³³ There is a special provision for law professors who can be registered as attorneys without passing the bar exam, if they have requirements. Lawyer Act, art. 5.

²³⁴ Sendai Gender Equal Opportunity foundation, 'Female Ratio of Professional Judges, Public Prosecutors, and Attorneys' <http://www.sendai-l.jp/chousa/pdf_file/5/5-1/5_1_1.pdf> accessed 29 March 2016.

²³⁵ DH Foote, 'Reflections on Japan's Cooperative Adversary Process' in M Feeley and Setsuo Miyazawa (eds), *The Japanese Adversary System in Context* (New York; Palgrave Macmillan 2002), 37.

²³⁶ Public Prosecutors Office, 'About the Public Prosecutors Office' <http://www.kensatsu.go.jp/soshiki_kikou/index.htm> accessed 11 September 2015.

²³⁷ Ibid.

assistant officers carry out investigations, determine whether suspects should be indicted or not in criminal cases, supervise law enforcement, and have the representative authority to represent the public interest in relation to a variety of laws²³⁸.

3.3.3.1.1 A Prosecutorial Review Commission [Kensatsu Shinsakai]

A Prosecutorial Review Commission (PRC)²³⁹, composed of eleven members who were selected from the electoral register, had been the existing form of lay participation in Japanese criminal justice. This was introduced in the post-war reforms as a 'Japanese version of the American grand jury with the specific function of reviewing and assessing the propriety of prosecutors' indictment decisions.'²⁴⁰ The Commission was to examine the prosecutors' decisions to order an arraignment or not and the development of the prosecution proceedings²⁴¹. The Commission was regarded as having a unique role to possibly counteract and control the power of the prosecutors. Moreover, unlike criminal trials, the procedure does not apply the concept of the careful and detailed judiciary administration²⁴².

The improvements to the review/moderation of the Prosecution system were proposed to be legally binding in the 1999 Judicial Reform²⁴³. Fukurai emphasises the importance of this being legally binding because lay participation will provide a moral element including 'their sense of justice, fairness, and accountability' in the deliberation of criminal cases even against Japanese powerful companies, elites or where people related to the government are often involved²⁴⁴. In cases where the PRC determines that indictment was the correct and fair course of action, the prosecutors must reconsider if they decided not to indict. After that, if they still decide not to prosecute within three

²³⁸ The Prosecutors Office, 'The Principles of the Prosecution'
<<http://www.kensatsu.go.jp/content/000128767.pdf>> accessed 20 September 2015.

²³⁹ Prosecution Review Committee Act, act no.147 of 1948.

²⁴⁰H Fukurai, 'A Step in the Right Direction for Japan' S Judicial Reform : Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal , Civil, and Administrative Litigation' (2014) 36 Hastings International and Comparative Law Review 517–567, 525.

²⁴¹ Ibid, art. 2.

²⁴²M Clack, 'Caught Between Hope and Despair: An Analysis of the Japanese Criminal Justice System' (2003) 31 Denver Journal of International Law and Policy 525–629, 534.

²⁴³The JRC, *supra* note 5, ch. II, part 2, sec. 3.

²⁴⁴H Fukurai, 'Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution' (2011) 1 East Asia Law Review 1–42, 42.

months, then the PRC will reconsider the case²⁴⁵. Defence attorneys must be involved in the reconsideration of the indictment decision²⁴⁶. If the PRC still considers that indictment was the appropriate and fair decision, then the public prosecutor is obliged to attend the PRC conference and present the argument for his or her opinion. If more than eight members vote to prosecute²⁴⁷, the case will proceed²⁴⁸. The major argument about this system is the publicity about the investigating process of the PRC²⁴⁹. There is no way to examine the process because during the investigating procedure, - the confidentiality of the case before indictment or if there is to be no indictment – has to be protected.

The PRC's mandate is to check the broad range of prosecutorial discretion, while another way to check it is through the superior prosecutors' supervision. The powerful exercise of prosecutorial discretion in Japan, underlined by the importance of a defendant's confession and expressions of remorse²⁵⁰, is criticised by many researchers²⁵¹, including Foote²⁵², because of the possible abuse of prosecutorial discretion. In addition to indictment, prosecutors are entitled to recommend sentences²⁵³ and suspend prosecution, as article 248 of the CCP states that 'prosecution need not be institute owing to the character, age, environment, gravity of the offence, circumstances or situation after the offence'. The great acceptance of a defendant's confession obtained at the investigation stage by professional judges is often mentioned by researchers as a problematic relationship between professional judges and prosecutors. Moreover, the excessive dependence on prosecutors tends to be proved by high conviction rates. Two reasons the conviction rate is high are suggested by

²⁴⁵ Prosecutorial Review Committee Law, art. 41(2).

²⁴⁶ Ibid, art. 41(4).

²⁴⁷ Ibid, art. 41(6).

²⁴⁸ Prosecutorial Review Committee, 'Statistics on Accepted Cases and Solved Cases' (Tokyo; 2014).

²⁴⁹ K Anderson and M Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Law Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspectives' (2004) 37 Vanderbilt Journal of Transnational Law 935–992, 948.

²⁵⁰ DH Foote, 'Prosecutorial Discretion in Japan: A Response' (1986) 5 UCLA Pacific Basin Law Journal 96–106.

²⁵¹ See,

²⁵² Ibid. He focused on the lack of plea bargaining in Japan at that time and the great use of suspension of prosecution.

²⁵³ Art. 293(1) of CCP.

Ramseyer and Rasmusen: professional judges' avoidance of acquittal because of negative impacts on their career, and prosecutorial discretion for case selection supported by high prosecution budgets²⁵⁴. The PRC can therefore be seen as part of the increase in lay adjudication, embodying the lay elements of democracy in the Japanese criminal justice system like citizen judges and executing their legally-binding decision.

3.3.3.2 Professional Judges

There are four kinds of inferior courts: the Summary Courts, the Family Courts, the District Courts, and the High Courts²⁵⁵. The Summary Courts handle civil cases involving claims which do not exceed ¥140,000 (£1014.49)²⁵⁶ and criminal cases related to offences punishable by fines or lighter penalties, and civil conciliation²⁵⁷. There are 438 locations nationwide. The Family Courts, situated in 50 locations nationwide, handle family and juvenile cases, and some civil cases related to personal status, such as divorce actions, and perpetuation²⁵⁸ are handled in the Family Courts²⁵⁹. The District Court, which holds citizen judge trials, handles at first instance most types of civil and criminal cases. They are situated in 50 locations nationwide with branch offices in 203 locations. The High Courts handle appeals filed against judgments rendered by the District Courts, Family Courts, or Summary Courts. The Supreme Court is the highest and final court that handles appeals filed against judgements rendered by the High Courts. The 1947 Constitution defines the independence of the judiciary of the Supreme Court and the inferior courts²⁶⁰, which was not provided for in the Meiji Constitution²⁶¹, and it also prohibits any attempts at influence from the executive branch on the final judicial power²⁶².

²⁵⁴ Rasmusen and Ramseyer.

²⁵⁵ Courts in Japan, 'Inferior Courts'

<<http://www.courts.go.jp/about/sosiki/kakyusaibansyo/index.html#koutou>> accessed 9 September 2015.

²⁵⁶ £1=¥138 at the rate of 17/07/2016.

²⁵⁷ Court Act, art. 33.

²⁵⁸ Civil Provisional Remedies Act, act no. 91 of 1989

²⁵⁹ Court Act, art. 31(3)1.

²⁶⁰ The Constitution, art. 76.

²⁶¹ The Japanese courts depended on the government for finance, judicial recruitment and promotions under the Meiji Constitution. See CA Ford, 'The Indigenization of Constitutionalism in the Japanese Experience' (1996) 28 Case Western Reserve Journal of International Law 3–62, 17.

²⁶² Ibid.

Professional judges are actively involved in investigating the facts of the case, which is characteristic of the inquisitorial approach. Professional judges of the District Courts are appointed by the Supreme Court²⁶³, and they are not removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties²⁶⁴. Executive organisations or agencies cannot dismiss professional judges²⁶⁵. A district court handles cases through a single judge²⁶⁶, except for some cases, such as crimes punishable with the death penalty, or life imprisonment with or without labour for not less than one year²⁶⁷. Judges have the duty to interpret the law, and the probative value of evidence is left fully to their free discretion²⁶⁸. The decisions of higher courts have a certain influence on the inferior courts although they are not bound by any higher courts' decision.

3.3.3.3 Defence Attorneys

Defence attorneys, described as lawyers [*Bengoshi*] are allowed to provide legal counselling and represent clients in the legal processes. There are no clear delineated qualifications between criminal defence attorneys and civil case attorneys in Japan. The suspect/defendant may appoint a defence attorney at any time²⁶⁹, and the attorney shall be appointed from qualified attorneys²⁷⁰. They must register their name in the roll of attorneys held by the Japan Federation Bar Association, after passing the bar exam²⁷¹. Their duties are to engage in acts relating to lawsuits, and objections, requests for re-examination, appeals, and other petitions against administrative agencies and other general legal services upon the request of a defendant,²⁷² in order to achieve social

²⁶³The Constitution, art. 77.

²⁶⁴*Ibid*, art. 78.

²⁶⁵*Ibid*.

²⁶⁶Court Act, art. 26.

²⁶⁷*Ibid*, art. 26(2) (ii).

²⁶⁸CCP, art. 318.

²⁶⁹CCP, art. 30.

²⁷⁰CCP, art. 31.

²⁷¹Lawyer Act, art. 8.

²⁷²*Ibid*, art.3.

justice by protecting fundamental human rights²⁷³. Therefore, a defence attorney represents the defendant in their defence against a public prosecutor's allegation.

The importance of the independence of the judiciary led to the protection of the role of defence attorneys in criminal trials and created a 'tripartite adversarial system'²⁷⁴. In fact, judicial independence was a major concern of post-war judicial reform²⁷⁵. However, according to Ramseyer *et al's* comparative study of the U.S. and Japan, the Japanese lower-court judges are under the control of politicians, the Supreme Court and the Secretariat, because of their great influence on judges' careers²⁷⁶. On the other hand, Haley claims that the Japanese judiciary are independent of political interference rather than economic and social influence²⁷⁷. In short, because there is one dominant party in the politics, Japanese professional judges' lack independence,²⁷⁸ and in this respect, the absence of competing political parties means that the judiciary institutions are mainly under the control of the government. The famous *Sunagawa* case in 1959²⁷⁹ revealed the extent of governmental control over the Supreme Court. Its Chief Justice gave an acquittal in the trial concerning whether the planned expansion of the U.S. military's *Sunagawa* air base was a violation of the Constitution or not. The U.S. National Archives and Records Administration revealed that the U.S. government put pressure on the Chief Justice. In addition to this, the active influence of the Prime Minister on the appointment of the Supreme Court Chief Justice implies government control over trial judgments, for example, as in the National Agriculture and Forestry Labour Union Performance of Police Functions Act Case²⁸⁰. The Chief Justice reached a verdict in accordance with government policy. Upham insists that 'Japanese judges are not

²⁷³Ibid, art.1.

²⁷⁴B George, 'The Impact of the Past upon the Rights of the Accused in Japan' (1965) 14 The American Journal of Comparative Law 672–85, 677.

²⁷⁵JO Haley, 'The Japanese Judiciary: Maintaining Integrity, Autonomy, and the Public Trust' in Daniel H Foote (ed), *Law in Japan: A Turning Point* (Washington, DC.; University of Washington Press 2008) 99–135, 118–20.

²⁷⁶JM Ramseyer, R Dan, and others, 'The Case for Manacled Judges: Learning from Japan after the Political Upheaval of 1993' (2006) 154 University of Pennsylvania Law Review 1879–1930, 1924.

²⁷⁷Haley, *supra* note 252, 114.

²⁷⁸JM Ramseyer, 'The Puzzling (In)Dependence of Courts: A Comparative Approach' (1994) 23 The Journal of Legal Studies 721–747.

²⁷⁹The Supreme Court Judgement, 16/12/1959, 13, no.13, 3225.

²⁸⁰The Supreme Court Judgement, 25/04/1973, 27, no.4, 547.

independent and never have been'²⁸¹ because of the tightly disciplined and bureaucratic nature of the Japanese judiciary. In addition, the relationship between prosecutors and professional judges is close because they train together after passing the bar exam²⁸² as well as sharing the common institutional orientations which, for example, strongly discourage the acquittal of defendants²⁸³. Japanese professional judges are considered as a 'highly-educated, well-trained elite group' having great competence and a positive attitude, and this implies that they are great fact-finders²⁸⁴. However this view is criticised by some supporters of a lay adjudication system who consider the judges to be biased and incompetent²⁸⁵. Meanwhile, Ito refers to the unique Japanese elitism in the Supreme Court as a 'benign elite'²⁸⁶ to explain the 'judicial contributions to the efficacious, self-restrained, conservative elite governance'²⁸⁷.

3.3.3.4 Defendants

The lack of protection of the rights of defendants in the Japanese criminal procedure is a serious problem. As is internationally recognised, the defence usually suffers from a strong bias towards prosecution,²⁸⁸ although the legislation in Japan proclaims equality of power for the prosecution and the defence as well as protection of the defendant's rights. A speedy and fair trial is also guaranteed and the trial is based on the obligation of the CCP find the truth.²⁸⁹ In addition, the fundamental human rights set by international standards, declared in international treaties, such as the right to counsel²⁹⁰, the right to silence²⁹¹, and the presumption of innocence²⁹² are required in the Japanese criminal procedure.

²⁸¹Upham, *supra* note 151, 422.

²⁸²Court Act, Act no. 59 of 1947, Chapter 4, Section 3. In the process after passing the bar exam, all candidates for professional judges, public prosecutors, and defence attorneys are trained together.

²⁸³S Miyazawa, 'Introduction: An Unbalanced Adversary System - Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective', *The Japanese Adversary System in Context* (NY; Palgrave Macmillan 2002), 3.

²⁸⁴R Lempert, 'A Jury For Japan ?' (1992) 40 *The American Journal of Comparative Law* 37–71, 48.

²⁸⁵KM Clermont and T Eisenberg, 'Trial by Jury or Judge: Transcending Empiricism' (1992) 77 *Cornell L. Rev.* 1124–1177, 1172.

²⁸⁶H Ito, *The Supreme Court and Benign Elite Democracy in Japan* (Surrey; Ashgate 2010).

²⁸⁷*Ibid.*, 16.

²⁸⁸De Haes and Gijssels v. Belgium 1997, (7/1996/686/809), para. 53.

²⁸⁹CCP, art. 1.

²⁹⁰*Ibid.*, art. 36.

²⁹¹*Ibid.*, art. 198(2).

²⁹²*Ibid.*, art. 336.

However, the defendant in Japanese criminal proceedings seems to suffer serious threats to his or her human rights. Fukurai and Kurosawa point out that the conviction rate was over 99% and there are serious human rights issues in the light of forced confessions, their acceptance as evidence, and limited access to a defence attorney²⁹³. Although the defendant has the right to remain silent, in the majority of cases, the right is often in danger of violation²⁹⁴. The defendant often provides a statement without use of this right²⁹⁵.

In addition, the rare use of the bail system for the accused and the defendant's/defence attorney's limited rights to access evidence which is not presented at trial by the prosecutor, indicates the restrictions of the defence position in Japanese criminal proceedings²⁹⁶. Bail, rather than pre-trial custody, rates continued to decrease between 1998 and 2004, and by more than 20% in 2011²⁹⁷, while the English rate was 47% in 2006 and 54% in 2010²⁹⁸. The decrease was said to be due to an increase in the amount of bail money²⁹⁹. It is the responsibility of the public prosecutor to provide an opportunity for the defence to inspect the evidence and to adhere to the defendant or defence attorney's rights³⁰⁰. However, the responsibility of the public prosecutor regarding disclosure of evidence is not written down in Japanese law. Therefore, it is at the discretion of the prosecution³⁰¹. The Japanese Supreme Court denied such responsibility in 1959, although it accepted that the defendant or defence attorney was entitled to make a claim to the court for the disclosure of evidence if the case fitted four conditions.³⁰² The conditions are that: the case had not reached a verdict, there was no

²⁹³H Fukurai and K Kurosawa, 'Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan' (2010) 7 US-China Law Review 1–18.

²⁹⁴Upham, *supra* note 151, 437.

²⁹⁵The defendant does not have the right to waive the right to trial. Constitution, art. 32, 37,

²⁹⁶Japan Federation of Bar Associations, 'Criminal Procedure Law 40th Year Declaration' (Tokyo; Japan Federation of Bar Associations 1989).

²⁹⁷Japan Bail Support Association presents the graph of bail practice rate between 1989 and 2013 on the basis of Annual Judicial Statistics by the Supreme Court, see Japan Bail Support Association, 'Bail Practice Rate Exceeded 20 % by 18 Years' (*Statistical Data*, 2014) <<http://www.hosyaku.gr.jp/bail/data/>> accessed 11 September 2015.

²⁹⁸Ministry of Justice [England and Wales], 'Criminal Justice Statistics' (London; 2011), 30.

²⁹⁹T Yasumura, *The Practice of the Bail System* (K Matsuo and M Inoue eds, Tokyo; Yuhikaku 2002), 141.

³⁰⁰CCP, art. 299(2).

³⁰¹*Ibid*, art. 316(14) (15).

³⁰²*Ibid*, art. 316 (22)-(27).

tangible reason for the claim, disclosure is especially important for the defence strategy, and there is no risk of the evidence being destroyed or of a witnesses being intimidated³⁰³. Only if at least one condition is met, the defence is eligible to claim a disclosure of evidence.

The principle of the equality of arms before the court, which ‘means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds, not entailing actual disadvantage or other unfairness to the defendant.’³⁰⁴ This is missing in the Japanese criminal justice system because of the emphasis on the careful and detailed judiciary administration, which underlies Japanese mixed legal traditions. There are obvious gaps between Western inspired and Japanese ingenious law and legal procedure. Both co-exist in the Japanese criminal justice system. Western inspired human rights guarantees were introduced in the Japanese criminal justice system because of the establishment of the 1946 Constitution drafted under the observation of General Headquarters/Supreme Commander for the Allied Powers (GHQ). By contrast, some parts of laws and legal procedures are not pertinent to the Western inspired concepts. For example, 1908 prison law³⁰⁵ had been practiced until the replacement of a new law in 2005³⁰⁶. The 1908 Prison Law used to be the oldest statute in the world and is controversial from a human rights’ point of view, such as ‘substitute prison system (*Daiyo Kangoku*), physical prison conditions and rules, minor solitary confinement, protection cells’ as Vize pointed out³⁰⁷. Furthermore, overreliance on confessions gained in the investigation phase in the Japanese criminal justice system is controversial³⁰⁸.

³⁰³ Ibid, art. 316 (22)-(27).

³⁰⁴ United Nations Human Rights Committee, ‘General Comment No 32 on Article 14 of the International Covenant on Civil and Political Rights’ (Geneva; 2007), para.13.

³⁰⁵ Act no. 28 if 1908.

³⁰⁶ Act on Penal Detention Facilities and the Treatment of Inmates and Detainees [*Keijishoyoshisetsu oyobi hishoyoshanado no shogu ni kansuru horitsu*] and Ordinance for Penal Institutions and Treatment of Inmates [*Keijishisetsu oyobi hishuyosha no shogu ni kansuru horitsu*] were newly introduced as the replacement of the 1908 Prison law.

³⁰⁷ J Vize, ‘Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System’ (2002) 20 UCLA Pac. Basin LJ 329–373, 332-341.

³⁰⁸ M Okubo, ‘From Confession to Guilty Pleas [*Jihaku Kara Yuzaitoben He*]’ (2012) 19 St Andrew’s University Law Review 1–28, 3.

Article 319 of the CCP and Article 38(2) of the 1947 Constitution emphasise the ‘voluntariness’ of confession is required³⁰⁹ from a human rights perspective [*Jinken yogo setsu*]. Moreover, it is a common belief that the admissibility of confessions should be evaluated by the voluntariness and legitimate procedure of obtaining a confession, as Sekiguchi suggested³¹⁰. Forced confessions in the investigation phase were historically valid. Although forced confessions violate the Constitution and the CCP, its practice is still noted³¹¹.

Regarding the reliability of confessions, it is interesting to point out the different interview styles police officers use as interrogation methods. As Wachi and Watanabe et al claimed ³¹², Japanese police officers tend to use a ‘Relationship-focused interviewing style’, which means that interviewers develop relationships with interviewees (suspects) to create respect, trust and confessions by ‘talking about their personal experiences, allowing [interviewees] to understand [interviewers’] professionalism and their sincere desire to understand and seek the truth’³¹³. This seems to be a unique feature that used different cultural psychology from the West. While Westerners emphasised ‘the independent view of self’ in society, Japanese people (Eastern Asians) valued ‘an interdependent view of self’³¹⁴. This Japanese characteristic illustrates the intimate personal connection between interviewers and interviewees to obtain confessions. However, it seems to be hard to believe that If strong personal connection exists, the validity of confessions will be upheld.

³⁰⁹ Sakoguchi analysed the concept of voluntariness in the rule of confession by tracing the establishment of the CCP and American influences. See S Sakoguchi, ‘Study of the Concept of “Voluntariness” in Confession Rule: With a Focus on the Development of Confession Rule between Japan and America [*Jihakuhosoku Ni Okeru Ninnisei Gainen Ni Kansuru Kousatu*]’ (2013) 15 Ryukoku University Law Review 1–18.

³¹⁰ K Sekiguchi, ‘Study on the Exclusionary Rule of the Criminal Confessions Vol 10’ (2014) 64 The Hokkaido Law Review 39–101.

³¹¹ I Futaba, ‘Crime , Confession and Control in Contemporary Japan’ (1984) 2 A Socio-Legal Journal 1–30.

³¹² T Wachi, K Watanabe, and others, ‘Police Interviewing Styles and Confessions in Japan’ (2014) 20 Psychology, Crime & Law 673–694

³¹³ Ibid, at 690.

³¹⁴ Ibid.

Thaman points out that the six adversarial principles align with the international human rights standard, including the equality of arms. These are the presumption of innocence, the privilege not to self-incriminate, the right to a public and oral trial, the accusatory principle, and independence of the judge from the executive (investigative agency)³¹⁵. The introduction of the citizen judge system was expected to enhance these adversarial principles in the Japanese criminal procedures - which were already supposed to be present theoretically in the 1947 Constitution - and eventually achieve the model criminal justice system which the JRC proposed.

This section highlights that laws and actors in Japanese criminal justice are inspired by Western countries, in particular Germany and the US, and share concepts of human rights and democracy, referred to in the 1907 Constitutions and the CCP. However, the Japanese criminal justice system retains specific features that conflict with the concepts. Haley's and Foote's studies criticised the over-emphases on confessions,³¹⁶ the presence of the suspect's/defendant's repentance³¹⁷, and a broad prosecutorial discretion³¹⁸ and adherence to due process norms of fairness leading to powerful bureaucratic controls³¹⁹. These elements have been inherited through the historical developments of Japanese laws and legal systems and connected with Japanese legal and societal cultures, such as collectivism and authoritarianism³²⁰, so it is apparent that the citizen judge system underpins the concepts of democracy rather than the Japanese indigenous cultures. However, a lay adjudication system constitutionally and statutorily fits the Japanese criminal justice system. Moreover, to develop the indigenous legal and societal cultures meeting the concepts of democracy, lay adjudication that will promote legal and social changes³²¹ appears to be significant and effective.

³¹⁵ SC Thaman, 'Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures' [2002] Saint Louis-Warsaw Transatlantic Law Journal 89–118, 103.

³¹⁶ See, for example, JO Haley, 'Why Study Japanese Law?' (2010) 58 American Journal of Comparative Law 1–14; DH Foote, 'Confessions and the Right to Silence in Japan' (1991) 21 Georgia Journal of International and Comparative Law 415–488.

³¹⁷ JO Haley, 'Constitutional Adjudication in Japan: Context, Structures, and Values' (2011) 88 Washington University Global Study Law Review 1467–1491.

³¹⁸ MD West, 'Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion' (1992) 92 Columbia Law Review 684–724.

³¹⁹ N Urabe, 'Rule of Law and Due Process: A Comparative View of the United States and Japan' (1990) 53 Law and Contemporary Problems 61–72.

³²⁰ JO Haley, 'The Myth of the Reluctant Litigant' (1978) 4 Journal of Japanese Studies 359–390.

³²¹ See Chapter 2.

3.4 The Establishment of the Judicial Reform Council (JRC)

As noted Chapter 1, the JRC was set up during the period in office of the 84th Prime Minister, Keizo Obuchi, in order to ‘consider fundamental measures necessary for judicial reform and judicial infrastructure arrangement by defining the role of the judicature in Japan in the twenty-first century’³²². The Japan-U.S. Structural Impediments Initiative (SII) triggered a review of the Japanese economic system following the beginning of the reform programme: Six Sweeping Changes [*Rokudai Kaikaku*] ranged over six subjects. These were: administrative reform, fiscal restructuring, social security reform, economic structural reform, financial system reform, and educational reform³²³. The judicial reforms were influenced by the theme of the Six Sweeping Changes grounded in three fundamental principles: liberty, fairness, and globalisation³²⁴. Members of the JRC were selected from diverse backgrounds, both academics and practitioners, and this demonstrated the government’s intention to reflect public opinion in the reform³²⁵. The JRC announced that the public should build a free and fair society with mutual cooperation and autonomous responsibility through simple, efficient, and transparent government procedures to accomplish important administrative functions effectively³²⁶. Moreover, on this basis, the public could be empowered to contribute to the development of an international society³²⁷. As a result, they recommended four focuses for the judicial reforms: the reform of the legal training system³²⁸; the establishment of the Japanese Legal Support Centre³²⁹, the reform of legal proceedings; and the reform of the Lawyers Act³³⁰.

The JRC sought to provide a reconstructed legal framework for Japan in the context of the globalised future which would require all Three Pillars of the Judicial System

³²²Judicial Reform Council Establishment Act, act no. 68 of 1999, art. 2.

³²³R Hashimoto, ‘Six Changes Advanced by the Cabinet: A Message from the Prime Minister’ (1997) <<http://www.kantei.go.jp/jp/kaikaku/>> accessed 5 September 2015.

³²⁴JRC, ‘Midterm Report [Chukan Hokoku]’ (Tokyo; 2001), 6.

³²⁵The JRC consists of 12 members including Professor Koji Sato as a chairman. See the list of members of the JRC: at <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/meibo.html>.

³²⁶JRC, *supra* note 5.

³²⁷*Ibid.*

³²⁸Training system after passing the bar examination and the establishment of the Law School.

³²⁹Japan Legal Support Centre <<http://www.houterasu.or.jp/en/index.html>> accessed 5 September 2015.

³³⁰Act no.205 of 1949. The last amendment was constructed in 2014: act no.69 of 2014.

Reform. Firstly, the construction of a justice system responding to public expectations (coordination of its institutional base) was required; secondly, a legal profession supporting the justice system (the expansion of the human base); and lastly the establishment of the popular base (lay participation in the judicial system)³³¹. The CCC, consisting of eleven legal professionals and academics, sat between 2002 and 2004 in parallel with the JRC to engage in making a plan and drafting the Citizen Judge Act. The intended target of the citizen judge system was introduced but it would have to be compatible with the existing criminal procedures and seek a form of lay adjudication system compatible with the Japanese traditions. In order to understand how the citizen judge system is to work in practice, it is essential to examine the Japanese legal traditions enshrined within the criminal procedures.

3.5 Aims and Desired Impact of Introduction of the Citizen Judge System

3.5.1 The Aims of the 1999 Judicial Reform

Reviews of the Japanese criminal justice system were undertaken by the JRC to determine the *Recommendations of the Justice System Reform Council* in 2001³³². Chapter 6 of the recommendation clarifies the key points what should be targeted to reform the shape of an ideal justice system for future Japanese society. The aims have been:

- a) to be a more usable, understandable, reliable, and accessible system with fairer, more proper and more prompt proceedings;
- b) to develop a legal professional training and recruiting system to support legal professionals to gain the rich legal, ethical, and cultural knowledge necessary to play active roles in various areas of society;
- c) to provide education for people about the justice system by means of public participation in legal proceedings and support for the system³³³.

³³¹ JRC, supra note 5, ch.IV.

³³² Ibid.

³³³ Ibid, ch.I, part 2, sec. 2. Ch. II also mentions the civil justice reform in chapter 1.

With these ambitious fundamental aims, a wide range of reforms to the justice system took place.

3.5.2 Targeted Features

A shifting emphasis from the inquisitorial principles to adversarial principles is one of the main targets and impacts hoped for by the introduction of the citizen judge system. As mentioned above, in the course of the historical developments, the Japanese criminal procedures already had the mixture of these two principles before the 1999 Reform, similar to many other existing countries' procedures³³⁴. However, Foote claims that more strong adversarial approaches by the defence attorneys are necessary³³⁵. In order to respond to that, moreover, to achieve the aims of the 1999 Reform, a review of the basic principle of substantive truth, is necessary.

3.5.2.1 *The Inquisitorial and Adversarial Principles*

The inquisitorial principle [*Shokken Shugi*] is predominantly practiced in Japanese criminal proceedings, although it adopted adversarial principles through its historical development³³⁶. The remaining inquisitorial principle, including the principle of substantive truth, and the necessity of legal reasoning for judgements, and judicial reviews, leads to high levels of professionalism in the proceedings³³⁷.

Throughout the criminal justice procedure in Japan, public prosecutors and professional judges play a central role because of the importance of inquisitorial principles, while the equality of actors, in particular the prosecution and the defence, is valued in the adversarial methodology. The prosecution in Japan has a high level of discretion over decisions throughout the criminal proceedings, from prosecution to the presentation of evidence in a trial. Johnson points out the Japanese prosecutors' main interest in seven factors: searching for the truth, deciding an appropriate charge, encouraging remorse in offenders, rehabilitating offenders, protecting the public,

³³⁴ Regarding the mixture of an inquisitorial and adversarial system, see, N Jörg, S Field and C Brants, 'An Inquisitorial and Adversarial Systems Converging?' in Phil Fennell and others (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford; Oxford University Press 1995).

³³⁵ Foote, supra note 165, 316.

³³⁶ Soldwedel, supra note 185, 1467.

³³⁷ SC Thaman, 'Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures' [2002] Saint Louis-Warsaw Transatlantic Law Journal 89–118, 93, 103.

maintaining consistency, and respecting the suspects' rights³³⁸. Landsman and Zhang suggest that the development of the Japanese criminal process in adjudication shows the dominance of 'judge-directed inquisitorial courts'³³⁹, for example, the existence of a preliminary judgement investigation in the pre-war period³⁴⁰. Moreover, the critical importance of the role of searching for the truth by professional judges in the current Japanese criminal trial procedure is pointed out by Flaherty³⁴¹.

Victims are entitled to participate in more serious criminal trials and ask questions of witnesses and defendants because of an increase in the protection of victim's rights after great public attention to murders committed by juvenile defendants³⁴². This introduction of victim participation tends to be on inquisitorial principles³⁴³, and in fact, according to Miyazawa, the direct motivation for introducing victim participation in the Japanese system came from studies of the French and German systems which are influenced by inquisitoriality³⁴⁴. Therefore, there is strong adherence to the inquisitorial principle in the existing criminal procedure, even after the reform of 1999. Both the introduction of victim participation in 2008³⁴⁵ by the amendment of the CCP in 2007 and the citizen judges' participation from 2009³⁴⁶ in serious criminal cases, seem to illustrate the indecisive targets of the reform of 1999. The newly introduced systems have led to difficulties in evaluating the impact of each system, and increased possible concerns about the citizen judges system. For example, Shirakawa and Karasawa point out the

³³⁸DT Johnson, *The Japanese Way of Justice: Prosecuting Crime and Japan* (Oxford; Oxford University Press 2002), 98.

³³⁹S Landsman and J Zhang, 'A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts' (2007) 25 UCLA Pacific Basin Law Journal 179–227, 181.

³⁴⁰ Professional judges used to examine the findings of the preliminary investigation conducted by the prosecution and police. See CCP 1922, art. 306–308.

³⁴¹D Flaherty, 'Democratization, 1919, and Lawyer Advocacy for a Japanese Jury' (2011) 37 The Journal of Japanese Studies 257–287, 279.

³⁴² See S Matsui, 'Justice for the Accused or Justice for Victims: The Protection of Victims' Rights in Japan' (2011) 1 Asian-Pacific Law & Policy Journal 55–95.

³⁴³ See J Doak, 'Victims' Rights in Criminal Trials: Prospects for Participation' (2005) 32 Journal of Law and Society 294–316.

³⁴⁴S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' (2014) 42 International Journal of Law, Crime and Justice 71–82, 75.

³⁴⁵ Basic Act on Crime Victims [*Hanzaihigaishanado Kihonho*]. Act no. 161 of 2004, the amendment of the CCP 2007, act no.95 of 2007. A sequence of changes started from 1980 through the consistent efforts of the National Association of Crime Victims and Surviving Families (NAVS). See, Matsui, 60–67.

³⁴⁶ Citizen Judge Act (CJA), act no. 63 of 2004.

influence of the victim participation on the decisions made by citizen judges. They used a simulation study, and concluded that victim participation could lead to a more severe penalty in light of the victims' emotions expressed during the hearing, and concluded that victim participation did not influence the level of the sentence, but people opposed to victim participation tend to give a more lenient sentence because citizen judges realised about the influence of victim participation and try not to be influenced³⁴⁷.

3.5.2.2 A Meticulous Judicial Administration

The inquisitorial approach to criminal justice in Japan derives from the careful and detailed judicial administration that enables professional judges to pursue the truth in their adjudications. However, this also leads to their bias towards the prosecution, demonstrating an emphasis on a dossier of evidence, including testimony statements made at the investigation phase.

Professional judges have the right to check the appropriateness of the conduct of the investigation³⁴⁸ and have the responsibility for executing appropriate, smooth and prompt criminal procedures³⁴⁹. The evaluation of the probative value of evidence is fully dependent on the professional judges³⁵⁰. This can be problematic in the light of the protection of the basic rights of the defendants where evidence is obtained through unreasonable searches and seizures. Article 319 of the CCP prohibits confession under compulsion, torture, and threats after unduly prolonged detention or when there is doubt about them being voluntary³⁵¹. Supreme Court decisions have ruled out the use of confessions as evidence obtained under certain situations, such as where the suspect is handcuffed³⁵² or those obtained by promising the suspension of an indictment³⁵³. Apart from confession, there is no rule about evidence obtained through unreasonable

³⁴⁷Y Shiraiwa and K Karasawa, 'The Effect of the Victim Participant's Statements and People's Attitudes to Victim Participation on Sentencing Decisions' (2013) 53 the Japanese Journal of Experimental Social Psychology 12–21, 17. See the Act to Amend Parts of the Code of Criminal Procedure and the Prosecution Board, Act no. 74 of 2000 ; the Act Concerning Measures to be Adopted in Criminal Procedure to Protect Victims of Crime, Act no. 75 of 2000.

³⁴⁸Court Act, art. 203(2).

³⁴⁹CCP, art. 294.

³⁵⁰Ibid, art. 318.

³⁵¹Ibid, art. 319.

³⁵² The Supreme Court decision, 13/9/1958, 17, no.8, 1703.

³⁵³ The Supreme Court decision, 1/7/1966, 20, no.6, 537.

seizures. Therefore, great discretion is given to professional judges on deciding the admissibility of evidence.

The courts have the right to direct and control trial proceedings [*Soshō Siki Ken*], and because of the necessity for swift action, the presiding judge has that right during the trial³⁵⁴. According to the fundamental principles of a meticulous and judicial administration, professional judges do not seem to play a neutral role. Article 312(2)³⁵⁵ gives professional judges the right to order the public prosecutor to change a count or applicable panel, and Article 298³⁵⁶ declares that the professional judge is allowed to examine evidence *ex officio*. It recognises inquisitorial principles in order to seek the substantive truth with the imbalanced discretion exercised by professional judges.

On the other hand, Lay adjudicators play an important role in sustaining the adversarial principle in criminal proceedings, although lay adjudication is not 'essential'³⁵⁷ for an adversarial trial. The lay adjudication system is not a requirement but it can be a catalyst for the development of the culture of criminal justice³⁵⁸. Greer presents the four consequences of introducing the Northern Irish Diplock court system: an increase in conviction rates; an increase in the inquisitorial style of professional judges; an acceptance of vague evidential standards and the meaningless of warnings and instructions by judges regarding the credibility of testimony³⁵⁹. However, while their prevalence underlies their significance as tools for promoting the fair trial principle, it does not fully explain the balance between the fair trial principle and democracy³⁶⁰. The consideration of the fair trial principle appears to lead to the popularity of adversarial principles, which have influenced the criminal justice reforms of inquisitorial systems, but adversarial systems have also been influenced by inquisitorial 'truth-finding'

³⁵⁴ CCP, art. 294.

³⁵⁵ CCP, art. 312(2).

³⁵⁶ *Ibid*, art. 298.

³⁵⁷ MR Damaska, 'Evidentiary Barriers to Conviction and Two Models of Criminal Procedure: A Comparative Study' (1973) 121 *University of Pennsylvania Law Review* 506–589, 564.

³⁵⁸ M Feeley, 'The Adversary System' in Robert Janosik (ed), *Encyclopedia of the American Judicial System II* (New York; Charles Scribner's Sons 1987), 755.

³⁵⁹ S Greer and A White, 'Restoring Jury Trial to Terrorist Offenses in Northern Ireland' in Mark Findlay and Peter Duff (eds), *The Jury under Attack* (London; Butterworths 1988), 125–35.

³⁶⁰ In finding the European criminal procedures, the convergences between adversarial and inquisitorial principles were sought. P Roberts, 'Comparative Criminal Justice Goes Global' (2008) 28 *Oxford Journal of Legal Studies* 369–387, 377.

instruments as Jörg *et al* point out in their study regarding the consideration of the ECHR³⁶¹.

Adversarial proceedings in the Japanese criminal justice system are guaranteed by the Constitution of 3rd of May 1947, introducing three principles were introduced in the post-war reforms of the due process of law, the guarantee of the suspect's/defendant's right to silence, and the presumption of innocence. Firstly, it introduced the principle of due process of law. Article 31 of the Constitution guarantees the due process of law saying that '[n]o person shall be deprived of life or liberty nor shall any other criminal penalty be imposed, except according to procedure established by law. Moreover, Article 256 of the CCP states that 'prosecution shall be instituted by submitting the charge sheet to the court'³⁶², and '[n]o documents or other article which may cause the judge to be prejudiced are to be attached or referred to in the charge sheet.'³⁶³The second principle is for the suspect and defendant to be, guaranteed the right to silence and thirdly, the presumption of innocence was introduced. Article 38 of the Constitution says '[n]o person shall be compelled to testify against himself', moreover, the CCP also declares the accused's right to remain silent and not to answer particular questions³⁶⁴. The presumption of innocence is also guaranteed in the CCP³⁶⁵, which reflected Article 14(2) of the International Covenant on Civil and Political Rights which Japan ratified in 1978. The suspect/defendant is guaranteed their fundamental right to defence as one of the parties in criminal proceedings by the introduction of these three principles in the post-war reform. The reform introduced the Constitution, and the amendment of the CCP provides the fair trial principle, including the three principles as well as the support of a court-appointed defence attorney, and the protection of the suspects' and defendants' many fundamental procedural rights, which are the international standards within the Japanese criminal procedure.

³⁶¹ N Jörg, S Field and C Brants, 'Are Inquisitorial and Adversarial Systems Converging?' in C Harding, P Fennell and N Jörg (eds), *Criminal Justice in Europe: A Comparative Study* (Oxford; Clarendon Press 1995) 41-56.

³⁶² CCP, art. 256(1).

³⁶³ Ibid, art.256 (6).

³⁶⁴ Ibid, art.301 (1).

³⁶⁵ Ibid, art. 336.

On the other hand, Suzuki claims that the adversarial system is not equal to the principle of due process³⁶⁶ on the basis of disagreement with Matsuo's theory that there are two regimes: a 'mere adversarial principle' [*Tannaru Tōjisha Shugi*] and a true adversarial principle [*Shin no Tōjisha Shugi*]³⁶⁷. The mere adversarial principle is a belief that litigation should consist of the claims and proof offered by each party - the prosecution and the defendant - and the mere adversarial principle is a belief in the due process of law³⁶⁸. Suzuki claims that the first principle should be considered with reference to the concept of the criminal procedure and the other should be considered contractually; moreover, he believes that adherence to the adversarial system is unnecessary and the importance is to maintain fundamental human rights in the procedure³⁶⁹.

The Japanese model of criminal procedure is a predominantly inquisitorial mode, then, with adversarial influences. This mixture derives from its historical development and Japanese societal culture. The Japanese system has an inherent paternalism, which contrasts with the American adversarial system. Foote talks of 'benevolent paternalism', illustrating the state's wide discretion concerning access to information³⁷⁰, and the challenges of strengthening the adversarial approach, and dealing with the restricted transparency of the investigation process, and Japanese social collectivist culture³⁷¹. Judicial reformers have had to confront the challenges of how to align the two different legal traditions with the need to create a modernised criminal procedure. This has been a difficult process for Japan - undertaking to adopt the lay adjudication system and produce successful results.

The Japanese criminal process was structured with a unique composition of both inquisitorial and adversarial principles leading to dependence on judicial power and lacking transparency and protection for the suspects/defendants. Moreover democratic principles are guaranteed in theory in the legislation, namely the 1947 Constitution,

³⁶⁶S Suzuki, *The Fundamental Structure of Criminal Procedure* (Tokyo; Seibun Dou 1996), 12.

³⁶⁷K Matsuo, 'Fundamental Theory of the Criminal Procedure Law [Keiji Sosho Ho No Kisoriron]', *State and Citizen [Kokka to Sitizen]* (Tokyo; Yuhikaku 1986), 337.

³⁶⁸ Ibid.

³⁶⁹ Suzuki, *supra* note 366.

³⁷⁰ Foote, *supra* note 165.

³⁷¹ Ibid.

where there is the assertion of democracy in Japan. In accordance with the Constitution and CCP, adversarial principles such as the independence of the judiciary, an equal balance of power between the prosecution and the defendant, have been enjoyed in criminal procedures, along with the strong inquisitorial principles of a meticulous and methodical administration supported by Japanese social attributes. There is a high dependence on the dossier compiled from the crime investigation process, and the long duration of trials. The average duration of a trial was 9.5 months in 2006 in contested cases including pre-trial arrangement meetings³⁷². It seems to be necessary to get rid of such problematic situations so that more adversarial principles - orality and immediacy - could be injected.

3.5.3 The Progress of the 1999 Judicial Reform

The JRC's recommendation established essential guidance on the five points in the criminal justice system³⁷³. These are the improvement and speeding up of criminal trials, the establishment of a public defence system for suspects and defendants; the role of public prosecution; investigations and trial proceedings; and the rehabilitation of offenders and protection of victims. Criminal justice reforms were premised on the introduction of lay adjudicator participation, and therefore, the introduction of a pre-trial arrangements procedure, an opening hearing on consecutive days, the introduction of principles of orality and immediacy, and the support to achieve them for the courts and legal professionals. In short they were the fundamental structures used for the draft of the Citizen Judge Act. The principle of orality means that evidence in court should be presented in the form of oral testimony rather than a written dossier. In response to the deliberations of the pre-trial investigation, the examination of the investigation documents, especially the statement documents, would often take hours in the hearing and it was rare for a criminal trial to be held on consecutive days before the introduction of the citizen judge system. The developments of the principles of orality and immediacy will be closely examined in the following chapters.

³⁷² The Supreme Court, 'A Report on the Criminal Trial Cases, Material 3 [Chihosaibansho Ni Okeru Keijisoshojiken Daiisshin No Shinri Jokyo, Siryo 3]' (Tokyo; 2006)
<http://www.courts.go.jp/saikosai/vcms_lf/80910004.pdf>, table 10.

³⁷³ JRC, *supra* note 5, Ch. II, part 2, sec. 1.

3.5.3.1 Court-Appointed Defence Attorney System [*Kokusen Bengonin Seido*]

The JRC emphasised the importance of protecting the rights of suspects and defendants to ensure a fair criminal justice system³⁷⁴. Before the reform, Japan had a Court-Appointed Defence Attorney System which is the system where the defendant has right to request a defence attorney³⁷⁵; however, after the reform, the suspect had the same right by an amendment of the CCP in 2004³⁷⁶. To assist this reform, the Japanese Judicial support centre [*HoTerasu*] was established, as a core body for comprehensive support with respect to the implementation and establishment of support from defence attorneys and related experts³⁷⁷, and it provides court-appointed attorneys³⁷⁸. The expenses and fee would be partially or fully paid by the suspect/defendant³⁷⁹. The Court-Appointed Defence Attorney System was established by the 2004³⁸⁰ and 2006³⁸¹ amendments to the CCP, and this service has been provided by the Japan Judicial Support Centre, which was also established in the 1999 reform.

3.5.3.2 Immunity Systems

The JRC proposed the introduction of new forms of investigations and trial proceedings, as well as adversarial principles in juvenile cases. Because of the heinousness, complexity, organisation, or internationalisation of crimes, it is necessary to update the techniques and proceedings for investigation and hearing evidence in trials. The immunity system was introduced into the Japanese criminal justice system in 2015 by amendment to the CCP³⁸². The prosecutor is able to obtain evidence from a witness which will not be used against him or her³⁸³. According to Emoto, there are three points concerning the immunity system which violate the Constitution. The constitution prohibits the defendant from testifying against him/herself, and guarantees equality under the law, and the separation of the three powers of the administration, legislation

³⁷⁴ Ibid, sec. 2.

³⁷⁵ The Constitution, art. 37(3), CCP, art. 36.

³⁷⁶ The Amendment of CCP, act no. 62 of 28/5/2004.

³⁷⁷ Comprehensive Legal Support Act, act no. 74 of 2004, art. 1.

³⁷⁸ Ibid, art. 38.

³⁷⁹ Act on the Cost of Criminal Procedure, act no. 40 of 1971, art. 2 (3); Comprehensive Legal Support Act, art.39 (2).

³⁸⁰ Act no. 62 of 2004.

³⁸¹ Act no. 36 of 2006.

³⁸² The 189th congress, 13/03/2015.

³⁸³ CCP, art. 157(2)1. (2)2.

and judiciary³⁸⁴. The Japanese investigative procedure already involves enough secrecy and the immunity system will lead to even more secrecy in procedures. This appears to be a part of the international movement towards plea bargaining. Although arguments about its availability have been arisen in the light of the legitimacy of the truth³⁸⁵ and the legal ethics of the justice system³⁸⁶, the extensive use of plea bargaining became a popular solutions both in domestic and international criminal justice systems³⁸⁷.

In addition, the internationalisation of the criminal justice system was also proposed to improve international cooperation and mutual legal assistance³⁸⁸, support for legal enforcement organisations in developing countries, and the advancement of legal professionals' knowledge and techniques to correspond to those of the international society³⁸⁹.

3.5.3.3 How the Legal Professionals Should Support the Justice System

The JRC recommendations for legal professionals to support the legal system come under six headings. These are the legal professional population, the legal training system, the lawyers system, the public prosecutor system, the professional judge system, and mutual exchanges between the legal professionals³⁹⁰.

The recommendations suggest increasing the number of successful candidates passing the bar examination to reach 3,000 in 2018³⁹¹, as well as the increasing the number of judges, court' and public prosecution support staff. The lack of professional judges has been a long-lasting problem in Japan³⁹². In comparison with other countries, the number is low. Before the Judicial Reform 1999, the total number of legal

³⁸⁴M Emoto, 'Testimony Compelling System on the Basis of Criminal Immunity (5)' (2012) 62 Myojo Law School Journal 31–58.

³⁸⁵R Henham, 'The Ethics of Plea Bargaining in International Criminal Trials' (2005) 26 Liverpool Law Review 209–224.

³⁸⁶GB Palermo, MA White, and others, 'Plea Bargaining: Injustice for All?' (1998) 42 International Journal of Offender Therapy and Comparative Criminology 111–123.

³⁸⁷A Pathmanathan, "'Round Peg, Square Hole?' The Viability of Plea Bargaining in Domestic Criminal Justice Systems Prosecuting International Crimes' (2013) 13 International Criminal Law Review 319–384; K Kovarovic, 'Pleading for Justice : The Availability of Plea Bargaining as a Method of Alternative Dispute Resolution at the International Criminal Court' (2016) 1 Journal of Dispute Resolution 283–308.

³⁸⁸JRC, supra note 5, ch. II, part 3, .

³⁸⁹Ibid.

³⁹⁰Ibid, Part III.

³⁹¹ibid, Part III, ch. 1, 1.

³⁹²Y Matsuura, 'Law and Bureaucracy in Modern Japan' (1989) 1 Stanford Law Review 1627–1640, 1627.

professionals in 1999 was 20,730 in Japan, 941,000 in the U.S., 83,000 in the U.K., 111,000 in Germany, and 36,000 in France, as the JRC referred³⁹³. The realisation of the lack of legal professionals during the 1999 Judicial Reform impacted on the reform policy devised to increase the number. As a result, the total number of legal professionals in 2015 in Japan was 35,113³⁹⁴. The number of successful candidates increased between 2005 and 2015 to reach 2,102, but decreased to 1,810 in 2014³⁹⁵. Although the number of successful candidates has started to decrease, the overall number keeps increasing³⁹⁶. The number of students in law schools, who are potential candidates for the bar exam, started to decrease in 2009³⁹⁷. Regarding the legal training system, the JRC recommended the introduction of law schools³⁹⁸, a review of the bar examination and a legal apprentice system. In 2004, 74 law schools were established. Because of the increasing number of lawyers, their salaries decreased and there was a particular problem finding salaried job opportunities after passing the bar examination. As a result, the Ministry of Justice declared a decrease in the number of successful candidates again³⁹⁹.

The reforms of the lawyer system, the public prosecution, and the judges' systems were aimed to enhance the transparency of administration procedures and payments, and lay participation in the systems⁴⁰⁰ in relation to the transparency of the Bar Association's administration⁴⁰¹, the transparency of lawyers' fees⁴⁰², and lay participation in the public prosecution and courts' management⁴⁰³.

³⁹³JRC, *supra* note 5, Part III, ch. 1, part1.

³⁹⁴ Cabinet Secretariate Legal Training System Reform Office [Naikakukanbo Hoso Yoseiseido Kaikaku suishinshitsu], 'A Research Report Draft on the Number of Legal Professionals [Hoso Jinko Chosa Hokokusho an]' (2015), 203 <http://www.cas.go.jp/jp/seisaku/hoso_kaikaku/dai19/siryou4.pdf> accessed 5 March 2016.

³⁹⁵Japan Federation of Bar Association, 'Lawyer White Paper' (Tokyo; 2014), 74.

³⁹⁶Ministry of Justice [Japan], 'The Population of Legal Professionals' (2014), 7, <<http://www.moj.go.jp/content/000102262.pdf>> accessed 11 September 2015.

³⁹⁷*ibid*, 9.

³⁹⁸ JRC, *supra* note 5, Ch. III, part 2, 1.

³⁹⁹In the Ministry of Justice Survey, there are 500 successful candidates could not find a job opportunity. See JSRC LDP The Policy Affaires Research Concl, 'Midterm Report on the Legal Professional Training System Reform' (Tokyo; 2013).

⁴⁰⁰ JRC, *supra* note 5, ch. IV, part 3.

⁴⁰¹ *Ibid*, ch. III, part 6.

⁴⁰² *Ibid*, ch. III, part 3.

⁴⁰³ *Ibid*, ch. IV, part 2.

The judicial reform in 1999 which impacts on the judicial system include a decrease in the number of expected successful candidates for the bar exam, which seems to have adjusted to the practice of the newly introduced system, following each amendment to seek the best improvement for the Japanese criminal justice system. These adjustments appear to reverse the previous system at some points. Significant doubts remain over the restricted transparency during the investigation phase and the implementation of the immunity system.

Conclusion

This chapter developed the conceptual framework of the research by examining the relationship between the legal traditions and the criminal justice system in Japan through consideration of the issues involved in finding a solution in the judicial reforms of 1999. As I have argued in Chapter 2, the practice of any lay adjudication system will be conditioned by the influence from the political and social context as well as the democratic principles emphasised. The legal history and traditions of a country may impact on the introduction of a lay adjudication system. Moreover, the democratisation of the criminal justice system will affect the culture within the system, which is related to the wider society. Considering these issues is vital for an evaluation of the citizen judge system.

The developments in the Japanese criminal justice system have resulted from the modernisation and westernisation of the system and, moreover, by adopting and blending it with the indigenous legal traditions and social cultures. Therefore, Japan faces a criminal justice procedure in flux under the influence of two legal traditions, with the formal process guided by an ostensibly adversarial principle. However, the Japanese criminal procedure having characteristics from the inquisitorial model, such as the powerful public prosecutor's coercive powers, in particular in the investigation process, and professional judges have a dominant role throughout the procedure. The emphasis on principles of orality and immediacy appears to be the focus for the introduction of the citizen judge system. However, the inquisitorial approaches applied in the procedure may rise to the procedural challenges and limit lay adjudicators' participation.

The legal traditions and the historical features that shape Japanese criminal justice have conditioned the acceptance of democratisation by injecting more adversarial principles, in particular, in the democratisation of the criminal justice system as well as the practice of the citizen judge system. However, it is important to observe that the citizen judge system is a development of the criminal justice system as a whole. Japan has a history of democratising its system piece by piece. A clear picture of the real progress of the citizen judge system needs to be illustrated. Therefore the following chapter, the Citizen Judge Act will be evaluated to assess what the new system brings to the Japanese criminal justice system through applying the evaluation criteria proposed in Chapter 2 and this chapter taking a textual approach.

CHAPTER 4 AN EVALUATION OF THE CITIZEN JUDGE SYSTEM I

Introduction

This chapter examines the Citizen Judge Act (CJA) [*Saiban-in no Sankasuru Keijisaiban ni kansuru Horitsu*], promulgated into law in 2004 and evaluates it, applying the evaluative criteria for procedural testing proposed in Chapter 2. It is organised into four sections. Section 4.1 briefly explains the experience of the jury system between 1928 and 1943 and examines the reasons for its international influences. Section 4.2 clarifies why the citizen judge system tends to be considered as a combination of the mixed judge model and the jury model of the lay adjudication system. In Section 4.3 the various components of the proposed evaluative criteria to evaluate the citizen judge system as a democratic institution are applied to the CJA. This section of the chapter considers the manner in which the citizen judges' participation is being introduced, its compatibility with pre-existing laws, in particular the Constitution and the Code of Criminal Procedure (CCP), the extent of its correlation with the Japanese principles of criminal procedure and of its prospects of being considered meaningful from democratic perspectives. It also examines the international influences behind the introduction of both the mixed judge and jury model characteristics and possible justifications for the mixture of these models as a means of introducing the lay adjudication system and the effectiveness in its development. In addition, it assesses the extent to which the CJA has achieved the establishment of the citizen judge procedure for managing the targets discussed in Chapter 3 before evaluating the practice of the citizen judge system in the next chapter.

As Lempert noted, identification of the variables of a lay adjudication system is significant in evaluating the functions of lay adjudicators in legal decision-making¹, while Bifulco stressed the importance of the actors involved in citizen participation in the

¹ R Lempert, 'The Internationalization of Lay Legal Decision-Making: Jury Resurgence and Jury Research' (2007) 40 Cornell International Law Journal 477–88, 482.

procedures². The UNODC also suggested eight sets of questions which would determine how representative adjudicators are, in order to provide an assessment of a lay adjudication system, as referred to in Chapter 2. In this respect, a set of questions regarding lay adjudication procedures and the share of responsibilities between the actors involved in the procedures need to be answered in order to evaluate the degree of the lay adjudicators' participation³. For example, what kind of cases do they hear? How and how many lay adjudicators are chosen? What is the proportion of lay adjudicators and professional judges in the lay adjudicator panel? and how are responsibilities divided and what is the cooperation between them? What responsibilities are allocated to the involved actors associated with the lay adjudicators' participation? What are the conditions for appeal? Is it possible to overturn the verdict reached by the lay adjudicator panel? The aim of this chapter is to evaluate the Japanese citizen judge procedure established by the CJA and related legislation and to illustrate their participation by answering these questions.

4.1 Lay Adjudication in Japan

The mixed legal traditions have remained a pervasive presence underpinning the criminal procedure and the whole criminal justice system. The two legal traditions: civil law and common law have often worked in tandem but were influenced by political upheaval and judicial reform. Discussions on lay adjudication in criminal cases had taken place concerning previous reforms before the most recent one, in 1999.

Although Boissonarde proposed that the lay adjudication system should be introduced into the Japanese system⁴ and scholars in the eighteenth century referred to the English jury system as an 'excellent institution'⁵, the Japanese government did not introduce lay adjudication because of the immaturity of the Japanese legal system, for

² L Bifulco, 'Citizen Participation, Agency and Voice' (2013) 16 *European Journal of Social Theory* 174–187

³ Ibid.

⁴ GE Boissonade, *Projet de Code de Procédure Criminelle Pour l'Empire Du Japon, Accompagne D'un Commentaire* (Tokyo, Japan; 1882), 498-502.

⁵ T Osatake, *The Japanese Jury History in the Meiji Era [Japanese]* (Tokyo; Kokodo 1926), 18; Y Fukuzawa, *Complete Work of Fukuzawa Yukichi (1) [Japanese]* (Tokyo; Iwanami 1969), 40.

example, the lack of a defence attorney and the difficulty of obtaining witnesses⁶. In addition, a coercive confession by torture was accepted as evidence in trials, and physical coercion was applied in formal investigations until 1882⁷. Therefore, because of the necessity of organising the legal system first, as well as the opposition from the Grand Council of State, *Kowashi Inoue*, a lay adjudication system was not introduced. Moreover, the lack of democratic principles⁸ and an elitist approach and scepticism towards lay people⁹ prevented its introduction.

4.1.1 The Jury System between 1928 and 1943

The Jury Act [*Baishin Ho*] was issued on 18th of April in 1923¹⁰ under the democratic movement in the Taisho era, and was triggered by Taisho Democracy and Taisho Liberalism, and was enforced from 1st of October 1928. In the jury system. All cases which could result in the death penalty, life imprisonment with or without hard labour were tried by jury trial, and cases with penalties of over three years imprisonment could be tried by jury trial if the defendant so wished¹¹. The defendant had the right to waive a jury trial¹². The jury consisted of 12 jurors who were Japanese male citizens over thirty years old and who had paid their national taxes¹³ over the previous two years. There were three reasons why the jury system was suspended after 10 years. First, the legal professionals, professional judges, public prosecutors and defence attorneys had a negative attitude towards the practice of the jury system. Because of the elaborate preparation and proceedings, they advised defendants to waive their rights to a jury trial¹⁴. Second, with a guilty verdict, the defendant had to pay the costs of the proceedings in a jury trial if the defendant claimed the right to a jury trial¹⁵. Third, jury

⁶K Kume, 'The Report on the France Inspection Tour 1' (Tokyo; Taiheikan Kiroku 1878), 18; K Kume, *The Report on the France Inspection Tour 3* (Tokyo; Taijokan 1878), 145.

⁷M Egi, 'The Constitution and the Jury System', *Reihai Zenshu* (4) (Tokyo; Reihai Zenshu Press 1927), 27.

⁸Boissonade, *supra* note 12, 72.

⁹K Inoue, 'Opinions about the Jury System', *Legal Arguments: about the jury system* (Tokyo; Mukenshoya 1927).

¹⁰Act No. 50 of 1923.

¹¹Ministry of Justice [Japan], 'The Jury System in Japan' (2015)

<http://www.moj.go.jp/keiji1/saibanin_koho_gallery02.html> accessed 27 August 2015.

¹²*Ibid.*

¹³ The amount of tax was 3 yen, which quite expensive at that time. See, T Maruta, 'The Criminal Jury System in Imperial Japan and the Contemporary Argument for Its Reintroduction' (2001) 72 *Revue internationale de droit pénal* 215–224. 216–7.

¹⁴ *Ibid.*

¹⁵ *Ibid.*

trials, which required a lot of effort and cost, were avoided because of the expense of war damages¹⁶ that had to be required. In short, the jury system 'was unpopular, costly to maintain and, because in the war situation there was a lack of prospective jurors as the overwhelming majority of men over the age of thirty holding Japanese citizenship had joined the army'¹⁷. It was regarded as an unsuitable and inappropriate system for the Japanese people at that time, and, therefore, the system was considered a failure¹⁸. In addition to the unpopularity of the jury system, the authoritarian rule by the Japanese government, in particular in the early 1940s, leading to a 'deformed public sphere'¹⁹, abolished the jury system. In addition, as Maruta stated, although there were repeated arguments about the re-introduction of the jury system after the war, it did not happen because of the two major issues of the high reliability of professional judges and Japanese culture, which lacks a sense of the rights and responsibilities of citizens²⁰.

In the post-war reforms, the jury system did not remain in the new Constitution. Because of the aim of democratisation arising from the American influence, the Constitutional Problem Committee on 13 October 1945, was established. The drafts by the Committee were supervised by SCAP, who suggested adding an article regarding the jury system²¹. However, the jury system was not stipulated in the second draft and the final version of the Constitution. Koba has claimed two possible reasons for this. The first possible reason was that SCAP considered that the jury system would prevent the smooth operation of the occupation policy, and the other reason was that SCAP regarded that the word 'tribunal' in Article 37(1) of the Constitution included a jury trial²². In the process of drafting the Constitution, the reintroduction of the jury system was rejected by most members of the Commission and the Minister for Foreign Affairs *ad*

¹⁶ Japan had a series of wars in the 1920s, 1930s and 1940s, such as the First World War starting in 1914, the Second Sino-Japanese War in 1937, and the Second World War in 1941. See P Cave, 'Japanese Colonialism and the Asia-Pacific War in Japan's History Textbooks: Changing Representations and Their Causes' (2012) 47 *Modern Asian Studies* 542–580.

¹⁷ A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010) 12 *Asian-Pacific Law & Policy Journal* 1–23, 17.

¹⁸ *Ibid.*, 217.

¹⁹ ME Berry, 'Public Life in Authoritarian Japan' (1998) 127 *Daedalus* 133–165, 136–7.

²⁰ Dobrovolskaia, *supra* note 17, 221.

²¹ Y Koba, 'The Jury System and the Citizen Judge System [Baishinho to Saibanin Seido]' 13–22 <file:///C:/Users/Owner/Downloads/KJ00006611300.pdf> accessed 15 August 2015, 16–7.

²² *Ibid.*

interim referred to the unsuccessful practice of the jury system in the pre-war period and doubted the compatibility of Japanese cultural characteristics with the system²³. The Jury Act has been suspended since 1943. Therefore, Japan had not had a lay adjudication system in criminal cases until the citizen judge system was introduced in 2009.

4.2 Reasons for International Influences on the CJA

Japan introduced the citizen judge system based on an international model, namely the English, U.S., French, Germany lay adjudication systems. Considerable studies on various lay adjudication systems were undertaken during the drafting process of the CJA. When the Judicial Reform Council (JRC) proposed the introduction of a lay adjudication system, the JRC declared that reviews of the historical background, systems and practical terms and conditions of the system adopted in the Western countries should be considered²⁴. In fact, The Japanese government sent research teams to England (London), U.S. (New York, Washington D.C., and Seattle), France (Paris and Bordeaux), German (Köln and Munich)²⁵ in order to conduct investigations into hearings in 2000²⁶. The team visited the Ministry of Justice, the court, the law school, the Bar Association and law firms in each place to study their basic structures, their implementations, contentious issues and the advantages of both the legal systems and the lay adjudication systems²⁷. The result of the research reports from these visits highlighted the high cost of the all systems, the decline of the usage of the system (England/Wales), the incompetence of the lay judges (Germany), the reform of the systems (England/Wales and France), the use of the *voir dire* system (the U.S.), judicial appointment systems (France, Germany and the U.S.) and legal education systems (France and Germany)²⁸. The examination and adaptation of other legal systems is a common methods used in

²³ Ibid.

²⁴ Judicial Reform Council, *For the Judicial Reform : The Points of Contentions (Shihoseido kaikaku ni mukete: ronten seiri)* (Tokyo, 1999) , at 10. available at the website:
<http://www.kantei.go.jp/jp/sihouseido/pdfs/1221ronten.pdf>.

²⁵ The JRC, 'Outline of the International Research Trips'
<<http://www.kantei.go.jp/jp/sihouseido/sonota/kaigai/gaiyou.html>> accessed 24 May 2016.

²⁶ The reports from the research trips are available at the website:
<http://www.kantei.go.jp/jp/sihouseido/etc-dex.html>.

²⁷ Ibid.

²⁸ Ibid.

the drafting of Japanese laws, as the two historical Japanese legal systems developments show, as described in the previous chapter.

After studying other systems, the drafters of the CJA aimed to focus on building the best lay adjudication system to introduce into the existing Japanese criminal justice procedure. Some constructive suggestions were introduced at the planning stage by the comparative study, and the main recommendations was made to adopt the American jury system and the German system²⁹. While Maruta advocated the American jury system because of the high Japanese conviction rate and the desire to maintain the Japanese criminal procedure tradition, in particular the careful and detailed judiciary administration³⁰, Langbein recommended the German system because of its efficiency and accuracy in fact-finding³¹. In addition, the chief member of the Citizen Judge System and Criminal Justice Investigative Commission (CCC), Masahito Inoue, pointed out that 'we should not focus on which model, the jury model or the mixed judge model, should be adopted or which foreign system should be adopted.'³² However, it is noteworthy that Inoue's knowledge of the Japanese justice system and its legal traditions impacted throughout the course of both the introduction of the citizen judge system and the drafting of the CJA. He has been a high-profile legal figure in Japan, having Japanese and American educational backgrounds, and is considered to be an expert in Japanese criminal justice procedures. He continues to contribute to the development of Japanese criminal justice as a member of many governmental committees including the JRC and the CCC. This may account for his decisions to base the CJA on the CCP, of which he has specialist knowledge and expertise³³. Although the CJA did not emerge as a legal transplant from particular provisions, the CJA is largely sourced from Inoue's report.

²⁹ See, A Dobrovolskaia, 'Japan's Past Experiences with the Institution of Jury Service' (2010) 12 Asian-Pacific Law & Policy Journal 1–23, 3; M Ibusuki, '" Quo Vadis?: First Year Inspection to Japanese Mixed Jury Trial' (2010) 12 Asian-Pacific Law & Policy Journal 24–330, 28; T Maruta, 'Japanese Nationality Argument and the Mixed Court System: Is the Mixed Court System Appropriate for Japan? [Nihonjin No Kokuminsei to Sannshinnseido: Sanshinsei Ha Nihonjin Ni Muiteiruka?]' (2000) 51 Law and Politics [Hou to Seiji] 163–213; Thaman, 'Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures'.

³⁰ Ibid.

³¹ JH Langbein, 'Mixed Court and Jury Court : Could the Continental Alternative Fill the American Need ?' (1981) 6 American Bar Foundation Research Journal 195–219, 195.

³² JRC, 'The 30th JRC Conference Proceedings', *Judicial Reform Council Meeting* (Tokyo; JRC 2000).

³³ See his profile on the website: <http://members3.jcom.home.ne.jp/masinouye/framepageprofile.html>

Thus the very first draft of the CJA submitted showed the clear influence of other legal systems³⁴. For instance, the report suggested a citizen judge panel which consisted of three professional judges and four citizen judges, which is the same as the French and German system³⁵. Moreover, the fundamental contents of the CJA appear to be based substantially on his report, despite the fact that it omitted some details, such as the size of the fine to be imposed on citizen judges for the violation of confidentiality³⁶. as a result, very different lay adjudication systems' influences were indirectly imported into the CJA.

As a consequence of the legal traditions and international influences that led to the drafting of the CJA, it is the mixed features of both the mixed judge and jury models which have impacted on the degree of the citizen judges' participation. The collaborative structure of the citizen judge panel as well as the civil law tradition in the Japanese criminal procedure satisfy the definition of a mixed judge model of lay adjudication system identified in this research. The Japanese citizen judge system is the product of borrowing selected existing lay adjudication systems provisions and adapting and making them compatible with the pre-existing criminal procedure. There are also inherited incompatible principles, derived from the Japanese civil law tradition, which undermine the citizen judges' democratic functions. According to Kiss, there was no obstacle preventing the introduction of lay adjudication into the Japanese legal system, although its introduction would drastically change the role of legal professionals³⁷. Legal institutions participated in the discussions about whether Japan should introduce the jury mode or the mixed judge mode. In the 30th meeting of the JRC, opinions from the JFBA, the Ministry of Justice, and the Supreme Court were outlined. The JFBA strongly insisted on the introduction of the jury model³⁸. The Supreme Court and Ministry of Justice raised an objection to the jury model, but gave a positive response to the mixed judge mode³⁹. The discussion did not reach a conclusion at the JRC, and was deferred to

³⁴M Inoue, 'Material 1: The Outline of Possible Citizen Judge System, Submitted in the 28th Meeting' (Tokyo; 2003).

³⁵Ibid, 1.

³⁶Ibid, 13.

³⁷Kiss, *supra* note 2, 281-2.

³⁸JRC, *supra* note 32.

³⁹Ibid.

the CCC established in December 2001. In the 31st investigation meeting, they concluded that there should be a mixed judge system, although some local organisations indicated their objections to lay participation in sentencing⁴⁰. The following sections will elaborate the CJA and the citizen judge procedures.

4.3 The Citizen Judge Procedure

Article 1 of the CJA added special provisions to the Court Act⁴¹, the Code of Criminal Procedure (CCP)⁴² and other necessary legislation for criminal trials with citizen judges' participation. In other words, amendments of related acts were introduced⁴³, while the CJA's 113 Articles, divided into eight chapters, prescribed procedural rules and the duties of citizen judges and legal professionals to govern all stages of the citizen judge system.

The baseline of the citizen judge procedures did not depart from the original regular criminal trial procedure, as stated in the CCP, which was referred to in Chapter 3. However, the introduction of the CJA led to the amendment of the Court Act and the CCP⁴⁴. The police and public prosecutors are empowered to commence criminal investigations to collect all evidence⁴⁵, and if the prosecutor decides on an indictment, with the penalties applied to relevant cases explained in the following paragraph, the case file will be sent to the court and the citizen judge procedures will be followed. These can be divided into four stages in relation to citizen judges' duties and the procedures. Firstly, District Courts are required to organise a pre-trial arrangement conference after they receive the case from the prosecutor prior to the first trial date in order to prepare

⁴⁰Judicial Reforn Council Secretary General, 'The Citizen Judge System, Criminal Justice Investigation Committee Conference Proceedings' (Tokyo; Judicial Refirn Council Secretary General 2004). Regarding the details of the process for determining the citizen judge system, see Z Wang and H Fukurai, 'Popular Legal Participation in China and Japan' (2010) 38 International Journal of Law, Crime and Justice 236–260; H Tsuji, *The Citizen Judge Act/Criminal Procedure Law* (Tokyo; Shoji Homu 2005).

⁴¹Act no. 59 of 1947.

⁴²Act no. 131 of 1948.

⁴³In addition to the two acts, for example, the amendment of the Penal Code (act no. 45 of 1907) in 2005 expanded the duration of the imprisonment for serious criminal charges (amendment no. 156 of 2004).

⁴⁴Art. 1.

⁴⁵CCP, art. 189-246.

a successful and effective trial⁴⁶. Secondly, citizen judges are randomly chosen from the electoral register but the courts are authorised to finalise the citizen judges and supplementary citizen judges selection⁴⁷. Thirdly, citizen judges are entitled to attend the proceedings⁴⁸, hear and deliberate⁴⁹ the case in the trial, reach a judgement including culpability and sentence in collaboration with professional judges. Lastly, after the trial, the citizen judges are bound by a life-long duty of confidentiality relating to the case⁵⁰.

4.3.1 Subject Cases

Article 2 states that serious criminal cases for which the public prosecutor seeks the death penalty or at least one year imprisonment are to be tried by a citizen judge panel. The cases are in two categories: those which are punishable by death or indefinite imprisonment with hard labour, and those in which the victim has died due to an international criminal act, as listed in Article 25(2)(2) of the Court Act⁵¹. In short, the subject cases of the citizen judge systems are generally eight crimes, as follows:

- 1) homicide;
- 2) robbery resulting in bodily injury or death;
- 3) bodily injury resulting in death;
- 4) unsafe driving resulting in death;
- 5) arson of an inhabited building;
- 6) kidnapping for ransom;
- 7) abandonment of parental responsibilities resulting in the death of a child; and
- 8) other rape, drug and counterfeiting cases.

Serious crimes were chosen at the suggestion of the Recommendations of the Justice Reform Council⁵² because of the dramatic impact on society rather than for the

⁴⁶ Art. 49.

⁴⁷ Art. 37

⁴⁸ Art. 60.

⁴⁹ Art. 66.

⁵⁰ Art. 70.

⁵¹ Art, 2(2).

⁵²The Judicial Reform Council, 'Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century' [Japanese] (2001)
<http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html> accessed 14 August 2015, ch.III, part 2, 1.

protection of the defendant's right or for any other reasons⁵³. Wilson points out the Japanese government's intention to extend the subject of cases from serious crimes to less serious ones and even to civil cases⁵⁴, although a lay adjudication system in civil cases is extremely rare, in many contemporary legal systems⁵⁵, apart from in the U.S.⁵⁶

Serious criminal cases tend to be chosen for lay adjudicator trials. For example, the jurisdiction of the French lay adjudicator trial in *Cour D'Assises*, is for crimes which are punishable with ten or more years imprisonment⁵⁷. The German *Schöffengericht* (collaborative lay court) is practically a lay adjudication trial court, which hears cases where minimum punishment is one year's prison imprisonment, and the *Schwurgericht* (independent lay court), hears serious cases⁵⁸. In addition, in the English jury system, all serious indictable criminal offences must be tried by the jury in the Crown Court, which deals with four classes of criminal offences⁵⁹, but triable either way offences⁶⁰ can be tried either by the lay bench panel or a District Judge in the of Magistrates' Court or by a jury in the Crown Court⁶¹. The subject-matter of cases heard by the newly

⁵³ K Ida, 'Challenges Concerning to the Citizen Judge System[Shimin Hanji E Nokoru Kadai]' *Asahi Newspaper* (Tokyo, 2004).

⁵⁴ MJ Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2010) 33 *Fordham International Law Journal* 487–572, 515.

⁵⁵ In many legal systems, a lay adjudication system in civil cases was/has been abandoned including England and Canada. See, M Zander, 'England and Wales Report' (2001) 72 *Revue internationale de droit pénal* 121–157, 123; Department of Justice [Canada], 'The Role of the Public' <<http://www.justice.gc.ca/eng/csj-sjc/just/12.html>> accessed 11 April 2016;

⁵⁶ See LG Dooley, 'Essay: Our Juries, Our Selves: The Power, Perception, and Politics of the Civil Jury' (1995) 80 *Cornell Law Review* 325–361; VP Hans and S Albertson, 'Empirical Research and Civil Jury Reform' (2002) 78 *Notre Dame Law Review* 1497–1524.

⁵⁷ B Mckillop, 'Review of Convictions after Jury Trials : The New French Jury Court of Appeal' (2006) 28 *Sydney Law Review* 343–358, 344.

⁵⁸ GR Newman, *Crime and Punishment around the World, vol.4* (Santa Barbara, CA; ABC-CLIO 2010), 127; MD Dubber, 'The German Jury and the Metaphysical Volk: From Romantic Idealism to Nazi Ideology' (1995) 43 *American Journal of Comparative Law* 227–272, 230. However, according to Dubber, *Schwurgericht* (independent lay court) has not functioned any more.

⁵⁹ The offences are the most serious offences including treason and murder (Class 1), manslaughter and rape (Class 2), all remaining indictable offences (Class 3), and all triable either way offences (Class 4). See, G Slapper and D Kelly, *The English Legal System: 2012-2013* (13th edn, Hoboken; Taylor and Francis 2012), 245.

⁶⁰ Triable either way offences include: theft from an employer, burglary, fraud, actual bodily harm, grievous bodily harm, drug offences, harassment, criminal damage (more than £5,000, sexual offences, possession of indecent images, affray and violent disorder, racially or religiously-motivated offences, dangerous driving, death by careless driving, witness intimidation, and threats to kill.

⁶¹ P Duff, 'Criminal Law Review the Defendant ' S Right to Trial by Jury : A Neighbour ' S View' (2000) *FEB Criminal Law Review* 85–94, 86.

(re)introduced lay adjudication systems since the 1990s, such as the Spanish⁶², Russian⁶³ and Korean systems⁶⁴, are also serious criminal cases, although the range of cases⁶⁵ varies⁶⁶.

In some instances of serious criminal cases, citizen judges trials can be avoided in order to protect citizen judges' and the safety of their families. Article 3 grants discretion to the District Court, a public prosecutor, a defendant, a defence attorney or *sua sponte* to avoid a citizen judge trial, and exercise the right to a bench trial in cases where the lives, bodies and their interests of the citizen judges or their families may be threatened. In this respect, it is likely that, as Tsuchiya highlighted, terrorist and organised crimes cases will be excluded⁶⁷. Uncommonly, the case where there is a suspected danger to lay adjudicators tend to be excluded from trials, including, for example, in English⁶⁸ and Irish⁶⁹ trials.

The CJA does not allow either a defendant or a defence attorney to request to waive the trial by a citizen judge panel⁷⁰, as the JRC recommendations were proposed with the intention of increasing civic participation rather than upholding bench trials for defendants⁷¹. This is a noticeable contrast between the CJA and the 1923 Jury Act. The defendant's right to waive a jury trial is sometimes believed to have caused the collapse

⁶² M Jimeno-Bulnes, 'Lay Participation in Spain: The Jury System' (2004) 14 International Criminal Justice Review 164–185, 165.

⁶³ SA Pashin, 'The Reasons for Reintroducing Trial by Jury in Russia' (2001) 72 Revue internationale de droit pénal 253–257, 254.

⁶⁴ J Lee, 'Korean Jury Trial : Has the New System Brought About Changes ?' (2010) 12 Asian-Pacific Law & Policy Journal 58–71, 61.

⁶⁵ In the Russian jury system, the cases of aggravated murder and other crimes of the second level courts of original jurisdiction, regional courts, territorial courts, republican supreme courts, and capital city courts are subject for the jury trial. See SC Thaman, 'The Good, the Bad, or the Indifferent: "12 Angry Men" in Russia, Part of Symposium: The 50th Anniversary of "12 Angry Men"' (2007) 82 Chicago Kent Law Review 791–808, 796.

⁶⁶ There is an argument about the exclusion of political crimes in the Spanish system. See, SC Thaman, 'Spain Returns to Trial by Jury' (1997) 21 Hastings International and Comparative Law Review 241–537, 260.

⁶⁷ Y Tsuchiya, *Start of the Citizen Judge System: The Expectations and Concerns* (Tokyo; Kadensha 2008), 28.

⁶⁸ Criminal Justice Act 2003 [England], sec.44.

⁶⁹ JD Jackson, K Quinn and T O'Malley, 'The Jury System in Contemporary Ireland: In the Shadow of a Troubled Past' (1999) 62 Law and Contemporary Problems 203–232, 220.

⁷⁰ Art. 62.

⁷¹ JRC, *supra* note 52, 216.

of the pre-war jury system⁷². Kiss explained that the unpopularity of a jury trial was because defence attorneys believed that waiving a jury trial and choosing a bench trial was a way to show the defendant's loyalty to authority in the hope of a lenient sentence⁷³. However, the defendants often tend to be allowed to waive the right to be tried by a lay adjudication trial in some legal systems⁷⁴, such as the American⁷⁵, German⁷⁶, and Korean⁷⁷ systems in different conditions. The defendant's waiving right may be related to the issue of whether the concept of lay participation in criminal justice systems is the fundamental or 'nominal' right for the citizens⁷⁸. Moreover, the defendant's right to waive a lay adjudicator with the consent of public prosecutor and professional judge will represent a possible exercise of the defendant's control against the prosecutor's and judge's discretion⁷⁹. In Duff's comparative analysis between the English and Scottish jury systems, he shows four methods to control defendants' access to lay adjudicator trials: the law itself, prosecutorial discretion, judicial choice, and the decision of the defence⁸⁰. The lack of defence rights in the Japanese citizen judge system to choose a citizen judge trial or a bench trial, appears to be symbolic of the weak position of the defendant as well as the powerful authority of the public prosecutor in the preliminary investigative procedures⁸¹. As West has suggested, the lack of detailed instructions on discretionary prosecution, the tenure position of a prosecutors, and a high conviction rate, lead the prosecutor to have 'tremendous power within the criminal

⁷² Dobrovolskaia, *supra* note 9, 12-3. 2010 ; M Dean, 'Trial by Jury: A Force for Change in Japan' (1995) 44 *International and Comparative Law Quarterly* 379-404, 388; K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' (2006) 6 *California Law Review* 55-80, 62.

⁷³ LW Kiss, 'Reviving the Criminal Jury in Japan' (1999) 62 *Law and Contemporary Problems* 261-283, 269.

⁷⁴ Lee, *supra* note 64, 61.

⁷⁵ EN Griswold, 'The Historical Development of Waiver of Jury Trial in Criminal Cases' (1933) 20 *Virginia Law Review* 655-669.

⁷⁶ Langbein, *supra* note 11, 199.

⁷⁷ RY Park, 'The Globalizing Jury Trial: Lessons and Insights from Korea' (2010) 58 *American Journal of Comparative Law* 1-74, 58.

⁷⁸ Langbein, *supra* note 76.

⁷⁹ K Anderson and M Nolan, 'Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Law Assessor System (Saiban-in Seido) from Domestic Historical and International Psychological Perspectives' (2004) 37 *Vanderbilt Journal of Transnational Law* 935-992, 953.

⁸⁰ Duff, *supra* note 61.

⁸¹ JJ Kodner, 'Reintroducing Law Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step' (2003) 2 *Washington University Global Study Law Review* 231-254, 236.

justice system'⁸². Furthermore, Anderson and Nolan claimed that introduction of the citizen judge system would enhance the prosecutor's power in spite of three implications to control their power: the primary motives of the reform in 1999 to limit their power and discretionary control, the increase in the use of plea bargaining, and their inability to divert confessed and summary cases from citizen judge trials⁸³. The problematic unequal relationship between the defendant and the prosecutor seems to persist in the citizen judge system. Moreover, this reinforces the impression that introduction of the citizen judge system aimed at enhancing democracy rather than defendant's rights⁸⁴. The next section evaluates the CJA, considering how democracy is enhanced in the light of citizen judges' participation.

4.4 Evaluating the CJA

4.4.1 Selection of the Citizen Judges

A number of lay adjudication studies have highlighted the extent of influences on the selection process for lay adjudicators and the importance of the process from a fair trial perspective. Becoming a lay adjudicator as a citizen judge seems not to be a constitutional right because of possible unconstitutionality and there is no guarantee by legislation, unlike in some other legal systems such as in serious criminal cases in the U.S.⁸⁵, and Russian systems⁸⁶. Arguments about the right to have a lay adjudicator trial seem to be related to legal guarantees regarding lay adjudicator trials and defendants' choices⁸⁷. The duty of a citizen judge in Japan tends to be considered as an obligation rather than a public right. In fact, according to the Supreme Court, 50.1% respondents

⁸² MD West, 'Prosecution Review Commissions : Japan ' S Answer to the Problem of Prosecutorial Discretion' (1992) 92 Columbia Law Review 684–724, 691, 688-691.

⁸³ Anderson and Nolan, *supra* note 79, 953.

⁸⁴ *Ibid*, footnote 88.

⁸⁵ R Kitai-Sangero, 'From Murder to Eating French Fries in a Metro Station - The Defendant's Right to a Jury Trial for All Types of Offenses' (2008) 30 Whittier Law Review 5–40.

⁸⁶ SC Thaman, 'The Nullification of the Russian Jury : Lessons for Jury-Inspired Reform in Eurasia and Beyond' (2007) 40 Cornell International Law Journal 355–428, 358.

⁸⁷ T Brooks, 'The Right to Trial by Jury' (2004) 21 Journal of Applied Philosophy 197–212, 198.

out of 18,000 attendees at the Citizen Judge Forums between 2005 and 2006 confirmed that they would participate as a citizen judge only if it was unavoidable⁸⁸.

The Japanese Constitution does not require trial by lay adjudicators. The Sixth Amendment to the U.S. Constitution states that '[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district ...'⁸⁹The right to trial by lay adjudicators is derived from the principle in *Magna Carta*, which is commonly cited, as the right to trial by peers⁹⁰, usually defined as equal, i.e. citizens, although there are arguments about the historical background⁹¹ and misinterpretation of this term⁹². The European Court of Human Rights' case law declares that the use of lay adjudication had not been automatically a violation of a fair trial⁹³.

The Japanese Constitution provides that the accused in all criminal cases shall enjoy the right to a speedy and public trial by an impartial tribunal as in Article 37⁹⁴. Regarding the right to trial by lay adjudicators in Japan, there were doubts about whether the citizen judge system is constitutional or not because of three key points. Firstly, The Constitution states the judiciary should be only composed of professional judges, so the citizen judge system could be against the accused's right to have a fair trial as provided in Article 37, because the professional judges must be appointed by the Cabinet⁹⁵. Secondly, from the perspective of the independence of the professional judges, the citizen judge system could work to undermine the independence of judges, declared in Article 76, because their decisions made will be influenced by the citizen judges in collaboration with the professional judges. Thirdly, if the duty of the citizen judge can

⁸⁸ The Supreme Court, 'The Citizen Judge National Forum: The Summary of the Results of Questionnaire' (Tokyo; 2006), 8.

⁸⁹ The U.S. Constitution, Amendment VI,

⁹⁰ In the clause 39 of *Magna Carta*, '[n]o freeman shall be taken or/and imprisoned, or disseised, or exiled, or in any way destroyed, nor will we go upon him nor will we wend upon him, except by the lawful judgement of his peers or/and by the law of the land'.

⁹¹ WT Cornish, *Jury* (London; Allen Lane 1968), 12.

⁹² P Darbyshire, 'The Lamp That Shows That Freedom Lives—Is It Worth the Candle?' [1991] *Criminal Law Review* 740–52, 741.

⁹³ A Doobay, 'The Right to a Fair Trial in Light of the Recent ECtHR and CJEU Case-Law' (2013) 14 *ERA Forum* 251–262, 256.

⁹⁴ The Constitution, art. 37.

⁹⁵ *Ibid*, art. 80(1).

be regarded as an obligation by the state, this evokes conscription, so the citizen judge system could be seen as in opposition to freedom from bondage⁹⁶. Moreover, the strict requirement of confidentiality by citizen judges could impinge on freedom of expression⁹⁷. The JRC noted this interpretation of potential violation of the constitution, but concluded that it does not prohibit a lay adjudicator trial, although this triggered arguments among academics and the public⁹⁸. On the other hand, supporters of lay adjudication claimed that the Japanese Constitution was established under a great deal of American influence, therefore, the introduction of a lay adjudication system was assumed to be present in the Constitution as it is in the U.S. constitution⁹⁹.

The Supreme Court approved the constitutionality of the citizen judge system in November 2011¹⁰⁰. It held that the structure of the citizen judge system guarantees that a fair trial will be conducted by the courts and professional judges, who are recognised as responsible for a fair trial, and therefore, the citizen judge system does not interfere with the fundamental principles of the criminal justice procedure stated in the Constitution¹⁰¹. In addition, the judgment declared that ‘the courts in the Constitution depend on the principle that the Constitution allows public participation in the judiciary, and it does not prohibit public participation in the inferior Courts, which are different from the Supreme Court.’¹⁰² Although the Supreme Court approved the constitutionality of the citizen judge system, the responsibilities for being citizen judges should not be imposed on citizens, particularly because of their fragile support for the citizen judge system through lack of education and practice as lay participants. The inclusion of the citizen judge system within the Constitution seems to be urgent and necessary work. The argument about whether the citizen judges are exercising obligations or rights is still

⁹⁶Ibid, art. 18.

⁹⁷Ibid, art. 19, 21.

⁹⁸There are other 9 points arose as the reasons for the violation of the constitutionality. See T Shinya, ‘The Constitutionality of the Citizen Judge System [Saibanin Seido No Gokensei]’ (2013) 9 Omiya Law Review 133–144, 136; K Nishino, *Criticisms towards the Citizen Judge System* (tokyo; Nishikanda Henshu Shitsu 2008), ch. 2.

⁹⁹Y Higuchi, *The Constitution [Kenpo]* (2nd edn, Tokyo; Soubunsha 1998), 399.

¹⁰⁰The Supreme Court Verdict, 16/11/2011, no.65, 8, 1285.

¹⁰¹Ministry of Justice [Japan], ‘Citizen Judge System Q&A [Saibanin Seido Q&A]’ <http://www.moj.go.jp/keiji1/saibanin_info_room_03.html> accessed 9 September 2015.

¹⁰²The Supreme Court Verdict, 16/11/2011, no.65, 8, 1285.

being developed mainly in constitutional studies¹⁰³. With the continuing arguments, the importance of selecting citizen judges is also highlighted in order to construct appropriate citizen judge panels which reflect the community¹⁰⁴.

The selection process consists of three broad phrases: the listing of the candidates and the summoning stage, the summons response stage, and the *voir dire* stage, conducted privately. It is similar to the American process as explained by Rose, Diamond, and Musick who suggested, however, that the American selection process is open to the public, in a way which is different from the Japanese one¹⁰⁵.

Citizen judges are randomly selected from the electoral register list¹⁰⁶, and compiling the list is the responsibility of each individual District Court¹⁰⁷. Random selection will bring three advantages: an equal chance for all citizens to be a lay adjudicator, prevention of the manipulation of the composition of the lay adjudicator panel, and the construction of the panel as a 'cross-section'¹⁰⁸ of the community derived from a variety of social groups¹⁰⁹. The court and the municipal electoral council are responsible for the candidates list. First, the court will notify the municipal electoral council of the number of prospective citizen judges for the following year by 1st of September¹¹⁰, and second, the council must randomly choose candidates, compile the list by excluding disqualified candidates, and send it to the court by 15th October¹¹¹. Lastly, the court might modify the list by excluding candidates who are not qualified or who are prohibited from

¹⁰³ See D Midori, 'The Duties of Saiban-in and "Involuntary Servitude" (Constitution Art. 18)' (2003) 2 Studies, The Hitotsubashi Journal of Law and International 305–328; H Ishida, 'The Purpose and Essential Problems of the Saiban-in System from the Viewpoint of Constitutional Law (Symposium: The Saiban-in System (Lay Judge System))' (2010) 47 The Japanese Journal of Law and Political Science 238–250.

¹⁰⁴ Shimada and others, *supra* note 90.

¹⁰⁵ MR Rose, SS Diamond and M a. Musick, 'Selected to Serve: An Analysis of Lifetime Jury Participation' (2012) 9 Journal of Empirical Legal Studies 33–55, 35.

¹⁰⁶ Art. 13.

¹⁰⁷ Art. 20, 21.

¹⁰⁸ Thaman, *supra* note 29, 99.

¹⁰⁹ D French and M Laver, 'Participation Bias, Durable Opinion Shifts and Sabotage through Withdrawal in Citizens' Juries' (2009) 57 Political Studies 422–450, 424.

¹¹⁰ Art. 20.

¹¹¹ Art. 21–22.

becoming a citizen judge¹¹². If the council discovers that candidates have died or have lost the right to vote, it must notify the court¹¹³.

A list of qualifications and disqualifications relating to citizen judges is set out in Articles 14-16. As the result of random selection from the electoral register, a person is qualified to be a citizen judge if he or she holds Japanese nationality and is 20 years old or over. The minimum age of suffrage has changed to 18 in Japan, as in many countries¹¹⁴, from 19th June 2016¹¹⁵, but the Ministry of Justice announced that the age of 20 years old as the qualification for citizen judges will be maintained after this change¹¹⁶. A person is disqualified if he/she has not finished his/her compulsory education, if he/she has received a prison sentence, or if he/she has difficulty in performing the duty of a citizen judge because of his/her mental or physical problems¹¹⁷. Potential citizen judges are to be prohibited from serving if they engage in certain occupations in particular in the legal fields or in national administration institutions¹¹⁸. These qualifications and disqualifications for being a citizen judge seem to be basic requirements, compared to other jury models of lay adjudication systems, such as the English or American¹¹⁹ jury system. However, the list could be more lenient, like the English list, for example, which has removed legal professionals and people who are involved in justice business, such

¹¹² Art. 23(3).

¹¹³ Art. 23(4).

¹¹⁴ The minimum ages of lay adjudicators in many legal systems are eighteen, such as in England, the U.S, Bulgaria, Croatia, the Netherlands, Liechtenstein, Macedonia, Norway, Portugal, Serbia, Sweden, and Switzerland, as their voters' minimum age is eighteen. See, JD Jackson and NP Kovalev, 'Lay Adjudication and Human Rights in Europe' (2006) 13 Columbia Journal of European Law 83–124, 101.

¹¹⁵ Public Office Election Law, act no. 100 of 1950, reform no. 75 of 2015, 3.

¹¹⁶ Ministry of Justice [Japan], 'The Selection of Citizen Judges' <http://www.moj.go.jp/keiji1/saibanin_seido_gaiyou02.html> accessed 13 April 2016.

¹¹⁷ Art. 14.

¹¹⁸ Art. 15. The professionals are: a) Members of the National Diet; b) Ministers of State; c) Employees of national administrative institutions; d) persons who received a salary from the Defence Agency; e) judges or were judges; f) public prosecutors or were public prosecutors; g) lawyers including foreign registered lawyers, and past lawyers; h) patent attorneys; i) judicial scriveners; j) judicial clerks; k) employees of the Ministry of Justice; l) police officers; m) persons qualified as a judge, a public prosecutor, and a lawyer; n) professors and associate professors in law schools; o) legal apprentices; p) prefectural governors and mayors; and q) Self Defence Force officers.

¹¹⁹ JL Grossman, 'Women's Jury Service: Right of Citizen Ship or Privilege of Difference?' (1994) 46 Stanford Law Review 1115–60.

as judges, lawyers, and police officers from disqualification¹²⁰ under Schedule 33 of the Criminal Justice Act 2003.

The CJA also makes provisions for exemptions from citizen judge service on grounds of age, illness or important social responsibilities¹²¹. Examples of exemptions are as follows; a person who is over seventy years old; is a member of the local government; is a student; (has) served as a citizen judge or a supplementary citizen judge in the past five years; was called to be a citizen judge candidate in the past year; (has) served as a member or supplementary member of the a Prosecution Review Commission in the past five years; has difficulty in getting to the court because of disease or injury, nursing care for family, important work, or the funeral of a parent¹²². Moreover, a person who may be related to anyone directly involved in the case is also considered for excusal¹²³. While there is broad acceptance for the adoption by random selection, lenient exemption requirements provide some flexibility in the citizen judge system.

The selection process for citizen judges including the summons process is stipulated in the CJA between Articles 25 and 40. After compiling the list by the court, notification with a questionnaire is sent to the candidates to establish if they are to be included in the list in November for the coming year¹²⁴. The questionnaire requires the candidate to respond to any of the stated excusals, and if so, he/she will not be summoned¹²⁵. For each citizen judge trial, the prospective citizen judges are chosen randomly by lot, and the appearance request letter will be sent by six weeks before the summons¹²⁶. At the

¹²⁰ Regarding the attitudes of those people, the Bar Council illustrate a few words of caution, such as unnecessary to inform their occupations to other jurors and follow the judges' instructions as to any issue of the law, although he/she disagrees with them. See, M Zander, *Cases and Materials on the English Legal System* (10th edn, Cambridge; Cambridge University Press 2007), 488.

¹²¹ Art. 16.

¹²² Ibid.

¹²³ Art. 17. It stipulates the requirements for excusal: he/she will be excused in the case if he/she: a) is the defendant or victim; b) is a relative of the defendant or victim; c) is the legal representative, guardian, and custodian; d) has been employed by the defendant or lived with the defendant; e) is a person who made complaints or claims; f) is a witness or expert witness; g) is a representative, defence counsel, or assistant; h) worked as a prosecutor or police officer; i) worked as a prosecutorial reviewer or the assistant; and j) was involved in the examination procedure.

¹²⁴ The Supreme Court, 'How to Select Citizen Judges [Saiban-in No Erabarekata]' <http://www.saibanin.courts.go.jp/introduction/how_to_choose.html> accessed 8 May 2016.

¹²⁵ Ibid.

¹²⁶ Ibid.

prospective citizen judges appearance in the court, six citizen judges are chosen after *voir dire* and challenges¹²⁷.

The CJA provides a detailed procedure of *voir dire*, which will be expected to exclude unfair-minded lay adjudicators¹²⁸, and as Anderson and Ambler noted the Japanese *voir dire* system is 'a limited U.S.-style'¹²⁹. To confirm there is no connection between the candidates and the case, the professional judge must send the list of the candidates to the prosecutor and defence attorney at least two days before the date of the summons, and they are allowed to view copies of questionnaires submitted by the candidates on the date of the summons¹³⁰. In addition, the court is authorised to dismiss a person if there is a possibility that he/she may act unfairly¹³¹, and the court can question prospective citizen judges about their involvement in the case and their relationship with the defendant¹³². Furthermore both the public prosecutor and the defence attorney, can challenge up to four citizen judges without specifying a reason¹³³, and also challenge them with reasons, such as on the ground that the prospective citizen judges did not take the oath¹³⁴, but the court has the responsibility to authorise the challenge¹³⁵.

In other words, the finalisation of selected citizen judges is in the hands of the court. Throughout the selection phase of citizen judges, the court is granted considerable power by compiling the list of prospective citizen judges and finalising selected citizen judges. This can be critical bureaucratic control endangering democratised citizen judge panels. As studied in Chapter 2, a lay adjudication panel underpinned by the concepts of democracy is expected to be representative of all members of the community who are not influenced by bureaucracy. However, there is a possibility of manipulating the selection of citizen judges by the court. Moreover, the selection process, including *voir dire* and challenges, is exercised in secrecy and there is no way to check if manipulation

¹²⁷ Ibid.

¹²⁸ Langbein, *supra* note 11, 202.

¹²⁹ K Anderson and L Ambler, 'The Slow Birth of Japan's Quasi-Jury System (Saiban-in Seido): Interim Report on the Road to Commencement' (2006) 6 *California Law Review* 55–80, 64.

¹³⁰ Art. 31.

¹³¹ Art. 18.

¹³² Art. 34.

¹³³ Art. 36.

¹³⁴ Art. 41.

¹³⁵ Art. 37

is set in the CJA. Therefore, the powerful courts' and professional judges' positions in the selection of citizen judges could prevent the democratic function of a citizen judge system.

While the U.S. jury systems has 'extensive *voir dire* and challenges'¹³⁶, the English system does not allow *voir dire*, apart from reference to prima facie evidence for challenges for cause¹³⁷. The extensive system adopted in the U.S. allows defence attorneys, public prosecutors and professional judges to question and challenge jurors, and this raised the concerns about the use of race¹³⁸ and gender¹³⁹ in the exercise of peremptory challenges. As Rose, Diamond, and Musick argues, although direct influences of race-based excuses and unrepresentativeness of a lay adjudicator panel were not found in their study, the biases were 'legally and morally illegitimate'¹⁴⁰. Marder noted in the analysis of the Batson case in the U.S., 'harms that discriminatory peremptories caused, including harms not only to the defendant, but also to the excluded juror and to the community at large'¹⁴¹. However, *voir dire* in the Spanish system follows the U.S. style due to the belief in the advantages of *voir dire*, resulted in the exclusion of hostile lay adjudicators¹⁴². On the other hand, England abolished the *voir dire* in 1988 because of concerns about the effect of the peremptory challenge on the acquittal rate and the government's wish to avoid a professionalised jury¹⁴³. The absence of *voir dire* can be found in the Canadian¹⁴⁴ and Scottish¹⁴⁵ systems. Roberts

¹³⁶ M Cammack, 'In Search of the Post-Positivist Jury' (1994) 70 Indiana Law Journal 405–489, 433.

¹³⁷ EW Roskill, *Improving the Presentation of Information to Juries in Fraud Trials: A Report of Four Research Studies by the MRC Applied Psychology Unit* (London; Her Majesty's Stationery Office 1986), 128-9.

¹³⁸ MR Rose, 'A Voir Dire of Voir Dire: Listening to Jurors' Views Regarding the Peremptory Challenge' (2003) 78 Chicago-Kent Law Review 1061–1098.

¹³⁹ Rose, 'The Peremptory Challenge Accused of Race or Gender Discrimination? Some Data from One County'.

¹⁴⁰ Rose, Diamond and Musick, *supra* note 105, 50.

¹⁴¹ NS Marder, 'Justice Stevens, the Peremptory Challenge, and the Jury' (2005) 74 Fordham L. Rev. 1683–1729, 1694.

¹⁴² Thaman, *supra* note 65, 288.

¹⁴³ JD Jackson and S Doran, 'Juries and Judges: A View from Across the Atlantic-Simpson Murder Trial Elicits Comparison of Judicial System' (1997) 11 Criminal Justice - Washington DC Then Chicago- 15–19, 16.

¹⁴⁴ ER Sheyn, 'A Foothold for Real Democracy in Eastern Europe: How Instituting Jury Trials in Ukraine Can Bring About Meaningful Governmental and Juridical Reforms and Can Help Spread These Reforms Across Eastern Europe' (2010) 43 Vanderbilt Journal of Transnational Law 649–700.

¹⁴⁵ P Duff, 'The Scottish Criminal Jury: A Very Peculiar Institution' (1999) 62 Law and Contemporary Problems 173–201, 180-5.

notes the impossibility of screening and discovering potential lay adjudicators' biased attitudes by questioning in the selecting process, in his study of the American *voir dire* system¹⁴⁶. Spence, however, claims that skilful attorneys will be able to forecast lay adjudicators' decision-making tendencies in terms of their experience and social group inclusion¹⁴⁷. In other words, uncertainty about the effectiveness of *voir dire* to exclude hostile citizen judges is based on the differences between each legal professional's tactical and contingent skills. Thus, *voir dire* and peremptory challenges may lead to an unrepresentative composition and the professionalisation of the citizen judges, although they might be effective to exclude biased or inattentive citizen judge candidates.

The racial, gender, and social compositions of lay adjudicator panels are of fundamental concern, in the light of its influence on verdicts. In particular, the research on jury model systems, such as the U.S. and English systems, has been extensive. Bowers, Steiner and Sandys found in the American jury system that there were definite connections between the race and gender compositions of panels and their capital sentencing tendencies because of the 'jurors' narrative accounts yielding to 'further insights into their decision making', such as the defendant's background¹⁴⁸. On the other hand, Baldwin and McConville showed that juries in Birmingham, England were the partial representatives of the community and there were no significant relationship between the racial compositions of juries and the verdicts¹⁴⁹. The mixed results of much of the empirical research has revealed the importance of demographic improvement of selections for lay adjudicator panels to reflect the population¹⁵⁰. Moreover they have stimulated the analysis of detailed parameters, which influence the decision-making processes and the outcomes, such as different ways to apply the sentencing guidelines and the relationship between racial disparities in imprisonment and sentence length¹⁵¹.

¹⁴⁶ A Roberts, '(Re) Forming the Jury: Detection and Disinfection of Implicit Juror Bias' (2012) 44 Connecticut Law Review 827–882.

¹⁴⁷ Cited in Cammack, *supra* note 136, 425.

¹⁴⁸ See.

¹⁴⁹ J Baldwin and M McConville, 'Does the Composition of an English Jury Affect Its Verdict' (1980) 64 Judicature 133–139.

¹⁵⁰ Darbyshire, Maughan and Stewart.

¹⁵¹ JT Ulmer, 'Recent Developments and New Directions in Sentencing Research' (2012) 29 Justice Quarterly 1–40, 14.

4.4.2 The Size and Composition of the Citizen Judge Panel

The Japanese citizen judge panel consists of three professional judges, six citizen judges, and three supplementary citizen judges in contested cases¹⁵², while it is made up of one professional judge, four citizen judges, and supplementary citizen judges¹⁵³ in uncontested cases, in which there is no dispute about the facts and issues¹⁵⁴. The size composition is the result of ‘a key political battleground’ between the enhancements of citizen judges’ participation and a greater professional judges’ involvement in the drafting process of the CJA¹⁵⁵. As Fukurai has argued, the majority of the CCC supported a greater involvement of professional judges, while Shinomiya, one of the member of the CCC, strongly supported a much more limited participation for them¹⁵⁶. Consequently, the CCC remained the Japanese conventional concept of civic participation derived from the inquisitorial approach, including the subordinate role of citizen judges in the deliberative process in the collaborative form of the citizen judge panel with professional judges¹⁵⁷.

The number of lay adjudicators in a mixed judge panel for criminal cases varies depending on the lay adjudication system. For example, there are nine lay adjudicators and three professional judges in the French lay adjudicator panel¹⁵⁸. According to Ivkovic, the Croatian lay adjudication system has three different sizes and compositions depending on the seriousness of the offences in the case¹⁵⁹. In the jury model lay adjudication systems, the composition varies, for example, between twelve jurors in the

¹⁵² Art. 2(2).

¹⁵³ The number of supplementary judges shall not exceed the number of the citizen judges that constitute the panel. Art. 10(2).

¹⁵⁴ Art. 2(3).

¹⁵⁵ H Fukurai, ‘People’s Panels vs. Imperial Hegemony: Japan’s Twin Lay Justice Systems and the Future of American Military Bases in Japan’ (2010) 12 Asian-Pacific Law & Policy Journal 95–142, 110–2.

¹⁵⁶ Ibid.

¹⁵⁷ Ibid, 112.

¹⁵⁸ VP Hans and CM Germain, ‘The French Jury at a Crossroads’ (2011) 86 Chicago-Kent Law Review 737–768, 747.

¹⁵⁹ SK Ivkovich, *Lay Participation in Criminal Trials: The Case of Croatia* (Lanham; Austin and Winfield Publishers 1999), 21. Croatian lay adjudication panels are composed of one professional judge and two lay adjudicators for a small tribunal, two professional judges and three lay adjudicators for a large tribunal, and three professional judges and four lay adjudicators for a long-term imprisonment tribunal.

English¹⁶⁰ and Russian criminal trial jury and nine in the Spanish system¹⁶¹. The various size of the lay adjudicator panels and the share of lay adjudicators appears be related to the degree of the expected judicial control. As van Zyl Smit and Isakow commented in their comparative analysis on the German lay adjudication system, the lay adjudicators' participation as a part of a mixed lay adjudicator panel reflected their reduced independence of judicial control¹⁶². They also suggested that it was symbolic that the choice between a 'professional affair' and lay adjudicators' participation in the justice system influenced 'the open or democratic nature of the society'¹⁶³. In addition, King and Nesbit attributed the significant influence of the size of the lay adjudicator panels to various factors, such as deliberating time lengths, the possibility of hung juries and most importantly, their examinations of evidence¹⁶⁴. The size of lay adjudication panels is also an important variable in relation to their ability to exercise meaningful influences. The influences, as Thomas and Fink concluded, will be 'group performance, distribution of participation, the nature of interaction, group organization, member performance, conformity and consensus, and member satisfaction'¹⁶⁵. Hence, there is inevitable uncertainty about parameters in evaluating the relationship between the size and composition of a lay adjudicator panel and its influences on the decision-making processes and the outcomes because of aspects of law and a variety of practical aspects of actual lay adjudicators' behaviour¹⁶⁶.

The selection and composition of the citizen judge panel is the fundamental feature required to select representatives in the community. The essential groundwork of lay adjudication based on representative democracy necessitates the equal participation of citizens and respect for the opinion of all members of the community, as discussed in Chapter 2. There are important concerns relating to judicial control because the

¹⁶⁰JS Cockburn and TA Green, *Twelve Good Man and True: The Criminal Trial Jury in England 1200-1800* (Princeton UP 1988).

¹⁶¹Thaman, *supra* note 31.

¹⁶²D van Z Smit and NM Isakow, 'Assessors and Criminal Justice' (1985) 1 South African Journal on Human Rights 218–235, 218-9.

¹⁶³ Ibid.

¹⁶⁴ KA. King and TM Nesbit, 'The Empirical Estimation of the Cost-Minimizing Jury Size and Voting Rule in Civil Trials' (2009) 71 Journal of Economic Behavior & Organization 463–472.

¹⁶⁵ EJ Thomas and CF Fink, 'Effects of Group Size.' (1963) 60 Psychological bulletin 371–84, 371.

¹⁶⁶ FPA Coolen, B Houlding and SG Parkinson, 'Considerations on Jury Size and Composition Using Lower Probabilities' (2011) 141 Journal of Statistical Planning and Inference 382–391.

collaborative role of the citizen judge and the lenient qualifications and disqualifications relating to citizen judges may enhance citizen judges' representativeness. However it seems to be reasonable to conclude that the citizen judge panel, composed by the CJA, has the potential to be representatives of the Japanese people.

4.4.3 The Responsibilities of Citizen Judges

The responsibilities of citizen judges, the CJA stipulates, are largely confined to three procedural phases: the selection process, the decision-making process, and the post-trial process.

In the selection process, the CJA requires the appearance of the prospective citizen judges on the date of the selection process for citizen judges¹⁶⁷ and the other responsibilities are that citizen judges shall swear oaths that they will execute their duties in compliance with the laws and regulations impartially and in good faith¹⁶⁸. The citizen judges will be subject to a fine for making false statements in the selection procedure¹⁶⁹ or refusing an answer without legitimate reasons¹⁷⁰. Moreover, Article 102 states that if the prospective citizen judge does not appear and refuses the oath without legitimate reasons, he/she may be punished by a non-criminal fine of not more than ¥100,000 (£724.63)¹⁷¹. According to Nishino, who is a scholar strongly opposed to the introduction of the citizen judge system, the prospective citizen judge who fails to appear for the selection process can theoretically avoid paying fine forever because of the nature of the Japanese criminal procedure and unconstitutionality of the citizen judge system¹⁷². The existence of the fine for nonappearance at the process aims at forcing the prospective citizen judges to appear at the court as well as to change the general legal consciousness in Japanese society. Fukurai claimed that the requirement for the prospective citizen judges to appear in the selection process relies on nothing

¹⁶⁷ Art. 29(1). Travel expenses, daily allowances and accommodation charges shall be paid to the citizen judges, according to Article 29(2).

¹⁶⁸ Art. 39 (2).

¹⁶⁹ When persons violate this item are subject to a fine of up to 500,000yen (Art.110).

¹⁷⁰ When person violate this item are subject to a fine of up to 300,000yen (Art. 111).

¹⁷¹ £1 = ¥138 at the rate of 17/07/2016.

¹⁷² Nishino, *supra* note 98.

more than their own 'consciousness'¹⁷³, in spite of the possible imposed fine. He pointed out the low rate of litigation and low interests and influences of cultural and social values on the judiciary system in Japan but he expected that introduction of the citizen judge system would change this and legal consciousness would be enhanced in Japanese society¹⁷⁴. Kawashima pointed out the unique Japanese legal consciousness, in which there is less awareness of rights or contract because of Japanese social and cultural factors¹⁷⁵.

In the deliberation process, the presence of citizen judge is one of the requirements of the opening of a citizen judge trial. Article 54 of the CJA states that the requirements for the opening of a citizen judge trial, are the appearance of professional judges, citizen judges, the court clerk, and the public prosecutor¹⁷⁶. The existence of the defence is also a requirement¹⁷⁷ but not in circumstances where the court deems that the attendance of the defendant is not important for defence of his/her rights¹⁷⁸ or the detained defendant refuses to appear without justifiable reason and it is extremely difficult for the officials of the penal institution to bring him/her to the court¹⁷⁹. In addition, in pronouncing judgment, the citizen judges must appear, and if not, they will be subject to fine¹⁸⁰, although his/her nonappearance must not prevent the pronouncement or ruling from being rendered¹⁸¹. To sum up, attendance for the whole of the citizen judge trial procedure is the responsibility of the citizen judges themselves.

In addition, citizen judges must attend the deliberations and express their opinion in the deliberation room¹⁸². Article 9 of the CJA stipulates the responsibilities of citizen judges, such as the execution of their duties in compliance with the laws and regulations

¹⁷³ H Fukurai, 'The Rebirth of Japan ' S Petit Quasi-Jury and Grand Jury Systems : A Cross- National Analysis of Legal Consciousness and the Lay Participatory' (2012) 40 Cornell International Law Journal 315–354, 333.

¹⁷⁴ Ibid.

¹⁷⁵ S Miyazawa, 'Taking Kawashima Seriously: A Review of Japanese Research on Japanese Legal Consciousness and Disputing Behavior' (1987) 21 Law and Society Review 219–242.

¹⁷⁶ Art. 54.

¹⁷⁷ CCP, art. 286(1).

¹⁷⁸ CCP, art. 285.

¹⁷⁹ CCP, art. 286(2).

¹⁸⁰ Art. 112 (4), (5).

¹⁸¹ Art. 63.

¹⁸² Art. 66(2).

impartially and in good faith¹⁸³, the prohibition of acts that could impair trust in the impartiality of decisions¹⁸⁴, and the forbidding of acts that could offend citizen judges' dignity¹⁸⁵. In the deliberation process, when the presiding judge presents interpretation of laws and regulations and court proceedings on the basis of a consensus with other professional judges, citizen judges must execute their duties in accordance with the professional judges' decisions¹⁸⁶. In short, citizen judges have to cooperate with but, at the same time, obey professional judges' decisions.

In the post-trial process, the CJA sets a strict duty of lifetime confidentiality on citizen judges regarding information gained throughout the citizen judge trial proceedings¹⁸⁷. The information includes, for example:

- 1) Specific information learned in the trial, such as the case background and other members' information;
- 2) specific opinions of any member of panel about the question of guilt and sentencing; and
- 3) details of the vote, such as the ratio of votes or whether a reached unanimous decision was reached.

If citizen judges reveal this information, they will possibly be subject to a fine of up to ¥500,000 (£2,616) or up to six months imprisonment¹⁸⁸. This can create a mental burden for citizen judges and prevents a sharing of their experiences and opinions with the community¹⁸⁹, which was one of the expected outcomes of a citizen judge system. The further question arises as to what is included as subject to confidentiality. For example, if the citizen judges discuss their personal opinion about their general experience, this is not included under the confidentiality rule¹⁹⁰. The ambiguous regulations are confusing and increase citizen judges' anxiety. The nature of the information which cannot be disclosed should be explained more fully in the CJA and the mandatory

¹⁸³ Art. 9(1).

¹⁸⁴ Art. 9(3).

¹⁸⁵ Art. 9(4).

¹⁸⁶ Art. 66(4).

¹⁸⁷ Art. 108.

¹⁸⁸ Art. 79

¹⁸⁹ Wilson, *supra* note 54, 534-37.

¹⁹⁰ The Supreme Court, 'The Topics Subject to Confidentiality'

<http://www.saibanin.courts.go.jp/qa/c6_3.html> accessed 27 May 2016.

penalty should be removed¹⁹¹. This view has been expressed by a number of scholars¹⁹². Indeed, post-trial interviews and access to information can engage the public interest and it also leads experienced citizen judges to review their experience as well as to encourage responsible and careful deliberations. The prohibition on sharing the experience will also prevent the community from observing the function of the citizen judge system¹⁹³, and no one is permitted to contact a citizen judge regarding the case or for the purpose of learning information about the deliberations¹⁹⁴.

The CJA mandates that the identities of citizen judges are also to be kept secret, unless they specifically agree to disclosure¹⁹⁵, both during and after the trial¹⁹⁶. Moreover, the citizen judge is protected after having completed their duty to some extent, for example, in his/her employment for the service¹⁹⁷, privacy and being contacted after their service¹⁹⁸, and if threatened¹⁹⁹. The purpose of the strict confidentiality is to guarantee that the citizen judges can freely express themselves and debate with the other members in the panel without a fear of being threatened and or abused in public. Therefore, the strict confidentiality rules stimulate the democratic function of citizen judges as a result of in-depth discussions during deliberations and potential personal attacks by their final decisions²⁰⁰.

To summarise, this section argued that the responsibilities of citizen judges throughout the citizen judges procedure, enforced by the possibility of strict sanctions, are necessary to protect their settled democratic functions.

¹⁹¹ T Sakamaki, 'Current Issues: The Meaning and Challenges of the Citizen Judge System' (2006) 308 *Hougaku Kyoshitsu* 10–15; Y Imazaki, 'An Overview of the Introduction of the Citizen Judge System and Criminal Trials [Saibanin Seido Dounyu to Keiji Saiban No Gaiyo]' (2005) 56 *Hanrei Times* 4–19, 18.

¹⁹² See, Z Corey and VP Hans, 'Japan's New Lay Judge System: Deliberative Democracy in Action' (2010) 12 *Asian-Pacific Law & Policy Journal* 72–94, 93;

¹⁹³ Y Tsuji, 'Explanation of the Citizen Judge Act (3) [Saibanin No Sankasuru Keijijiken Ni Kansuru Horitsu]' (2009) 60 *Housou Jihou* 729–803, 798.

¹⁹⁴ Art. 73.

¹⁹⁵ Art. 79.

¹⁹⁶ Art. 79. The professional judges are bound by the confidentiality as their duty. See Court Act No. 59 of 1947, art. 75. The JSRC intended that the citizen judges should have the same duty as the professional judges. See, JRC, *supra* note 58, ch. IV, pt. 1(2) (b).

¹⁹⁷ Art. 100.

¹⁹⁸ Art. 101, 102.

¹⁹⁹ When persons violate this item are subject to a fine of up to ¥200,000 and/or imprisonment for up to two years at Art. 107.

²⁰⁰ *Ibid.*

4.4.4 Cooperation between Citizen Judges and Professional Judges

The reasons for the collaborative structure of a citizen judge panel have been discussed earlier in this Chapter and in Chapter 3. According to the JRC's recommendations, the importance of the citizen judges' participation is equal to the cooperation between members of the citizen judge panel. The recommendations suggested that:

... while judges and citizen judges share responsibilities, the judges who are legal specialists and the citizens who are laypersons will share their respective knowledge and experience through mutual communication and reflect the results thereof in their judgment²⁰¹.

The cooperative deliberation between members of the citizen judge panel appears to be essential not only because of the recommendations of the CJA but also because of the Constitution as explained in the previous chapter. The dominant influence of professional judges' instructions on citizen judges' deliberation has been one of the major concerns in the mixed judge model but also, to some extent, in the jury model of lay adjudication systems²⁰². Such concerns also occur in relation to the citizen judge system. In Japan, citizen judges' independent legal conclusions could be considered as unjust in that the Constitution stipulates that the judiciary should be composed of professional judges²⁰³. Thus, without professional judges, the judiciary may be considered as inadequate, and unconstitutional. In this respect, it is likely that citizen judges are not authorised to decide law and fact independently. The presiding judge takes on the duty of explaining the relevant laws or ordinances to make them understandable to citizen judges so that they are able to perform their duty²⁰⁴. Moreover, the professional judges on the panel have full authority for the interpretation of laws and ordinances, the procedure and other decisions²⁰⁵. Instructions should include an indication that both the professional judges and citizen judges are independent and

²⁰¹ JRC, *supra* note 58, IV-1(1)-1.

²⁰² A Koch, 'C.J.A. Mittermaier and the 19th Century Debate About Juries and Mixed Courts' (2001) 72 *Revue internationale de droit pénal* 347–353.

²⁰³ The Constitution, art. 37.

²⁰⁴ Art. 66 (5).

²⁰⁵ Art 6 (2) and (3).

equal to each other, while an important role of the professional judges is the provision of guidance on appropriately structured deliberation by the citizen judges. In accordance with the judges' instructions, citizen judges are required to reach the determination by themselves. Therefore, the professional judges summarise the arguments of prosecutors and defence attorneys, prepare the information materials including the questions of facts and tenets of law in order to instruct the citizen judges in the pre-trial arrangement conferences²⁰⁶. The instructions of professional judges need to support citizen judges reaching their decisions independently in accordance with Article 9 of the CJA. Coercive pressure of professional judges on citizen judges should be avoided, while professional judges must provide uniformity of judicial decisions, reducing the differences between professional and citizen judges' attitudes towards their decisions²⁰⁷. The relationship between the instructions by the professional judges and the lay adjudicators' independence is one of the most challenging aspects relating to the principles of democracy and a fair trial. Professional judges' instructions can prevent citizen judges from using their common sense in deliberating on the evidence²⁰⁸, but without them lay adjudicators become 'uncontrollable'²⁰⁹. As mentioned earlier, the CCC maintained the conventional civil law approach in which citizen judges are subordinate to the powerful professional judges' authorities in the decision-making process. Hence, there appears to be a contradiction related to the independence of the citizen judges and the professional judges' authorities in the name of 'consideration' [*Hairyo*]²¹⁰ in the deliberation process.

The established citizen judge trial procedures are governed by the detailed trial procedure codified in the CJA, CCP, and Regulations of the Citizen Judge Trials²¹¹. Citizen judge trial procedures from the opening of a trial to the declaration of the verdict can be divided into five stages. A trial starts with the public prosecutor reading out the

²⁰⁶ This is the same as the most Continental European model, such as French model (art. 347 of CPP).

²⁰⁷ See Thaman, *supra* note 9, 108; MR Damaska, *Evidence Law Adrift* (New Haven; Yale University Press 1997), 42-3.

²⁰⁸ SD Jordan, 'The Criminal Trial Jury: Erosion of Jury Power' (2002) 5 *Howard Journal of Criminal Justice* 1-62, 25.

²⁰⁹ J Clark, 'The Social Psychology of Jury Nullification' (2000) 24 *Law and Human Behavior* 39-57, 56.

²¹⁰ Art. 51.

²¹¹ *Saiban-in no Sankasuru Keijijiken ni Kansuru Kisoku*, the Supreme Court Regulation no. 7 of 1944, and the amendment no.1 of 2009.

indictment defining the crime which the defendant has allegedly committed²¹². After the reading, the presiding judge informs the defendant of their rights including the right to silence, and to refuse to answer all questions²¹³ [Stage 1: initial appearance [*Boto Tetsuzuki*]. Both parties present evidence in according with the course decided in the pre-trial arrangement conference [Stage 2: examination of evidence [*Shoko Shirabe Tetsuzuki*]. The prosecutor gives an indication of the level of punishment that the defendant should receive for the crime if found guilty and explains how the evidence would support a guilty verdict, while the defendant and defence attorney may make final submissions to rebut or mitigate the accusations by the prosecutor [Stage 3: argument proceedings [*Benron Tetsuzuki*]. A citizen judge panel retires to the deliberation room to deliberate the evidence and consider the verdict [Stage4: deliberation [*Hyogi*]. The panel must rely only on witness statements or oral evidence presented during the trial and their probative value is reliant on the discretion of the adjudicators²¹⁴. The decision is declared in court, identifying the relevant facts of the case and providing a verdict with reasons with reference to fact and law [Stage 5: Rendering of the verdict [*Hanketsu senkoku*]. Between Stage 1 and 3, and 5 the proceedings are conducted in the open court, and Stage 4 is carried out in the deliberation room.

4.4.4.1 In the Courtroom

It was expected that the role of professional judges would be dramatically changed by the introduction of the citizen judge system. Soldwedel suggested that their role was to routinely rubber-stamp prosecutors' recommendations'²¹⁵ highlighting their tendency to rely on written documents rather than live testimony. Moreover, Fukurai claimed that Japanese professional judges 'near blind acceptance of confessions as evidence of guilt' as one of reasons for forced confessions²¹⁶ which are one of the serious problems in the Japanese investigative stage. In addition, it was pointed out that the

²¹² CCP, art.291 (1).

²¹³ CCP, art.291 (2).

²¹⁴ CCP, art.317, 318.

²¹⁵ A Soldwedel, 'Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants' (2010) 41 Vanderbilt Journal of Transnational Law 1417–1474, 1431.

²¹⁶ H Fukurai and K Kurosawa, 'Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan' (2010) 7 US-China Law Review 1–18, 3.

limited autonomy and the lack of independence of professional judges was because of the educational system and the powerful authority of the Secretariat of the Supreme Court which reappoints professional judges every ten years²¹⁷. It is expected that these concerns will be improved by the collaborative decision-making process of citizen judges²¹⁸.

The introduction of the collaborative structure of the citizen judge panel introduced a new layout in the courtroom (see Appendix 5). The new design of the courtroom of the District Court appears to provide citizen judges' seats next to the professional judges and the citizen judges sit down facing up to the public gallery. The courtroom layout in other lay adjudication systems, especially the jury model systems, including English and American systems, have a clear separation between lay adjudicators and professional judges. The courtroom architecture shows an engineering of separation between different groups: members of the public, jury, advocates and witnesses, and officers of the court under controlled conditions, as Hanson suggested in his analysis of the English courtroom²¹⁹. Rosenbloom highlighted that the professional judges' space show his/her independent and impartial refereeing position²²⁰. The architectural features of the courtroom provide for full attention of the public gallery towards the citizen judges, and visual impact shows an openness to the public and the pressure of the responsible role of the citizen judges as well as unity on the citizen judge panel between citizen judges and professional judges.

Moreover, the citizen judges are allowed to take notes and ask questions of witnesses and experts in the court and outside of the court²²¹. The citizen judges are also allowed to ask questions of the defendant either in voluntary or requested statements²²²

²¹⁷ Ibid, 6.

²¹⁸ A Plogstedt, 'Citizen Judges in Japan: A Report Card for the Initial Three Years' (2013) 23 *Indiana International and Comparative Law Review* 371–428, 389.

²¹⁹ J Hanson, 'The Architecture of Justice: Iconography and Space Configuration in the English Law Court Building' (1996) 1 *Architectural Research Quarterly* 50–59, 55.

²²⁰ JD Rosenbloom, 'Social Ideology as Seen Through Courtroom and Courthouse Architecture' (1998) 22 *VLA Journal of Law and the Arts* 463–523, 487.

²²¹ Arts, 56 and 57.

²²² Questioning to the defendant by citizen judges is limited in a statement. The questioning opportunity is not provided to protect the defendant's right to silence.

and of victims in court²²³, and the citizen judge can comment on this²²⁴. The right to question in the court is one of important features which is intended to enhance citizen judges' participation, although professional judges have the power to limit the questions presented in order to prevent irrelevant statements in court²²⁵. The questioning by citizen judges signifies that the targets which the citizen judge system aims for is citizen judges' active participation, an educational learning process, and collaboration with the professional judges.

Research on juror questioning in the American system shows the conflict between substantial effectiveness and the risks of undermining defendants' rights. Senger noted that direct questioning by citizen judges will be effective in supporting their crucial presence in the courtroom²²⁶, while he also pointed out the controversies of juror questioning in the American system which can lead to antagonism, inefficiency and complications²²⁷. Although the Japanese system is much more professional judge-driven and there are less possibilities for controversies compared to the American system, the citizen judges' rights to question in the decision-making process will lead to potential difficulties as well as the introduction of a new role of the professional judges as a 'mediator'²²⁸ for the citizen judges, as a presiding professional judge interviewed for this research suggested. In addition, Lundy criticised questioning by lay adjudicators in that it may lead to improper prejudices by them and the necessity to protect defendants' rights and dignity by the avoidance of juror questioning²²⁹. McClanahan examined the possible violation of the defendants' right to silence giving the example of citizen judges' inappropriate statements in a rape case²³⁰. On the other hand, questioning could

²²³ Arts. 59 and 58. Crime victim can be more active in the criminal procedure in Japan. For example, they are allowed to question the accused, make statement showing their opinions and sentiments, pursuant to the amendment to the Code of Criminal Procedure in 2007 in order to respect victims' dignity, rights and interests, Article 292(2). Victim participation in the trial can be a concern for a danger of prejudicing defendants by the citizen judges.

²²⁴ Art. 66(5).

²²⁵ Art. 295 of the CCP.

²²⁶ D Senger, 'The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation' (2011) 2 University of Illinois Law Review 741–774, 759.

²²⁷ Ibid, 760.

²²⁸ Interview, professional judge, 25/05/2011.

²²⁹ Cappello and Strenio.

²³⁰ After the defendant did not response, one of the citizen judge said, 'You piss me off.' J McClanahan, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United

enhance lay adjudicators' understanding²³¹, but Heuer and Penrod suggested making lay adjudicators better informed by giving more information rather than allowing them to ask questions²³².

In the Japanese system, questioning by citizen judges appears to be important, as in the mixed judge model, because the question list can provide a record of 'sentence-aggravating or sentence-mitigating elements through excuses or justifications'²³³ in a reasoned judgment. The citizen judges' right to question will stimulate the principle of orality in criminal procedure. As referred to in Chapter 3, one of the expected transformations of the system is from the dependence on a written dossier to the practice of the principle of orality. All evidence, including witnesses' testimony, must be presented in open court²³⁴. This common focused principle is in line with other principles, such as immediacy, publicity and the presumption of innocence²³⁵, which are seen as adversarial principles, found in the criminal procedures of other systems, such as the German²³⁶ and French²³⁷ systems. The emphasis on orality and immediacy, and the right to confront the witnesses for the defendants had been expected following the introduction of the citizen judge system²³⁸. Broom believed that emphasised orality in the Japanese trial would reveal probable abuses in obtaining confessions at the investigative stage, and the unavailability of witnesses²³⁹.

However, Alldridge offered criticisms of orality in the light of the increased cost, the preparation time, and possible distortion by expert witnesses according to their

States' (2011) 37 North Carolina Journal of International Law and Commercial Regulation 725–792, 773.

²³¹ Lundy. See *United States v. Sutton*, 970 F.2d 1001, 1005 (1st Cir. 1992).

²³² L Heuer and SD Penrod, 'Trial Complexity: A Field Investigation of Its Meaning and Its Effects' (1994) 18 *Law and human behavior* 29–51.

²³³ Thaman, *supra* note 9, at 108-9.

²³⁴ CCP, art. 171, 304, 306 and 171.

²³⁵ AS Goldsteint and M Marcus, 'The Myth of Judicial Supervision in three "Inquisitorial" Systems: France, Italy, and Germany' (1977) 87 *The Yale Law Journal* 240–283.

²³⁶ W Perron, 'Lay Participation in Germany' (2001) 72 *Revue internationale de droit pénal* 181–195, 183-4.

²³⁷ RL Lerner, 'The Intersection of Two Systems: An American on Trial for an American Murder in the French Cour D'assises' (2001) 1 *University of Illinois Law Review* 791–856, 812.

²³⁸ Thaman, *supra* note 29, 104.

²³⁹ RM Bloom, 'Jury Trials in Japan' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 35–68, 59-60.

experiences and behaviour²⁴⁰. Moreover, Coen commented on the importance of orality in adversarial principles but criticised the lack of written materials, such as summaries of evidence and lists of witnesses, which would support lay adjudicators' understanding²⁴¹. The other expected transformation is in respect of the delay in criminal procedures which includes the long term detention of the defendant, inadequate procedures for disclosure evidence, and the difficulties in examining, as immediate practice, the credibility of confession statements²⁴². The two transformations appear to be common expectations from the introduction of a lay adjudication system, as Thaman shows in the study of the Spanish and Russian systems²⁴³. The emphasis on the principles of orality and immediacy seem to result in the inconsistency that these principles requires convictions to be based on the evidence documented in the case file but it is solely the evidence and witnesses' testimony presented in open court that will be deliberated²⁴⁴. Overall, the Japanese citizen judge procedure is based on a conflicted principle derived from the Napoleonic mode of an inquisitorial pre-trial approach devoted to creating a dossier and the emphasis of orality at trial derived from the adversarial mode.

4.4.4.2 *In the Deliberation Room*

In contrast to the citizen judges trial procedures in the courtroom, the procedure in the deliberation room seems not to be regulated by the CJA or other legislation. The inadequate provision of deliberation procedures with poor support for the citizen judges' participation and insufficient assistance to cope with professional judges' or co-citizen judges pressures are likely to be contributing factors to the propensity of judges to manipulate directly or indirectly citizen judges' participation. A worrying concern is that

²⁴⁰ P Alldridge, 'Scientific Expertise and Comparative Criminal Procedure' (1999) 3 *International Journal of Evidence & Proof* 141–164, 150.

²⁴¹ M Coen, 'Juror Comprehension of Expert Evidence: A Reform Agenda' (2010) 3 *Criminal Law Review* 195–211, 201.

²⁴² T. Sakamaki, 'Current Issues: The Meaning and Challenges of the Citizen Judge System', *Hougaku Kyoshitsu*, 308 (2006), 10–15; O Ikeda, *The Explanation of the Citizen Judge Law [Kaisetu Saiban-in Ho]* (2nd edn, Tokyo; Kobundo 2009). At 3.

²⁴³ Thaman, *supra* note 66 and 86.

²⁴⁴ J Herrmann, 'Bargaining Justice-A Bargain for German Criminal Justice' (1992) 53 *University of Pittsburgh Law Review* 755–776, 768.

professional judges consequently control the decisions with or without citizen judges' realisation despite their participation.

After hearing all the evidence and testimony in court, the citizen judge panel moves to the deliberation room and starts the discussion that will result in a verdict. The CJA does not contain any provisions which set out procedural rules to reach a verdict. It stipulates only that the citizen judges shall attend deliberation and express their opinion in the deliberation room²⁴⁵. Moreover, the presiding judge shall give consideration, ensuring that the citizen judges are capable of executing their duties, by organising the deliberations comprehensibly for the citizen judges, and by arranging sufficient opportunities to speak to citizen judges²⁴⁶. Article 6 of the CJA clarifies the cooperative and separate authorities of citizen judges and professional judges. Both the citizen judges and professional judges will deliberate and reach decisions regarding fact-finding, application of laws and regulations, and sentencing, but only professional judges decide on the interpretation of laws and regulations and court proceedings²⁴⁷.

A question list for citizen judges, which tends to be common in the mixed judge system, does not exist in the citizen judge system. However, professional judges present the contested point document [*Soten Seirihyo*], which is based on the results of the pre-trial arrangement conference²⁴⁸. When the professional judges instruct the citizen judges by explaining points of argument, a contrast in status is set up between them. It has been previously noted in Chapter 3 that the principle of *in dubio pro reo*: innocent until proven guilty in criminal procedure in Japan is stated in the CCP²⁴⁹ and the Supreme Court has declared that the proof should have verisimilitude to an extent that no one can call it into question²⁵⁰. In addition, the probative value of evidence is at the free discretion of the judges²⁵¹, and when pronouncing a sentence, the court shall identify the significant facts constituting the crime, the list of evidence, and the application of

²⁴⁵ Art. 66(2).

²⁴⁶ Art. 66(5).

²⁴⁷ Art. 6.

²⁴⁸ Professional judges tended to proceed the deliberation in mock trials opened before the introduction. See H Murase and M Kawamoto, 'Regarding to Deliberation of the Citizen Judge Trial: The Evaluation of the Mock Trials [Saiban-in Saiban No Shinri Nado Ni Tsuite]' (2008) 1358 *Jurist* 89–95.

²⁴⁹ CCP, art. 336.

²⁵⁰ The Supreme Court Decision, 5/8/1948, 2, no. 9, 1123.

²⁵¹ CCP, art. 318.

laws and regulations²⁵². This approach has been applied in the citizen judge system. Article 67 of the CJA states the approach to verdicts:

- 1) The decision with participation of the citizen judge at the deliberations ... shall be rendered by the majority of opinions of the number of persons constituting the panel including the opinions of both professional judges and citizen judges...
- 2) In cases where opinions are split on the sentencing and none of them obtains the majority of opinions of the number of persons constituting the panel including opinions of both professional judges and citizen judges the verdict must be rendered by the most favourable opinion to the accused, which number is obtained by adding the number of the most unfavourable opinions to the accused to the number of favourable opinions one by one.

These provisions were introduced to divide equal responsibilities and influences over decisions amongst the members of a citizen judge panel without violating the impartiality of the judgment. Historically, Japanese criminal procedures have struggled to be regarded as legitimate because of the extent of the ‘unfettered’ judges’ discretion in the interpretation of laws²⁵³. This is likely to remain a possible threat because of governmental intervention which is often extensively influenced by external Western powers²⁵⁴. This influences the extent to which any lay adjudication system allows both lay adjudicators’ discretion as well as professional judges’ supervision. The extent to which the system can be regarded as successful depends on the appropriate balance between them. What is the potential the CJA to encourage citizen judges’ participation in the process for verdict and sentencing? It is likely to trigger arguments about judgment and sentence whether by the bench trial or by the citizen judge trial. Its potential in this respect is tied to the degree of its compatibility with other principles of a fair trial, mentioned in Chapter 2. The correlation between these principles and the CJA in criminal procedures and rules ensure that the responsibility for supervising citizen judges should rest with professional judges. However, this will lead the citizen judges’ participation to depart from the democratic function, with respect to the greater

²⁵² CCP, art. 335.

²⁵³ See, *supra* note 148, 343.

²⁵⁴ Fukurai and Kurosawa, *supra* note 207.

enhancement of citizen judges' participation being more favourable. The greater the compatibility with the principles of a fair trial, the less the prospects of success.

The CJA sought to balance the democratic principles of citizen judges' participation and collaboration with professional judges by the adoption of special majority verdicts, while the existing constitutional and criminal procedural norms aligned with citizen judges' participation. A majority vote is accepted in most countries. For example, in European lay adjudication systems, including the French and German systems, a two-thirds majority verdict²⁵⁵ has always been exercised²⁵⁶. The English jury system has exercised a super-majority verdict, ten-to-two verdicts after unanimous verdict requirements since 1967²⁵⁷. Abramson pointed out three negative points resulting from the lack of unanimous verdict requirement. There would be less time for deliberating; less lay adjudicators' confidence in their decisions; and the exclusion of minority opinions²⁵⁸. The unanimity verdict underpins representative democracy derived from the Abramson's view of democracy values as 'conscience of the community'²⁵⁹. However, a majority vote questions the principle of 'beyond a reasonable doubt' guaranteed in the Constitution²⁶⁰.

Article 67 provides that each citizen judge has a vote as well as each professional judge, and a majority vote is acceptable. However, at least one professional judge must vote on the majority side²⁶¹. In other words, in contested cases a professional judge has a veto. For decisions on sentencing, in the event that a majority cannot be reached, opinions in favour of the harshest sentence are to be added to those for the next harshest option, until the requisite majority is reached²⁶². This is based on the existing criminal procedure norm stated in Article 77 of the CCP. However, the special majority

²⁵⁵ Frase.

²⁵⁶ Park, *supra* note 158.

²⁵⁷ Jury Act 1974 [England], sec. 17.

²⁵⁸ J Abramson, *We, the Jury: The Jury System and the Ideal of Democracy* (New York; BasicBooks 1994), 199.

²⁵⁹ *ibid*, 18.

²⁶⁰ Art. 31.

²⁶¹ Art. 67.

²⁶² Art. 67(2), R. Gladding, 'The Japanese Lay Jury System: Lessons from the Anglo-American Jury System [Nihon No Saibaninseido: Eibei No Baisiinnseido Kara Manaberukoto]', *Shimane Law Review*, 52 (2008), 59–73, at 67-8.

requirement sufficiently enhances the citizen judges' participation to the extent that they could hope to demonstrate their representativeness and competence.

The verdict stage in the citizen judge system contains important features of criminal procedure closely associated with the civil law tradition. Citizen judges panel decisions are issued in a public court and confirmed by a written judgment, and both parties, prosecution and defendant, can appeal the case²⁶³. The verdict procedures are, like the deliberation procedure, secretive and private²⁶⁴. On the other hand, citizen judges are expected to function as adjudicators who are capable of reaching their own independent decisions²⁶⁵. This collaborative style in verdict proceedings between professional judges and lay adjudicators are the same as in the French²⁶⁶ and German²⁶⁷ systems, which closely influenced the historic developments of the Japanese criminal procedure as explained in Chapter 3. The introduction of the CJA conformed to the existing legal tradition that had been in existence for nearly 90 years.

The unchanged strict judicial control by professional judges seems to be linked to the important principle of substantial truth in criminal procedure, notwithstanding that professional judges may explain to citizen judges the importance of active participation in the trial²⁶⁸. The JRC envisaged the value of discovering truth through a legitimate criminal justice system believed in by the citizens²⁶⁹, rather than through a detailed deliberative process. Moreover, Jordan confirmed the modern shift of the focus of the justice system from a discovery of the truth to a fairness of the procedure²⁷⁰. However, for example, in the study of the Kazakhstan lay adjudication system, Kovalev concluded that the introduction of lay adjudicators in decision-making process would not impact upon the inquisitorial concept of the criminal procedure, in particular, because of the

²⁶³ Art. 63.

²⁶⁴ Art. 70.

²⁶⁵ Art. 8.

²⁶⁶ EJ Leib, 'A Comparison of Criminal Jury Decision Rules in Democratic Countries' (2007) 5 *Ohio State Journal of Criminal Law* 629–644, 640-1.

²⁶⁷ *Ibid*, 633.

²⁶⁸ Art. 2(1).

²⁶⁹ JRC, *supra* note 58.

²⁷⁰ SD Jordan, 'The Criminal Trial Jury: Erosion of Jury Power' (2002) 5 *Howard Journal of Criminal Justice* 1–62, 10-11.

professional judges' controlling influences, unless 'effective safeguards' for lay adjudicators' were provided²⁷¹.

Controversy had arisen about the desirability of a dichotomised deliberation procedure [*Tetsuzuki Nibun Seido*], which is the idea that culpability and sentencing should be deliberated separately in Japan. This approach is based on concerns about the pre-trial arrangement conference proceedings and the decision-making process. The separation may be the result of seeking an 'easy to understand'²⁷² process. There is a concern that if the culpability and sentencing are deliberated together, citizen judges can be easily confused between arguments²⁷³. The dichotomised deliberation procedure had been considered since around the 1950s, but it was not applied until the introduction of the citizen judge system. However, similar arguments have occurred in Japanese history on four occasions: firstly, at the introduction of the current criminal law in 1949 with a debate on the system to review the final judgment [*Hanketsu mae Chosa Seido*], which the defendant can request;²⁷⁴ secondly, just after the implementation of the current law with the criticism of the practice in criminal court procedure;²⁷⁵ thirdly, in the late 1960s, when Japanese legal scholars specialising in the German system, in particular the West German system, had started advocating a dichotomised procedure in deliberation;²⁷⁶ fourthly, in the introduction of the citizen judge system on the advice of legal academics and defence attorneys²⁷⁷. There seem to be five major advantages of the dichotomised procedure in deliberation. Firstly the procedure may preserve focus in the culpability deliberation. Separating evidence relating to culpability and sentencing will avoid the temptation for the defendants' criminal record and the victim's feelings to influence the deliberation on culpability. Secondly, the sentencing deliberation can be independent. The sentencing range in

²⁷¹ NP Kovalev, 'Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent and Impartial Jury or a "Court of Noddors"?' (2004) 11 *Journal of Eastern European Law* 123–157, 155.

²⁷² Art. 66 (5).

²⁷³ K Harada, 'Sentencing in the Citizen Judge System [*Saibanin Seido Ni Okeru Ryoukei Handan*]', *Gendai Keiji ho*, 6 (2004), 2004, at 47.

²⁷⁴ Ryuichi Hirano, *Problems on the Treatment of the Defendant* (Tokyo: Yuuhikaku, 1982), 49.

²⁷⁵ H Matsuo, *Criminal Procedure Law* (Tokyo: Kobundo, 1999), 57.

²⁷⁶ R Hirano, 'The Histories of Criminal Laws in Europe [*Yoroppa Shokoku No Keijiho No Ugoki*]' (1968) 40 *Housou Jihou* 76–83.

²⁷⁷ A Goto, *The Citizen Judge Act for Practitioners* (Tokyo: Gendaijinbunsha, 2004), 124.

Japanese Criminal Law is wide, so independence can mitigate harsher punishments, enabling a debate and the collection of a wide range of material aid for the defendants' rehabilitation. Thirdly, it avoids the dilemma of defence attorneys' setting an advocacy strategy. If the deliberation procedure is separated, a defence attorney does not take a risk in his/her strategy. For example, in a contested case, a harsher penalty may be imposed on the defendant because the defence attorney has focused the debate on culpability rather than by the strategy where he/her admits guilt and gives mitigating evidence. Fourthly, if the citizen judge panel reach a not guilty judgment, the procedure will save time. Therefore, the procedure will operate effectively. Lastly, in a case where the defendant is not guilty, his/her criminal record and private information are not disclosed in the hearing. In other words, the innocent defendants' privacy will be protected.

Although the cooperative deliberative process in the citizen judge procedure seems to be the only possible structure for citizen judges' participation in terms of constitutionality, the CJA appears to urge their active participation in the courtroom and the deliberation room by allowing them to question witnesses, defendants and victims and encouraging the citizen judge panel to have active discussions in the deliberation room. However, these encouragements seem to depend heavily on professional judges' discretions derived from inquisitorial concepts. Professional judges and citizen judges are not only the two actors to have responsibilities to achieve active citizen judges' participation.

4.4.5 Responsibilities of Professional Judges, Public Prosecutor and Defence Attorney

Article 51 of the CJA states that professional judges, public prosecutors, and defence attorneys shall endeavour to make proceedings prompt and comprehensible so that citizen judges may execute their duties fully whilst avoiding imposing an excessive burden on the citizen judges. In other words, not only professional judges but also the adversarial parties need to support the active participation of citizen judges'.

4.4.5.1 Pre-Trial Arrangement Conference

In order to introduce and emphasise citizen judges' participation in the Japanese criminal procedure, the compulsory pre-trial arrangement conference procedure was

introduced, while the pre-existing preliminary investigation procedures remained. The pre-trial arrangement conference was mandated by Article 49 – 65 of the CJA and the amendment of the CCP²⁷⁸. The pre-trial arrangement proceedings stage is stated to be concerned with the establishment of ‘productive trial proceedings’ which are conducted successively, systematically, and speedily²⁷⁹, before the opening of court. To achieve that, after a public prosecutor indicts a suspect, a pre-trial arrangement conference procedure is held to discuss and to organise evidence and points of dispute points in advance of the trial. The conference consist of a public prosecutor, a defence attorney, and professional judges in order to clarify issues, applicable law, disclose disputed facts and evidence which will be easily discussed and understood by the citizen judges in the trial²⁸⁰. The pre-trial arrangement conference is not new in Japanese criminal procedure²⁸¹, but it is compulsory in the citizen judge procedures. According to Article 316-5 of the CCP, eleven issues are discussed in the proceedings:

1. Clarification of the counts or applicable penal statues;
2. Permission for addition, revocation or alternation of the counts or applicable penal status;
3. Arrangement of the issues of the case by the allegation, which is planned to be put forward on the trial dates;
4. Making of requests for the examination of evidence;
5. Disclosure of the facts to be proved, the matters to be examined and other matters relating to the evidence requested;
6. Confirmation of the opinion concerning the request for examination of evidence;
7. Rendering of a ruling to examine the evidence or dismiss the request for examination of evidence;
8. Decision on the order and method of examining the evidence for which a ruling for examination has been made;

²⁷⁸ CCP, no. 62 of 2004, and see also the act 49.

²⁷⁹ CCP, 217-2.

²⁸⁰ Art. 49-63, and CCP act. 316(6) (1).

²⁸¹ CCP, art. 316(2).

9. Rendering of a ruling on the filing an objection against the examination of evidence;
10. Rendering a ruling on the disclosure of evidence;
11. Setting or changing of the trial dates and a decision on other necessary matters for the proceedings of the trial.

In his study of the U.S. litigation, Rosenberg supported the idea that the pre-trial conference leads to a fairer trial because of good preparation by public prosecutors and attorneys and clear debates over the issues, although the active participation of attorneys is necessary²⁸². Nevertheless, the pre-trial conference will provide more concrete supervision by professional judges, increasing the risk of formalisation and routinisation²⁸³. Although the preparatory stage appears to be effective in achieving a successful citizen judge trial, the compulsory pre-trial arrangement conference proceedings raised three concerns.

The first concern is the secrecy of the pre-trial arrangement conference process which could lead to an information gap between the professional judges and the citizen judges. The pre-trial arrangement conference proceedings are not open to the public or to the citizen judges, although there is an obligation to record the information discussed during the proceedings²⁸⁴, and this can be made available to citizen judges²⁸⁵. The professional judges can exclude witnesses and evidence in the pre-trial arrangement proceedings which could lead to prejudice and an unfair judgment in the pre-trial arrangement proceedings. Therefore professional judges have access to all the evidence, some of which may not be presented in the trial. Basically the same judges have charge throughout the citizen judge procedure. This could lead to a disproportionate restriction of information to the members of the citizen judge panel.

²⁸² M Rosenberg, *The Pretrial Conference and Effective Justice: A Controlled Test in Personal Injury Litigation* (New York; Columbia University Press 1964).

²⁸³ CRB Cousino, 'Adversarial vs. Inquisitorial Systems: The Rule of Law and Prospects for Criminal Procedure Reform in Chile' (1998) 5 *Southwestern Journal of Law and Trade in the Americas* 323–364, 360.

²⁸⁴ CCP, art. 316-12.

²⁸⁵ CCP, art. 316(24).

The second concern is regarding evidence. Basically, new evidence cannot be requested after the pre-trial arrangement conference proceeding has taken place²⁸⁶, although a professional judge is not prohibited from requesting evidence on his/her authority²⁸⁷. Evidence having indirect probative value could previously be submitted in a bench trial. However, that kind of evidence will now be excluded to avoid an increase in the amount of evidence presented in the trial which could cause delay. Landsman and Zhang claimed that the problems of the decrease in the amount of evidence and testimony presented at the pre-trial preparation could obstruct the major contribution of the citizen judges' participation by lessening the chance of citizen judges' making a 'common-sense assessment of witness credibility'²⁸⁸.

The third concern is related to the equality of power between public prosecutor and defence attorney. A public prosecutor and defence attorney need to build their strategy before the pre-trial arrangement conferences and it is better that the strategy is consistent from the pre-trial arrangement conference to the trial. A public prosecutor is not required to disclose all evidence that they have collected. Therefore a defence attorney has to request disclosure of the evidence relevant to the case. Fukurai anticipated that public prosecutors would disclose broader types of evidence to support evidential discovery and information, compared to prior to the introduction of the citizen judge system²⁸⁹. However, submission of the full list of the evidence obtained at the investigative stage is not compulsory for the public prosecutors in Japan. Also the disclosure process must be requested by the defence attorneys or the professional judges and the reasons for the request must be revealed²⁹⁰. This may reveal the defence attorney's strategy to the public prosecutor before the trial and may guide his/her preparation. Therefore, the pre-trial conference technique of defence attorneys is

²⁸⁶ Art. 55.

²⁸⁷ CCP, art. 316 (32).

²⁸⁸ S Landsman and J Zhang, 'A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts' (2007) 25 UCLA Pacific Basin Law Journal 179–227, 191.

²⁸⁹ H Fukurai, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy' (2011) 86 Chicago Kent Law Review 789–830, 821-2.

²⁹⁰ CCP, 316 (16)-(17).

important²⁹¹ in order to pursue an effective legal strategy including possible settlement before the trial²⁹².

The pre-trial arrangement conference appears to have become more important than before in other lay adjudication systems. The Victoria Criminal Procedure Act 2009 in Australia introduced obligatory pre-trial procedure before the lay adjudicator trial²⁹³. For those countries which give the defendants/defence attorneys the right to waive a lay adjudicator trial, the pre-trial arrangement conference is considered 'important'²⁹⁴ in order to make the decision as to whether they go forward to a lay adjudicator trial or not²⁹⁵. The popularity of plea bargaining appears to increase the importance of the conference particularly in the U.S.²⁹⁶ The Auld Report, in its analysis of the English jury system, claimed the importance of pre-trial assessment with defendant participation in an oral rather than dossier form²⁹⁷. The pre-trial arrangement conference appears to be fundamental in its emphasis which is both management focused, which aims at achieving speedy trials, and a defendants' rights-focused approach, which aims at elaborating defence attorneys' commitment and also the deliberations of the defendants/defence attorneys, public prosecutors, and professional judges. However, concern by both indirect and direct judicial influence over lay adjudicators is undeniable.

As Dean has pointed out, the introduction of the citizen judge system has succeeded in promoting the examination of evidence from a prosecutors' dossier to live-presented testimony²⁹⁸. This seems to be a considerable transitional experiences in relation to trial

²⁹¹ L Walker and J Thibaut, 'An Experimental Examination of Pretrial Conference Techniques' (1970) 55 Minnesota Law Review 1113–1138.

²⁹² The bill to claim the amendment of the parts of the CCP was submitted on 31/03/ 2015, which include the amendment of the disclosure procedures, however, there has not been no progress since the submission.

²⁹³ The Hon Paul de Jersey AC, 'The Evolution of the Modern Criminal Trial: A Plethora of Change' (2014) 46 Australian Journal of Forensic Sciences 250–257, 252.

²⁹⁴ Lee, *supra* note 69, 60.

²⁹⁵ In particular, in the U.S. there are heated arguments about the pre-trial conference in not only criminal cases, but also civil cases. See, M Ponte, Lucille, 'Putting Mandatory Summary Jury Trial Back on the Docket: Recommendations on the Exercise of Judicial Authority' (1994) 63 Fordham Law Review 1069–1098; JC Carlisle, 'Simplified Procedure for Court Determination of Dispute under New York's Civil Practice Law and Rules' (1988) 54 Brooklyn Law Review 95–130, 104-28.

²⁹⁶ See, King, 'The American Criminal Jury'.

²⁹⁷ A Auld, 'Review of the Criminal Courts of England and Wales' (London; 2001), ch.10 para. 221-228.

²⁹⁸ M Dean, 'Legal Transplants and Jury Trial in Japan' (2011) 31 Legal Studies 570–590, 587-8.

preparation for public prosecutors and defence attorneys²⁹⁹. Moreover, they both need to advocate and ask questions to witnesses using language and visual aids which citizen judges can understand³⁰⁰. Therefore training for this change was necessary and, especially, a shift in the practice of defence attorneys was fundamental³⁰¹ in order to adapt as the adversarial party³⁰². However, Lempert expected that the introduction would affect prosecutorial charging decisions with a switch to plea bargaining in order to avoid a citizen judge trial³⁰³. There is an argument as to whether public prosecutors' trial preparation, coaching witnesses before the citizen judge trial, could cause a presumption of guilt in the analysis of case studies³⁰⁴. The possible over-controlling authority of the public prosecutors appear to be problematic, which is something the German system has also faced³⁰⁵. In a comparative study between the Russian and Japanese lay adjudication systems, Mack noted the potential for more prosecutorial/judicial supremacy over the trial process. For example, the public prosecutors could be more critical in charging for their own purposes as well as their remaining right to appeal an acquittal as 'a procedural insurance policy'³⁰⁶.

4.4.5.2 Appeal

In the citizen judge procedure, the standard appeal practice [Koso] has continued just as before the introduction of the citizen judge system. Appeal against a verdict reached by a citizen judge panel is allowed and a bench trial will be held at the appellate court, which is generally the High Court. The three professional judges in the bench trial are able to quash the original judgment reached by a citizen judge panel. The possibility of

²⁹⁹ Z Corey and VP Hans, 'Japan's New Lay Judge System: Deliberative Democracy in Action' (2010) 12 Asian-Pacific Law & Policy Journal 72–94, 73.

³⁰⁰ Wilson, *supra* note 54, 516.

³⁰¹ Y Miyamoto, 'Current Situations and Challenges of Defence Strategies in Citizen Judges [Saibanin Seido Ni Okeru Bengokatudo No Genjo to Kadai]' (Tokyo; Japan Legal Support Centre 2014).

³⁰² Dean presented that defence attorneys used to 'focus their representations on mitigation' because the defendant often confess guilty. Dean, *supra* note 290, 588.

³⁰³ R Lempert, 'A Jury For Japan ?' (1992) 40 The American Journal of Comparative Law 37–71, 67.

³⁰⁴ MH Okawara and K Higuchi, 'A Presumption of Guilt Rather than a Presumption of Innocence? Forensic Linguistic Analysis of a Japanese Criminal Case of Complicity in the Saiban-in Trial' (2012) 3 Yonsei Law Journal 95–127.

³⁰⁵ DG Levin, 'Saiban-in-Seido: Lost in Translation? How the Source of Power Underlying Japan's Proposed Lay Assessor System May Determine Its Fate' (2008) 10 Asian-Pacific Law & Policy Journal 199–234, 212.

³⁰⁶ R Mack, 'Reestablishing Jury Trials in Japan: Foundational Lesson from the Russian Experience' (2012) 2 Creighton International Law and Comparative Law Journal 100–127, 126.

a bench trial in appeal can lead to an underestimation of the citizen judge panel's decision because it is possible for the decision to be overturned by the appellate judges. They may overturn a not-guilty verdict and set the sentence. In contrast, England has not introduced the right for the prosecution to appeal against a non-guilty verdict *per se*, but it has granted the prosecution the power to apply to the Court of Appeal for retrial if there is new and compelling evidence against the acquitted person in relation to the former offence³⁰⁷. The Russian appellate judges often overturn lay adjudicators' verdict but the case is then retried by other lay adjudicator trials³⁰⁸. Overturning the citizen judges' decisions by the appellate courts which are composed of only professional judges seems to diminish the effect of the citizen judge. This can be considered to hinder deliberative democracy as well as the legitimacy of the courts, and is contrary to the principle *ne bis in dem*³⁰⁹. Professional judges are appointed by the state, and in Japan, the professional judges in the District Courts are appointed by the judges of the Supreme Court appointed by the Emperor.³¹⁰ Professional judges' rejections of the decisions of the people are a serious deviation from basic principles of democracy. From this perspective, the judgment reached by the citizen judge panel should not be discarded by the appellate court.

While Japanese bureaucratic culture is rooted in the criminal justice system, the reform has at least introduced democracy into the system. This development could cause the inappropriate practice of the citizen judge system to be caught between these two cultures. The real problem in this respect is the procedural transformative nature of the reforms to Japan's criminal justice system. The criminal procedure has been a static entity but also subject to continuous reforms by the government. Law reformers sought to balance democratic values with Japanese traditional principles, while the internationally-inspired lay adjudication system led to the adoption of a mixed lay adjudication procedure in between the jury and mixed judge models. Japan chose to align the criminal procedure with a moderate interpretation of democratic values.

³⁰⁷ Criminal Justice Act, sec. 75-80.

³⁰⁸ VP Hans, 'Jury Systems Around the World' (2008) 4 Annual Review of Law and Social Science 275–297, 288.

³⁰⁹ Plogstedt, *supra* note 218, 427.

³¹⁰ The Constitution, art. 6(2).

Conclusion

This evaluation of the CJA examines the citizen judge procedure by the means of a textual study on the CJA (before the empirical examination in the next chapter) and has discussed the extent to which citizen judges' participation has been accepted. It also sought to examine the extent of the citizen judges' participation in the criminal procedure. The CJA's provisions provide comprehensive rules for citizen judges' participation in criminal trial procedure in line with the existing Japanese criminal justice procedure. The CJA certainly introduced enhanced civic participation in criminal procedure, which was quite limited before its introduction. There were entirely understandable reasons for introducing the citizen judge system and democratising the criminal justice system which was centralised and had limited lay participation. The drafters of the CJA succeeded in establishing a means by which lay adjudicators' participation should be included in the existing system.

The structure of the CJA was designed to introduce lay adjudicators' participation. However, the Act and related legislation also stated the restrictions of their participation and introduced obstructive factors affecting how representative and attentive it is. Because of the considerable restrictions by the CJA as well as the continued reliance on the active role of the professional judges, judicial control still exists and seems to be emphasised alongside the collaborative structure of the citizen judge panel.

There are some concerns, furthermore, throughout each stage of the citizen judge procedures, that the application of the CJA may result in it being construed as a government imposition and as a political act designed to control the judiciary rather than a reform to democratise the citizen judge system. Cooperation between professional judges and citizen judges who share the responsibilities and duties in some parts of the decision-making process will provide a sense of unity amongst group members and the process should encourage citizen judges to make individual decisions. Moreover, the extent of the citizen judges' rights such as taking notes and questioning, will influence their decisions. If citizen judges' participation is perceived as meaningful, it would certainly validate the CJA, which gives citizen judges the same rights as

professional judges, although it will be necessary to assess professional judges' influence on citizen judges in particular in the deliberation room.

In addition, the two procedural insurances of the pre-trial arrangement conference process and the bench trial in the appellate court establish concrete judicial control in the citizen judge procedure. The pre-trial arrangement conference procedure is considered as necessary to identify arguments and evidence heard in the trial. In the view of the Supreme Court, 'the conference is essential to focus on certain points in disputes and make a trial simpler'³¹¹. On the other hand, the introduction of the pre-trial arrangement conference is part of safeguarding for legal professionals against citizen judges' participation.

There are also problems with the selection procedure of citizen judges which relate to the issue of how representative citizen judges are. The Japanese selection procedure employs random selection and limited *voir dire* vetting by the prosecution and defence, and avoids the 'elite capture' of the German lay adjudication system.³¹² The CJA provides a number of conditions for dismissal from citizen judge duty, and this results in damage to random selection which prevents citizen judge panel being fully representative of the community.

Yamamoto's views about the problem of the citizen judges promoting conflict in the Japanese criminal justice system rests on a wider picture of historic submission to the judiciary as legal professionals and the public to establish 'just judgment', and also on the principle of substantial truth in the judiciary administration³¹³. The CJA confirms that citizen judges are obliged to 'execute their duties in compliance with laws and regulations, impartially and in good faith'³¹⁴, and not to 'act in a way that could impair trust in the impartiality of decisions.'³¹⁵ However, the Supreme Court view is that the

³¹¹ The Supreme Court, 'For Achieving the Criminal Trial in Which Lay People Can Easily Participate' [Japanese] (2005) <<http://www.saibanin.courts.go.jp/topics/kokumin.html>> accessed 13 September 2015.

³¹² Weber, 'The New Japanese Jury System: Empowering the Public, Preservation Continental Justice', [2009] East Asia Law Review 125–176, 166.

³¹³ M Yamamoto, 'Problems on the Citizen Judge System in Japan [Saiban in Seido No Mondaisei]' (2012) 25 Chuo-Gakuin University Review of Faculty of Law 29–53.

³¹⁴ Art. 9(1).

³¹⁵ Art. 9(3).

impartiality of the trial is sustained by the existence of professional judges who decide on the interpretation of laws and regulations, court procedures, other than the decisions made with the consideration and participation of citizen judges under Article 73(1) of the Constitution. Therefore, the citizen judges' participation in Japanese criminal procedure has no potential to exist without professional judges' supervision. The real expectation in the CJA is that the practice of the citizen judge system is driven largely by democratisation of the criminal justice procedure. However, the citizen judges' participation is greatly restricted because of the contradictions that have existed between concepts of democracy and those of substantial truth and these remain divisive and crucial issues. Diehm suggests that the discrepancies will result in 'perceptions of insensitivity, misunderstandings, and ultimate failure.'³¹⁶ The CJA provides the procedures which introduced lay adjudicators' participation which did not exist before. But it also was to be applied by actors who are practicing in the system, leading to an injustice which can undermine democratic values, and more centralisation and control by the judiciary. In that context, the citizen judge system has the potential of being a failed rather than successful lay adjudication system because citizen judges' participation and a representative and attentive position for citizen judges were not secured in the system. The absolute control by legal professionals over the citizen judge trial is to a large extent the result of the many challenges facing the citizen judge system. Considerable doubts about the poor capacity and application of the CJA remains. Therefore, the practice of the citizen judge system will be examined in the next chapter.

³¹⁶ JW Diehm, 'The Introduction of Jury Trials and Adversarial Elements into the Former Soviet Union and Other Inquisitorial Countries' (2001) 11 Law & Policy 1–38, 38.

CHAPTER 5 AN EVALUATION OF THE CITIZEN JUDGE SYSTEM II

Introduction

In this final substantive chapter, following the procedural examination in the previous chapter, I will examine the citizen judge system in practice and how it applies the CJA, using the examination criteria proposed in Chapter 2. The quantitative data is secondary, gathered by the Supreme Court and from some District Courts. The primary qualitative data is original material collected by the researcher from interviews with the former citizen judges and legal professionals listed in Chapter 1 who had taken part in citizen judge trials. This chapter considers the manner in which the citizen judge system is applied and how far expected domestic outcomes occurred and are compatible with the existing criminal procedural principles. The most crucial question that arises is whether the CJA has been successfully put in place? In order to answer this question, five essential sub-questions are examined by applying the evaluation criteria proposed and developed in the 2 and 3 chapters. The question concerns: the frequency of the actual use of citizen judge trials; citizen judges' ability to understand the law and the information obtained during their trial duties; citizen judges' attentiveness in the decision-making process; the features that need to be improved; and the actors'-including the citizen judges' satisfaction levels.

This chapter is organised in four sections. Section 5.1 focuses on the citizen judges' participation, representativeness and attentiveness. Section 5.2 deconstructs the impacts of the citizen judges' participation on the citizen judges, the criminal justice procedures and legal professionals, defendants, and society. Section 5.3 examines citizen judges' participation in death penalty cases drawing on the example of the Nagoya Family Homicide case in order to show its advantages and challenges in the case of trials where the death penalty could be imposed. Section 5.4 measures the success of the citizen judge system in terms of citizen judges' and legal professionals' satisfaction with the citizen judge system.

5.1 Citizen Judges' Participation, Representativeness and Attentiveness

5.1.1 The Frequency of Citizen Judge Trials

The Supreme Court's annual statistics are published in accordance with Article 103 of the Citizen Judge Act (CJA)¹. Consisting of 78 tables divided into four chapters, the annual statistics report contains a wide range of quantitative data, including the number of defendants tried by new citizen judge trials, the duration of the pre-trial arrangement conference process, the selection process, the decision-making process, and the number of non-Japanese defendants tried in citizen judge trials. The Supreme Court estimated that the number of citizen judge cases would be approximately 4,000 per year, that is, 3% of all criminal cases in the District Courts in 2005, for example². However, the actual number of defendants tried in citizen judge trials in practice was far smaller than expected³. Only 9,652 defendants were tried in citizen judge trials between May 2009 and February 2016. The annual number of defendants tried by citizen judge trials between 2010 and 2015 were 1,506, 1,525, 1,500, 1,387, 1,202, and 1,182, respectively⁴. Thus, the average number was 1,359 over each of the five years. The Supreme Court statistics indicate the actual use in practice of citizen judge trials: the number of citizen judge trials was far fewer than anticipated before the CJA was put in place.

There are two possible reasons for the relatively low number of citizen judge trials: a decrease in the number of reported offences suitable for citizen judge trials and/or a change in prosecutorial policy. If the number of reported criminal cases decreases, the total number of cases received by the Public Prosecutor's Office will be on the decrease. Also, if the criminal cases reported become less serious, the number of cases that are suitable subjects for citizen judge trials could decrease because of prosecutorial policy. However, a prosecutor interviewed for this research confirmed that there was no organisational or conscious strategy to avoid citizen judge trials when making indictment

¹ The statistical data between 2009 and 2014 by the Supreme Court is available on the website at the moment (May 2016): <http://www.saibanin.courts.go.jp/> [Japanese].

² Y Tsuchiya, *Start of the Citizen Judge System: The Expectations and Concerns* (Tokyo; Kadensha 2008), 28.

³ The Supreme Court does not publish the number of citizen judge cases but does publish the number of defendants tried by citizen judge trials.

⁴ The Supreme Court, 'Digest: The Implementation of the Citizen Judge Trials' (Tokyo; 2016), 1.

decisions⁵. The prosecution ratio has shown a constant small decline since 1997⁶. It was 64% of reported offences in 1997, at 37.8% in 2008 and at 32.8% in 2014⁷. Although whether there was any change in prosecutorial policy is not clear, a decrease in the number reported offences since 2003 is evident. As a matter of fact, the total number of cases received by the Public Prosecutor's Office has largely been on the decrease since 1986⁸. The total number of criminal arrests in 2006 and 2007 was 649,503 and 640,657⁹, while it was 394,121 and 370,568 in 2012 and 2013¹⁰, according to the Supreme Court statistics. They also demonstrate significant variations in the number of citizen judge trial cases depending on the court/prefecture. For example, in the Tokyo, Osaka, and Chiba prefectures, 1128¹¹, 1,058¹², and 989 citizen judge trials were held between 2009 and 2016, whereas in Shimane, Tottori, and Toyama prefectures 22, 26, and 35 trials occurred during the same period¹³. These are the largest numbers and the smallest number for all Japan.

5.1.2 Selection of Citizen Judges

While the CJA was a product of government-driven judicial reform, there were concerns that the difficulty of ensuring citizen judges' understood the process had led to fewer candidates presenting themselves to the selection process for citizen judges, than expected. The Supreme Court conducted a survey of citizens' motivations for becoming citizen judges and the results showed that a very small number of respondents believed in the importance of the duties of citizen judges for the community – only 14.6% and 11.3% of Public Prosecutor Committee members with and without deliberative experience, respectively. Between 2009 and 2012, 1,241,406 people were listed as citizen judge candidates and approximately 40% of citizen judge

⁵ Interview, public prosecutor, 11/06/2011.

⁶ Ministry of Justice [Japan], 'White Paper on Crime [Hanzaihankusho]' (2015) <<http://hakusyo1.moj.go.jp/jp/62/nfm/mokuji.html>> accessed 20 March 2016, table 2-2-3-2.

⁷ Ibid.

⁸ Ibid.

⁹ National Police Agency, 'Police White Paper 2007' (2007) <<https://www.npa.go.jp/hakusyo/h20/toukei/t1-05.pdf>> accessed 7 June 2016.

¹⁰ National Police Agency, 'Police White Paper 2013' (2013) <<https://www.npa.go.jp/hakusyo/h27/data.html>> accessed 6 June 2016, table 2-4.

¹¹ The number was the total between that of Tokyo District Court central (868) and Tachikawa branch (260).

¹² The number was the total between that of Osaka District Court central (834) and Sakai branch (224).

¹³ The Supreme Court, *supra* note 5, 2.

candidates actually served each year between 2010 and 2013¹⁴. In spite of concerns, an appropriate average of 74% of citizen judges who were summoned to attend, appeared in court between 2009 and 2013¹⁵. For instance, 47 out of 49 candidates showed up for selection in the first citizen judge trial¹⁶. Subsequently, 6 citizen judges were chosen from the 47 candidates. A large number of candidates voiced their dissatisfaction with the inefficient selection procedure in 2009¹⁷. In Nagasaki District Court, approximately 30 citizen judges candidates participated in the selection process¹⁸; this means that on average, 24 candidates were not selected for each citizen judge trial. These figures suggest that pre-introduction concerns regarding the public's unwillingness to participate have not – in practice – affected the citizen judge system. However, there has been a certain amount of dissatisfaction amongst the candidates. In fact, the appearance rate when summoned to attend the selection process started to decrease from 2009 and has continued to do so every year since¹⁹.

The excluded candidates who are excused from appearing seem to widely accept not being citizen judge candidates, while challenges to the selected citizen judges by the public prosecutors and defence attorneys were relatively rare. The court seems to have been very lenient in excusing people from their duty. The rate of acceptance of excuses was 28.3% at the notification stage²⁰, 30.7% at the inquiry stage²¹, and 91.4 % at the summons stage²². The percentage of candidates who made excuses which were accepted increased throughout the selection process from 61.1% overall in 2009 to 66.2% in 2016²³. The wide acceptance of excusals before and at the summons stage presumably make the pool of citizen judge candidates small before the random selection

¹⁴ The Supreme Court, 'Report on the Implementation Status of the Citizen Judge Trials' (Tokyo; 2013), 3.

¹⁵ Ibid, 20.

¹⁶ Ibid.

¹⁷ Asahi Newspaper, 'First Citizen Judge Trial in Japan' (2009) <<http://www.asahi-net.or.jp/~xx8f-ishr/saibanin1.htm>> accessed 1 June 2013.

¹⁸ Nagasaki District Court, 'The Implementation of the Citizen Judge System in Nagasaki District Court' (2013), 1.

¹⁹ The Supreme Court, *supra* note 14, 6.

²⁰ As explained in Chapter 4, the court shall randomly choose candidates, compile the list by excluding disqualified candidates, and send it to the court by 15th October.

²¹ After the notification stage, the court modify the list by excluding candidates. The Supreme Court, *supra* note 14, 18.

²² Ibid, 20.

²³ The Supreme Court, *supra* note 4, 5.

method by lot and this will affect the degree of representativeness of the community. However, few challenges to citizen judge candidates were made; actually, only 0.1% of potential candidates were challenged without cause, according to the Supreme Court survey²⁴. The defendant in a robbery case which resulted in a death made a special appeal because the defence challenge with reasons of one citizen judge candidate was not accepted. Moreover, the implementation of the court's decision was not suspended²⁵. The argument in the case was whether the objection to the selection process of the citizen judge²⁶ was applied according to Article 425 of CCP, the suspension of the criminal procedure, or not²⁷. Ultimately, the Supreme Court decided the objection to the selection process of citizen judges had not been applied according to Article 425. Moreover, the judgment was that the selection process was suitable, with flexible cooperation between legal professionals²⁸. Furthermore, the judgment stated that random selection by lot without challenges by the public prosecution or the defence attorney is preferable in order to make the operation of the citizen judge procedures consistent, and has been carried out effectively²⁹. A public prosecutor interviewed for this research, claimed that he tried not to challenge the candidates, in fact, he had never challenged a citizen judge candidate³⁰.

Although there is leniency in accepting excuses for non-attendance, the citizen judges are representative of the community in Japan in terms of their ratio to the general population, as described below. The gender proportions were almost equal, with 55.3% of citizen judges being male and 43.4% female³¹. Their ages were from 20-29 (13.7%), 30-39 (20.0%), 40-49 (24.2%), 50-59 (20.0%), 60-69 (18.6%), and over 70 (2.0%)³². Their occupations were fulltime employment (employees) (57.4%), employers (6.3%), part-time employees (15.2 %), and housewives/househusbands (9.4 %) ³³. Considering the

²⁴ The Supreme Court, 'Report: The Implications of the Citizen Judge System' (Tokyo; 2015), 22.

²⁵ CCP, art. 425.

²⁶ CJA, art. 35(1).

²⁷ 'Case Study' (2015) 1478 Jurist 92–94, 92. The Supreme Court 15/03/2013.

²⁸ Ibid, 94.

²⁹ Ibid.

³⁰ Interview, public prosecutor, 22/05/2011.

³¹ The Supreme Court, 'Result Report of Questionnaire Data from Former Citizen Judges in 2015' (Tokyo; 2015), 100.

³² Ibid.

³³ Ibid.

combination of all these factors, it is fair to say that the citizen judges selected from 2009 to 2016 were from diverse backgrounds and fully representative of the community in Japan.

5.1.3 Citizen Judge's Attentiveness

Table 5.1.3 Attentiveness and Competence of Citizen Judges³⁴

	The Former Citizen Judges
Had a difficulty in understanding evidence	0
Had a difficulty in understanding applicable laws	0
Professional Judges' Explanations were important to understand information they obtained during the trial	5
Participated actively in the courtroom	5
Believed co-citizen judges participated actively in the courtroom	5
Participated actively in the deliberation room	5
Believed that co-citizen judges participated actively in the courtroom	5
Believed that professional Judges' Explanations were important to understand information they obtained during the trial	5
Reaching a decision by themselves without professional judges' pressure	5

The 5 former citizen judges interviewed for this research thought that they had carried out their citizen judge duties with care and attention throughout the decision-making process, and they considered their five other co-citizen judges were attentive too³⁵. Although the number and frequency of citizen judge questions and note-taking

³⁴ Interviews, citizen judges, 12/05/2011 – 01/06/2011.

³⁵ Ibid.

skills may not be a measure of their attentiveness, all citizen judges interviewed for this research confirmed that they asked questions and took notes, both in the courtroom and in the deliberation room ³⁶. As discussed in Chapter 2, the citizen judges' attentiveness can be assessed by the competence of citizen judges in accordance with the parameter of the citizen judges' satisfaction with, or confidence in their work, not by professional judges' standards. The citizen judges' competence, will be evaluated in terms of their understanding of the information given them throughout the citizen judge trial procedure and their ability to make an individual final decision independently without pressure from other members of the citizen judge panel: the three professional judges and five co-citizen judges.

There are three different types of information citizen judges' need to understand: information related to the citizen judge procedure and citizen judges' duties, trial evidence and the appropriate laws. Greater access to clear and comprehensible information for citizen judges, according to Wilson, was aimed at providing 'systemic transparency' ³⁷ as well as 'civic participation and education' to guarantee the fundamental rights of the defendants³⁸. Furthermore, there are the expectations and requirements surrounding the criminal procedure and justice obligations set down in articles of the Constitution, which guarantee the principles of a fair trial and transparent standards and access to justice for all. Fundamentally, these principles are consistent with the overall vision of citizen judges being able to understand information and so ensure the fundamental rights and freedoms of Japanese citizens.

Citizen judges are expected to understand all three kinds of information, mentioned above. Information about the citizen judge procedure and citizen judges' duties is widely available to the public in cartoon booklet form and various videos on the Supreme Courts' website³⁹, while citizen judges have the procedures and their duties explained to them before the court case. All five former citizen judges interviewed for this research

³⁶Ibid.

³⁷ MJ Wilson, 'Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time' (2010) 33 Fordham International Law Journal 487–572, 528.

³⁸ Ibid, 572.

³⁹ The Supreme Court, 'Information Related to the Citizen Judge System' <<http://www.saibanin.courts.go.jp/news/video.html>> accessed 15 June 2016.

confirmed that the explanation of the information was easy to understand⁴⁰. The second, the trial evidence, is about the facts and the evidence. All five former citizen judges interviewed for this research noted that they had no problems understanding this information⁴¹. According to a Supreme Court survey, 96% of former citizen judges who answered the Supreme Court questionnaire thought that the information presented by the public prosecutors and defence attorneys and explained in the hearings were easy and straightforward to understand⁴². The third type of information is about law. All five former citizen judges interviewed for this research confirmed that they had no problem understanding the legal and deliberative issues⁴³, while all of them also believed that professional judge's explanations and support were important for that. Therefore, all former citizen judges interviewed for this research had strong confidence in their understanding skills in relation to all the types of information they obtained throughout their duties. Moreover, all eleven legal professionals interviewed for this research claimed that the citizen judges appeared to have a good understanding of all information⁴⁴. The Supreme Court survey provides statistical data about the former citizen judges' views about how easy it was to understand the information explained by the public prosecutors, defence attorneys and professional judges, as well as how easy it was for them to deliberate and discuss issues⁴⁵.

However, the survey does not provide any data about independent deliberation. All five former citizen judges believed that they were able to make their own minds up independently of the professional judges and their co-citizen judges. Independent, unbiased performance of duties is fundamental and in accordance with Article 8 of the CJA, which states that 'citizen judges shall be independent in the execution of their duties', but probably there are overlaps with the necessary cooperation between the citizen judges and professional judges, which are more focused on the citizen judges' independence because of the collaborative structure of the citizen judge panel.

⁴⁰ Interviews, *supra* note 34.

⁴¹ *Ibid.*

⁴² The Supreme Court, *supra* note 31, 5.

⁴³ Interviews, *supra* note 35.

⁴⁴ Interviews, professional judges, public prosecutors and defence attorneys, 26/04/2011- 10/06/2011.

⁴⁵ *ibid.*

5.1.4 Cooperation in the Citizen Judge Panel

All former citizen judges interviewed for this research believed their understanding skills in relation to all the information and their independent deliberation skills were sufficient. However, maintaining the attentiveness and competence of the citizen judges is presumably influenced by the professional judges' cooperation, not only because of the nature of the collaborative structure of the citizen judge panel, which consists of both citizen judges and professional judges. Moreover the structure leads to the judicial responsibility of professional judges and the citizen judges' psychological dependence upon them.

The relationship between the citizen judges and professional judges is thus largely dependent on the professional judges' behaviour rather than a cooperative relationship with an equal knowledge base. They are supposed to be equally responsible as co-members of the citizen judge panel and in other words, there is no hierarchical relationship between them.

As with the other collaborative structures with a lay adjudicator panel such as the mixed judge model, the citizen judge system also presents growing concerns about more powerful judicial control of the professional judges over citizen judges in the decision-making process. For example, lay adjudicators in the former Soviet Union legal system were called the 'noddors' because of their tendency to always agree with the professional judges⁴⁶. This tendency is a common concern, particularly in the mixed judge model of lay adjudication systems, while judicial control in the jury model arising from the professional judges' instructions to help jurors come to their decisions, is also a concern. Machura highlighted the statistical data in the German lay adjudication system, pointing out that 85% and 80% of respondents answered that none, or hardly any time pressure was put upon them during their deliberations by the presiding judges⁴⁷. In the Japanese citizen judge system, the professional judges often ask citizen judges whether they have any question in order to give them the opportunity to

⁴⁶ NP Kovalev, 'Lay Adjudication of Crimes in the Commonwealth of Independent States: An Independent and Impartial Jury or a "Court of Noddors"?' (2004) 11 *Journal of Eastern European Law* 123–157.

⁴⁷ S Machura, 'Interaction between Lay Assessors and Professional Judges in German Mixed Courts' (2001) 72 *Revue internationale de droit pénal* 451–479.

participate actively. However, how often and how many opportunities should be allowed for citizen judges to ask questions is not regulated by law and neither are professional judges required to ask citizen judges whether they have any questions. Thus the conduct of questioning sessions is dependent upon individual professional judges' discretion.

All 5 former citizen judges interviewed for this research had positive feedback about the comprehensibility of the professional judges' explanations and their friendliness, and this seemed to encourage unity and cooperation amongst the members of the citizen judge panel and provoke feelings of trust in the professional judges⁴⁸. The level of interaction between the citizen judges in the deliberation room seemed to differ for each citizen judge panel. For example, some citizen judges introduced themselves at the beginning with their names and credentials, and called each other by name in the deliberation room, although in general, particularly in the courtroom, they referred to each other by numbers⁴⁹. However, a common response of the all former citizen judges interviewed for this research was that they appreciated the professional judges' friendliness and generosity⁵⁰. The professional judges did appear to devise ways and means to enhance the citizen judges' performances. For example, the timeline of the deliberating process was available in the deliberation room as a guide or the professional judges explained the contents and aims of the procedure during breaks⁵¹. Moreover, one former citizen judge responded to the questions about the meaning of legal terminology 'justifiable defence', noting that the professional judges seemed to be happy to answer his questions. As a result he was confident that he understood all the information he was given⁵². A former citizen judge interviewed for this research referred to the fact that she found some information first, but she asked questions to the professional judges and they explained more clearly. Therefore she had no difficulty in understanding the information⁵³. Therefore, it is likely that the professional judges are

⁴⁸ Interviews, *supra* note 35.

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ T Tanojiri, 'The Future of the Citizen Judge Trials From the Public Prosecutors' Perspectives [Saibanin Saiban No Korekara - Kennsatsukan No Shiten]' (2014) 67 *Horitsu no hiroba* 19–26, 25.

⁵² Interviews, citizen judge, 25/05/2011.

⁵³ Interview, citizen judge, 31/05/2011.

generally supportive in providing appropriate judicial instructions as well as responding to citizen judges' psychological dependence.

Paradoxically the professional judges' relationship with citizen judges can be both encouraging and restrictive because the professional judges could manipulate them. A former citizen judge claimed that he felt they were guided by the professional judges⁵⁴. In addition to direct manipulation, the professional judge interviewed for this research pointed out that it was not difficult at all for professional judges to manipulate or guide citizen judges without their being aware of what was happening⁵⁵. The Supreme Court published former citizen judges' responses suggesting that they had experienced coercive pressure from the professional judges⁵⁶. Moreover, a gap in knowledge and information between professional judges and citizen judges appears to lead to the impossibility of building equal relationships between them. Vanoverbeke raised an example that a former citizen judge felt there was an information gap obtaining between the citizen judge's and professional judges' knowledge, and this frustrated him in his deliberations⁵⁷.

The Supreme Court statistics showed a significant increase in length of the decision-making process. The actual number of days of citizen judge attendance increased from 3.7 days in 2009 to 9.7 days in 2016⁵⁸. Moreover, the statistics show an increase in the length of deliberating time from 397 minutes in 2009, to 718.8 minutes in 2016⁵⁹. The Supreme Court acknowledged the increase in time for the decision-making procedure, but said that 'it is likely that the increase was the result of the time used in deliberating and delivering the verdict increase rather than due to any changes in the details of the cases'⁶⁰. The expanding duration of the decision-making process will become a burden on citizen judges and limited citizen judges candidates who can find time to attend the trial.

⁵⁴ The Supreme Court, 'Verification Report on the Implementation Status of the Citizen Judge System [Saibanin Saiban Jisshi Jōkyō No Kenshō Hōkoku]' (Tokyo; 2012), 175.

⁵⁵ Interview, professional judge, 14/05/2011.

⁵⁶ The Supreme Court, *supra* note 31.

⁵⁷ D Vanoverbeke, *Juries in the Japanese Legal System* (New York; Routledge 2015), 172.

⁵⁸ *Ibid.*

⁵⁹ *Ibid.*, 10.

⁶⁰ The Supreme Court, *supra* note 54, 4.

To sum up, the citizen judge system has provided the opportunity for citizen judges to participate in serious criminal cases, and these citizen judges seem to appropriately represent their communities. Moreover, the attentiveness of the citizen judges in terms of their competence to understand the information given throughout their duties is also indicated in the light of citizen judges' own confidence; however, it is based on cooperation with the professional judges.

5.2 Impacts of Citizen Judges' Participation

5.2.1 Impact on the Criminal Justice Procedure

5.2.1.1 *Pre-Trial Arrangement Conference Procedure*

The CJA was passed in 2004 and came into force in 2009. The pre-trial arrangement conference process, which takes place with the participation of the professional judges, public prosecutors and defence attorneys, was aimed to make the issues heard and deliberated in a citizen judge trial more comprehensible to citizen judges. There is no citizen judge participation in the pre-trial arrangement conferences. The compulsory pre-trial arrangement conference process in the citizen judge trial procedure was introduced to ensure effective decision-making proceedings for citizen judges, as discussed in Chapter 4. However, the duration of the process has increased over time. The average duration increased from the 2.8 months starting point in 2009, to lasting 5.4 months in 2010, 6.4 months in 2010, 6.9 months in 2013, 6.8 months in 2014, 7.4 months in 2015, and 8.6 months in 2016⁶¹. Therefore, apart from a small decrease in 2014, the duration of the pre-trial arrangement conference process has become constantly longer. This increasingly lengthy process then raises two concerns. Firstly, that the trial dossiers are increasingly detailed, which has led to the reliance on written documents. Secondly, a lengthy pre-trial process leads to extending the defendants' detention in custody⁶², which has caused financial problems for them and raised human rights concerns.

⁶¹ Ibid, 6.

⁶² T Sakamaki, 'Citizen Judge System and the Future of Criminal Justice [*Saibanin Seido to Keijishiho No Shorai*]' (2015) 177 Rule of Law 42–85, 46.

Detailed dossiers are prepared by the prosecution and defence, but there seems to be heavier dependence on that created by the public prosecutor. In addition to the two sets of dossier of documents, Investigative Reports [*Sogo Sosa Hokokusho*] explaining the non-disputed facts about the case are submitted by the public prosecutor, and the Bar Association can claim the right to introduce an agreement dossier [*Goi Shomen*]⁶³. In spite of the efforts devoted to making these detailed dossiers, the level of detail and extra information could confuse the citizen judges. Tanojiri suggests that a fact-focused context rather than a story-telling approach should be taken in the proven registration fact dossier because the public prosecutors should anticipate the defence attorney's possible counterclaims and alternative evidence⁶⁴. Moreover, he also claims that the public prosecutor should clarify the extent of the citizen judges' tasks; in other words, the public prosecutor has the authority to determine the range of the citizen judges' deliberations. Nishimura points out that requests for expert evidence, which can be asked for by the public prosecutor and defence attorney during the pre-trial arrangement conference process, have decreased⁶⁵. According to Vidmar, testimony at the trial has a significant influence on lay adjudicators' understandings of disputed facts, although critics of expert testimony tend to focus on what they claim is lay adjudicators' incompetence, irresponsibility and biased acceptance of expert testimony. They also put emphasis on the common sense of lay adjudicators rather than the systematic evaluation of data and the academic knowledge of experts⁶⁶. Therefore, the increasing duration of the pre-trial arrangement conference process appears to show a pragmatic compromise in the preparation to support the citizen judges' participation. In addition, the focus on the pre-trial could be taking over the management of information⁶⁷ and knowledge so that the role of citizen judges in the decision-making process could be restricted.

⁶³ JFBA, 'Terminology Used at the Trial' (2016)

<http://www.nichibenren.or.jp/ja/citizen_judge/program/nichijougoka.html> accessed 11 June 2016.

⁶⁴ Tanojiri, *supra* note 51.

⁶⁵ T Nishimura, 'Current Situations and Challenges of Citizen Judge Trials' (2016) 67 *Freedom and Justice [Japan]* 49–57, 52.

⁶⁶ N Vidmar, 'Expert Evidence, the Adversary System, and the Jury' (2005) 95 *American Journal of Public Health* 137–143.

⁶⁷ J Casper, K Benedict and J Perry, 'Juror Decision Making, Attitudes, and the Hindsight Bias' (1989) 13 *Law and Human Behavior* 291–310, 294.

Ironically, the very first stage of the citizen judge trial procedure – the pre-trial arrangement conference process – has no citizen judge participation, and has become the main focus of legal professionals' concern to ensure successful and effective citizen judge trials by making highly detailed dossiers. Sugita describes this as the addictive nature of 'over-reliance on the written dossier', which is one of the most criticised points in the Japanese procedure⁶⁸.

5.2.1.2 *The Decision-Making Process*

The shift of emphasis from the inquisitorial approach to the adversarial approach was undertaken with the aim of introducing the citizen judge system. Moreover, changes aimed at emphasising orality and immediacy are confirmed to have taken place in the hearings, introducing rules of evidence similar to the trial procedure practice in common law jurisprudence⁶⁹. The trial takes place over consecutive days, in contrast to the bench trials, before the introduction of the citizen judge system. Although the duration of citizen judge trial procedures has increased since 2009, in comparison with the bench (professional judge alone) trials before the introduction of the citizen judge system, the duration of the criminal trial procedure has dramatically shortened. Long trials could go on for many years and were criticised⁷⁰ by many scholars, as Thaman has pointed out⁷¹. The trial used to be opened during one a month, but could then have intervals as long as three months before continuing⁷². Thus hearings over consecutive days without gaps are clearly one target of the introduction of the citizen judge system at which the Judicial Reform Council aimed⁷³. This achievement has also led to the direct presentation of evidence⁷⁴ in the hearings.

⁶⁸ M Sugita, *Theory and Practice of Citizen Judge Trials in Japan* (Tokyo; Seibundo 2012), 42.

⁶⁹ M Coen, 'Juror Comprehension of Expert Evidence: A Reform Agenda' (2010) 3 *Criminal Law Review* 195–211. 201.

⁷⁰ B George Jr, 'Rights of the Criminally Accused' (1990) 53 *Law and Contemporary Problems* 71–107.

⁷¹ SC Thaman, 'Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures' [2002] *Saint Louis-Warsaw Transatlantic Law Journal* 89–118, 102.

⁷² DT Johnson, *The Japanese Way of Justice: Prosecuting Crime and Japan* (Oxford; Oxford University Press 2002), 14-5.

⁷³ The Judicial Reform Council, 'Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century' (2001) <http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html> accessed 14 August 2015, ch4, part 1, 1(4)(a).

⁷⁴ JJ Kodner, 'Reintroducing Law Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step' (2003) 2 *Washington University Global Study Law Review* 231–254. 245.

The principle of orality has been more emphasised since the CJA was introduced. Thus, an approach, called *Hikokunin Shitsumon Senkōgata*, which prioritises the direct oral testimony of the defendant and witnesses is often used in citizen judge trials rather than reading out the investigators' record of the defendant's statement in the case of confession⁷⁵. There is still a tendency to use written material in citizen judge trials⁷⁶, and the use of written material, including confessions obtained in the investigative process, is not disapproved of⁷⁷.

The development of citizen judges' participation in trials could mark a dramatic departure from Japanese traditional principles. In particular, the principle of substantial truth, which underpins that adjudicators investigate written dossiers has given way to an emphasis on the prosecution's and defence's cross-examination when examining the evidence. Historically, the professional judges had assumed responsibility for both the discovery and the investigation of criminal offences⁷⁸. The new procedural roles prescribed by the CJA are out of tune with the traditional cultural interpretations of the responsibilities of public prosecutors and professional judges. This has created confusion as to the general area of their duties and the level of trust between them. According to Ando, one of the key reasons why the CJA is effectively applied⁷⁹ and enforced is because power remains with the professional judges and public prosecutors, because traditional principles include⁸⁰ a high level of trust in the authorities⁸¹. Moreover, the CJA leaves it to the citizen judges to subjectively evaluate the probative value of the evidence. As a consequence, professional judges have continued to use the same evaluation guidelines as in the past. Indeed, because the CJA does not address all

⁷⁵ Nishimura, 53.

⁷⁶ MJ Wilson, H Fukurai and T Maruta, *Japan and Civil Jury Trials* (Cheltenham; Edward Elgar Publishing 2015), .

⁷⁷ Ibid, 393.

⁷⁸ Levin.

⁷⁹ A Ando, 'The Future of the Citizen Judge Trials from the Professional Judges' Perspectives [Saibanin Saiban No Korekara - Saibankan No Shiten]' (2014) 64 *Horitsu no hiroba* 27–33.

⁸⁰ D Senger, 'The Japanese Quasi-Jury and the American Jury: A Comparative Assessment of Juror Questioning and Sentencing Procedures and Cultural Elements in Lay Judicial Participation' (2011) 2 *University of Illinois Law Review* 741–774. 764.

⁸¹ S Maruyama, 'The Tradition of Japanese Trials: Is the "Jury System" Planting Its Roots in Japanese Soil? [Nihon No Saibanbunka]' (2005) 13 *The Journal of Humanities and Sciences* 161–181, 176.

the procedural issues, such as the evidentiary standards, the citizen judges and professional judges are required to refer to earlier rules.

5.2.1.2.1 Verdicts

There is no significant change in verdicts reached by citizen judge panels and the bench judgements before the introduction of the citizen judge system. The Supreme Court's annual statistics show 8,820 judicial decisions reached by the citizen judge panels from 2009 to 2016, as referred to above, while the statistics also show that only 49 resulted in not guilty verdicts, while there were 8,591 guilty verdicts⁸². These figures suggest that if an individual is arrested and charged with an offence, there is a high probability that they will be convicted. In fact, the high conviction rate - 99.4%⁸³ - still remains. The high conviction rate was the one of the concerns⁸⁴, and this has not been changed by the introduction of the citizen judge system.

However, sentencing has been changed by the introduction of citizen judge system, according to Kojima⁸⁵. In fact, there have been some shifts towards more punitive sentencing in attempted murder cases, accidental death, robbery resulting in grievous bodily harm and rape resulting in bodily harm cases⁸⁶. In the bench trials before the introduction of the citizen judge system, the most likely sentences for individuals convicted of homicide were 11 years imprisonment, whereas in the citizen judge trials, defendants convicted for the same offence were sentenced to 16 or 17 years imprisonment⁸⁷. At the same time, the use of probation has been increased in homicide cases, robbery resulting in grievous bodily harm and arson in inhabited buildings cases⁸⁸. Therefore, as Kojima also pointed out, citizen judges' participation has increased the range of sentences, with both more punitive and more lenient tendencies⁸⁹. Possibly,

⁸² The Supreme Court, *supra* note 4, 4.

⁸³ $8591-49/8591 \times 100 = 99.4\%$

⁸⁴ RM Bloom, 'Jury Trials in Japan' (2006) 28 *Loyola of Los Angeles International and Comparative Law Review* 35–68, 47.

⁸⁵ T Kojima, 'Changes in Sentencing in the Citizen Judge Trials' (2015) 3/4 *Chuo Law Journal* 169–97.

⁸⁶ The Supreme Court, 'Materials 2 for Expert Meeting' (Tokyo; 2014).

⁸⁷ *Ibid*, table 1

⁸⁸ *Ibid*.

⁸⁹ Kojima, 171.

due to the change in sentencing patterns, in spite of unchanged high conviction rates, the prison population in Japan has decreased since 2009⁹⁰.

This may suggest that citizen judges tend to focus on the rehabilitation of the defendants rather than the retributive effect of punishment. The average ratio of cases sentenced with probation was 35.8% in judicial trials; on the other hand, the ratio in the citizen judge system is 55.7%⁹¹. The conviction rate has not changed much. The rate in the citizen judge system is still approximately 99%⁹². The ratio of lower court decisions that the appellate courts overturned dramatically changed from 41.0% to 23.9%⁹³, which is a different change from that which occurred after the introduction of the Russian jury system⁹⁴.

According to a professional judge, however, deliberation about sentencing has been conducted based on the Sentence database. At the first sentencing procedure, the professional judges provide the citizen judge with the typical sentence ranges for similar offences in the past from the database. There are several cases which drew attention to the fact that the sentences reached by the citizen judge panel exceeded the sentences asked for by the public prosecutor. For instance, a citizen judge panel in Osaka District Court gave a 15 year imprisonment sentence for a homicide case when 10 years imprisonment was asked for by the public prosecutor. Moreover, the Supreme Court rejected a final appeal by the defendant against the length of his conviction⁹⁵. For the murder, mutilation and concealment of the corpse in Miyazaki District Court, the citizen judge panel gave a life imprisonment sentence in spite of 25 years imprisonment being demanded by the prosecution. These examples highlight a level of independent thinking by the citizen judge panels. Nevertheless, the use of the sentencing database has meant that there was little or no discussion or explanation of how to make sentencing decisions between the members of the citizen judge panel, and Venoverbeke claims that the

⁹⁰ Ministry of Justice [Japan], table 2-4-1-1.

⁹¹ The Supreme Court, *supra* note 14. 85.

⁹² *Ibid.*

⁹³ The Supreme Court, *supra* note 54, 33.

⁹⁴ I Dline and O Schwartz, 'The Jury Is Still out on the Future of Jury Trials in Russia' (2002) 11 East European Constitutional Review 104–110, 108.

⁹⁵ Supreme Court decision, 24/07/2014.

citizen judge system functions as the justification of ‘a well-established system’ which is still run by professional judges⁹⁶.

5.2.1.2.2 Written Judgment

*The written judgment has become simpler and plainer in terms of the reasons for the citizen judge panel’s decisions*⁹⁷. Article 335 stipulates the necessity to signify the facts constituting the crime, the list of evidence and the application of the laws and regulations in the written judgment, but the fact-finding process and the reasons for determining the verdict are not required. The lack of detailed information in written judgments can lead to a re-examination of the records and evidence heard in citizen judge trials by the appeal courts. This could cause citizen judge panels’ decisions and citizen judges’ participation to be discredited or undervalued. The cooperation between the citizen judges and professional judges should be accurately expressed in the appeal court in assessing the legitimacy of the appeal. As Sakamaki points out, the cooperation is on condition that the professional judges will take on vocational responsibility for correcting any citizen judges’ misconceptions and misunderstandings, and if this does not take place, then trial decisions can be overturned and corrected⁹⁸ in the Court of Appeal. Therefore, the course of the cooperation reflected in the trial decisions should be clarified in the final written judgment.

5.2.1.3 After the Trial

The possibility of overturning the citizen judge panel’s decisions by a subsequent bench trial in the appeal courts appears to be symbolic of the limited extent of the citizen judges’ participation in the citizen judge procedures in Japan. An appeal with specific grounds, by either party, the prosecution or the defence, is allowed for an acquittal based on an error in applying the law, the sentencing⁹⁹ or fact-finding¹⁰⁰ procedures. Moreover, Article 393 of CCP states that the court of the second instance may conduct an examination of the facts upon the request of the public prosecutor or the defence, or may do so *ex officio* when it is deemed necessary. Therefore it seems to be fair to

⁹⁶ Vanoverbeke, *supra* note 57, 175.

⁹⁷ Ando, *supra* note 79, 31.

⁹⁸ Sakamaki, *supra* note 62, 403.

⁹⁹ CCP, art. 381.

¹⁰⁰ CPP, art. 382.

consider that an appeal in the appellate court is a rehearing bench trial procedure after a citizen judge trial.

In fact, the Supreme Court survey shows frequent overturning of the citizen judge panel decisions by the Appeal Court. The three professional judges in the bench trial are able to quash the original judgement reached by a citizen judge panel and 35% of citizen judge trial cases have been subject to appeal against the ruling, and the ratio of cases in which a citizen judge panel reached a guilty verdict but which the appellate panel subsequently overturned with a not guilty verdict was 0.38% in 2012, which was lower than of the figure before the introduction of the citizen judge system: which was 0.41%¹⁰¹. In 53 out of 804 cases in the appeal courts between 2009 and 2015 the citizen judge panel decisions were overturned¹⁰².

There seem to be two principles used by the appellate courts to evaluate the factual basis accepted by the citizen judge panels in their decision-making: the logic and empirical principle [*Ronrisoku, Keikensoku Ihan Setsu*] and the belief-priority principle [*Sinsho Yusen Setsu*].¹⁰³ The first principle means that the appellate courts can overturn citizen judge panel decisions when the decisions are in opposition to their logic and experience, but also when the decisions are not more than a different determination of the probative value of the evidence¹⁰⁴. The belief-priority principle emphasises that the beliefs of the appellate courts are superior and the court decisions take priority over citizen judges' decisions¹⁰⁵. The written judgements of the appellate courts are unlikely to clarify the distinction between the two principles. However, the principles of orality and immediacy practiced in the citizen judge trials are also emphasised in the appellate courts¹⁰⁶. Goto points out there are simpler requirements for overturning a guilty verdict than for overturning a judgment of innocence because a guilty judgment can be overturned if there is reasonable doubt, but in the latter case, if there is any possibility

¹⁰¹ The Supreme Court, *supra* note 4, table 81.

¹⁰² *Ibid*, table 79.

¹⁰³ T Oshima, 'Citizen Judges Trials and the Role of Appeal from Practitioner's Perspectives' (2015) 54 Criminal Law Journal [Japan] 374–394, 376.

¹⁰⁴ *Ibid*.

¹⁰⁵ *Ibid*.

¹⁰⁶ *Ibid*, 378

that the professional judges consider the defendant is not guilty, the verdict cannot be overturned, according to the Supreme Court¹⁰⁷.

The appellate courts should respect the citizen judge panels' decisions within this framework, although they could be considered as a 'second chance' of an acquittal for the defendants¹⁰⁸. Wilson has pointed out that the appeal requires additional expenses and the right to appeal tends to be used 'as a matter of right and receive *de novo* review of their case'¹⁰⁹. As Dean has pointed out, the appeal process can 'redress the miscarriage of justice' by investigating throughout the criminal justice procedure. However, the appeal could provoke public anxiety over the jury system in Japan¹¹⁰. The media coverage of miscarriages of justice determined by the appeal courts could lead to a 'crisis of public confidence' in the criminal justice system¹¹¹. A former citizen judge attending the post-citizen judge trial meeting in Kagoshima District Court referred to the fact that 'when he/she found out that the defendant in the case in which he participated had appealed to the High Court, he regarded his time and effort as being a citizen judge was nonsense. It was shocking.'¹¹² Two former citizen judges interviewed for this research showed similar emotion, such as shock and disappointment with the fact that the defendant who showed his regret in the citizen judge trial subsequently appealed to the higher court¹¹³. A former citizen judge interviewed mentioned that she was disappointed with that she heard the appeal on the TV news, and she preferred to hear from the court or at least in a more formal way than the news¹¹⁴. However, one of other citizen judges received a handwritten letter from the presiding judge of the trial that she attended, letting her know about the appeal, so he understood that¹¹⁵. It seems that the

¹⁰⁷ A Goto, 'Citizen Judge Trials and the Role of Appeal [Saibanin Saiban to Kousosin No Yakuwari]' (2015) 54 Criminal Law Journal [Japan] 358–373, 369.

¹⁰⁸ B McKillop, 'The New French Jury Court of Appeal Revisited' (2009) 31 Sydney Law Review 143–146, 144.

¹⁰⁹ MJ Wilson, 'Failed Attempt to Undermine the Third Wave: Attorney Fee Shifting Movement in Japan' (2005) 19 Emory International Law Review 1457–1488, 1476.

¹¹⁰ M Dean, 'Trial by Jury: A Force for Change in Japan' (1995) 44 International and Comparative Law Quarterly 379–404.

¹¹¹ R Nobles and D Schiff, 'Public Confidence in Criminal Justice: The Lessons from Miscarriages of Justice' (2009) 48 The Howard Journal of Criminal Justice 461–471.

¹¹² 'Meeting Minutes of Knowledgeable Persons of Citizen Judge System' (Kagoshima; 2015), 12.

¹¹³ Interviews, citizen judges, 16/05/2011 and 01/06/2011.

¹¹⁴ Interviews, citizen judge, 01/06/2011.

¹¹⁵ Interview, citizen judge, 13/05/2011.

appeal, in particular the lack of notification to the former citizen judges, contributes to a sense of distrust.

5.2.2 Impacts on Legal Professionals

5.2.2.1 Professional Judges

The introduction of the citizen judge system has had an impact on the role of the professional judges. It was expected that they would be more neutral, compared to their role before the citizen judge system was introduced. In the past they would read through and review the investigation documents and ask for more investigations, prompt the public prosecutors to change or review the charge, make judgment based on a large amount of evidence and create detailed and precise written judgments¹¹⁶. The professional judges have the responsibility to evaluate the rationality and validity of the evidence and to check whether the public prosecutor has fulfilled his/her role responsibly. This seems to be the original role of judges in the inquisitorial legal tradition. Revealing the true facts of the case should also be achieved under the citizen judge system. The professional judges in Japan used to have a substantial investigative role during the investigative and hearing phases of the criminal justice procedure, which derived from the inquisitorial roots of the legal system. However, that role was supposed to change with the introduction of cross-examination by the two sides: the prosecution and the defence. In addition to the change, the additional role of supporting citizen judges has been added, although notwithstanding this, the previous active role of professional judges seem to have remained in place.

It has been suggested that the existence of citizen judges has produced a change in the professional judges' consciousness. Before the introduction of the citizen judge system, professional judges did not often discuss the meaning of concepts in the law invoked, or the grounds for procedures. However, professional judges now need to explain legal terminology and trial procedures in understandable language for citizen

¹¹⁶ T. Sakamaki, 'What Is Necessary for the Citizen Judge System? [Saiban-in Seido Notameni Naniga Motomerarete Irunoka]', *Hiroba*, 59 (2006), 4–9, 4; T Murase and M Kawamoto, 'Regarding to Deliberation of the Citizen Judge Trial: The Evaluation of the Mock Trials [Saiban-in Saiban No Shinri Nado Ni Tsuite]', *Jurist*, 1358 (2008), 89–95, 91.

judges and Ono has claimed that this has made the professional judges rethink the substantive nature of these factors¹¹⁷.

5.2.2.2 Public Prosecutors and Defence Attorneys

The presentation, preparation and skills of public prosecutors and defence attorneys appears to be more important than before. Considering the Public Prosecutors Tanojiri has showed how the Basic Policy on Citizen Judge Trials, encouraged prosecutors to make considerable efforts in their preparation by producing understandable dossiers and evidence for citizen judges. They were also concerned about getting negative feedback from former citizen judges alleging that the public prosecutors' explanation was hard to understand, an outcome which occurred in 3.8% of cases in the Supreme Court survey of 2013¹¹⁸. A former citizen judge interviewed for this research mentioned that the 'defence attorney seemed to be reluctant to his work and his preparation was poor in comparison with the public prosecutor. The poor presentation skills of the defence attorney had affected the judgment he made'¹¹⁹. Moreover, a former citizen judge attending a post-citizen judge trial meeting in 2016, pointed out the difficulty encountered in understanding the defence attorney's explanation¹²⁰. Akita also studied the defence attorneys' preparation and presentation skills and referred to former citizen judge criticism to the effect that they had difficulty understanding the defence attorney's explanations. 28.8% from the Supreme Court Survey of 2015 and some citizen judges mentioned that defence attorneys seemed unmotivated, and talked in low tones¹²¹. In addition to the introduction of the citizen judges' participation in criminal trials, there was also a series of reforms, which included victims' participation in the trial and the introduction of *Ichibu Shikkoseido*, a system whereby inmates serve shorter periods of imprisonment, innovations which demand changes in defence attorneys' strategies¹²². The Supreme Court survey also showed that 30% of former citizen judges

¹¹⁷ K Ono, 'Citizen Judge System from Professional Judges' Perspective [Saibankan Karamita Saibanin Saibanseido]' (2015) 177 Rule of Law 52–62.

¹¹⁸ T Tanojiri, 'Efforts of Public Prosecution in Citizen Judge Trials [Saibanin Saiban Heno Kensatsu No Torikumi]' (2015) 177 Rule of Law 63–73.

¹¹⁹ Interview, citizen judge, 13/05/2011.

¹²⁰ Kumamoto District Court, 'Meeting Minutes of Knowledgeable Persons of Citizen Judge System' (Kumamoto; Kumamoto District Court), 17.

¹²¹ M Akita, 'Citizen Judge Trials from Defence Attorney's Perspective' (2015) 177 Rule of Law 74–85, 78.

¹²² H Shidehara, 'Criminal Defence of New Era' (2016) 67 Freedom and Justice [Japan] 48.

were not able to understand the reasons for or the context of the defence attorney's questions¹²³. Moreover, the survey shows that the 26.7% former citizen judges noticed that the defence attorneys' way of speaking and the context of his/her comments were hard to understand¹²⁴. This seems to be a transitional problem and suggest the necessity of better training for the defence attorneys to develop their presentation skills.

The capacity of the citizen judge system to handle the increasing number of cases has not been questioned in Japan. The Cabinet Secretariat has claimed that at the time that the CJA came into being in 2009, the recruitment of clerks of the court, public prosecutors assistants, and legal professionals was increased¹²⁵. As a result, the Public Prosecution Office appears to have ensured adequate human resources. Finance and technological capacities were also appropriately well-prepared for in citizen judge trials¹²⁶. In fact, the number of public prosecutors has constantly increased since 1991¹²⁷, and the annual budget for the Public Prosecution Office, except for a decrease in 2013, has increased since 2005¹²⁸.

By contrast, the defence attorneys appear seriously handicapped by a shortage of support staff as well as funding. The White Paper on Lawyers [*Bengoshi Hakusho*] reported that there were 36,415 qualified lawyers in Japan in 2015¹²⁹, and defence attorneys were assigned to 99.5% of criminal cases in the District Courts in 2014¹³⁰. The statistics in the White Paper show that 84.4 % of defence attorneys were court-appointed, while 19.5% were private defence attorneys¹³¹. The cost of court-appointed attorneys is covered by the government¹³² and the professional fee for these attorneys appears to be quite low compared to the fees of private defence attorneys. Some qualified lawyers have suffered from a lack of work because of the judicial reform in

¹²³ The Supreme Court, *supra* note 4, 6.

¹²⁴ *Ibid.*

¹²⁵ Cabinet Secretariat, 'Plans for the Smooth Implementations of the Citizen Judge System [Saibanin Seido No Enkatsuna Jisshi No Tameno Kodoikeikaku]' (2005)
<<http://www.cas.go.jp/jp/seisaku/saiban/kettei.html>> accessed 22 June 2016.

¹²⁶ Interview, public prosecutor, 10/06/2011.

¹²⁷ JFBA, 'The White Paper on Lawyers [Bengoshi Hakusho]' (Tokyo; 2015), 63.

¹²⁸ *Ibid.*, 261.

¹²⁹ *Ibid.*, 42, table 1-1-2.

¹³⁰ *Ibid.*, 101, table 2-1-2-3.

¹³¹ *Ibid.*

¹³² Act related to Criminal Procedure Costs, act no. 73 of 15/05/1991, art. 2(3), Legal Aid Act, act no. 74, 2/6/2004, art. 38(1).

1999, which increased the number of attorneys¹³³. A defence attorney interviewed for this research claimed they had few or poor training opportunities to develop their skills compared to public prosecutors, as well as difficulty in finding time to prepare for citizen judge trials because of their workloads¹³⁴.

The imbalanced capacity between the legal professionals may be due to the heavy demands of the preparation for the pre-trial arrangement conference procedure. A direct consequence of the public prosecutors' elaborate preparations leads to an increase in their workloads and other issues, such as extensions of the pre-trial arrangement conference process and the strengthening of their powers throughout the citizen judge trial procedures.

The general lengthening of the whole citizen judge procedures seems to have led to a focus on efficiency. As Ando points out, streamlining and shortening the pre-trial arrangement conference process as well as the decision-making process through cooperation between the opposing legal professionals are necessary¹³⁵. For example, an opening statement takes normally five to ten minutes if, the factual details of case which are in the written dossiers are omitted¹³⁶.

5.2.3 Impacts on Defendants

Judicial verdicts have not been dramatically influenced by the introduction of the citizen judge system as anticipated beforehand, in particular with regard to guilty or not guilty verdicts. However, there is the possibility that citizen judges' participation could put defendants in a weaker position in the criminal procedure because of the citizen judges' prejudice and bias, emotional rather than logical responses to crime and their general competence – the negative aspects of lay adjudication as discussed in Chapter 2. However, positive aspects could influence the citizen judges panel's decisions. As Malsch pointed out and as also mentioned in Chapter 2, there are numerous advantages of a citizen judge panel, for example, nine adjudicators in comparison with a professional

¹³³ The Judicial Reform Council, 'Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century'.

¹³⁴ Interview, defence attorney, 09/05/2011.

¹³⁵ Ando, *supra* note 79, 28.

¹³⁶ *Ibid*, 31.

judge panel in the bench trial with three professional judges - ¹³⁷. There are also other advantages including community involvement, avoidance of case hardening, the openness and comprehensibility of the criminal justice system ¹³⁸. However, if the democratic functions of citizen judges are achieved, the citizen judges' participation with other developments could lead to equality of arms between the prosecution and defence.

In addition to the existing inequality of arms between the prosecution and the defence because of the gap of in capacity between the public prosecutors and defence attorneys, citizen judges' participation has impacted on the defendants' attitude in court. One obvious change is their clothes and appearance. They are provided with suits, shoes, and ties to wear in the courtroom. The shoes look like proper leather shoes, but actually are slippers in order to discourage them from running away. The tie is also a normal tie attaching by buttons in order to prevent its use for committing suicide. This would appear to indicate, however, that the authorities believe the defendants need to consider their image and appear respectable in front of the citizen judges by being careful about how they look and how they behave in court. In addition if the defendant claims the right to silence, this may negatively affect his or her image, as it suggests that he/she does not feel remorse, although the right to silence is guaranteed by the Constitution¹³⁹ and CCP¹⁴⁰. For example, in 2013 the citizen judge penal reached a death penalty verdict in a homicide case where the defendant used the right to silence, although the appellate court commuted the sentence to life imprisonment¹⁴¹. There is a concern that citizen judges are unable to deliberate the case without the defendant's testimony because the right to silence prevents any meticulous questioning process. As Soldwedel has claimed, it also prevents the victim's feelings being affected by the defendants' remorse, a process which appears to be emphasised in the Japanese

¹³⁷ M Malsch, *Democracy in the Courts: Lay Participation in European Criminal Justice Systems* (Surrey; Ashgate 2009), ch9.

¹³⁸ Ibid.

¹³⁹ Art. 38(1).

¹⁴⁰ Art. 291(3).

¹⁴¹ STCJ System, 'About the Case Where the Death Penalty Sentence Was Overturned in the Tokyo High Court' (2010) <<http://saibanin-iranainko.com/topics/2013/06/20/東京高裁の死刑判決破棄を受けて 黙秘権を思う/>> accessed 1 June 2016.

criminal justice procedure¹⁴². In this respect, he also claimed that the Judicial Reform in 1999 ignored the promotion of the defendant's rights.

A former citizen judge interviewed for this research raised the issue of the lack of concern for foreign defendants. She mentioned that the defendant in the case in which she participated was Cuban. After the trial, she was scared about foreigners, in particular who have different skin tones from Japanese, on the street, remembering the defendant¹⁴³. Although this might also have happened if the defendant was Japanese, nevertheless the danger of discrimination is bound to arise because of the ethnic homogeneity of the Japanese population and the rigid separation amongst majority, 'internal others (minorities)', and 'external others (foreigners)'¹⁴⁴ in the Japanese society. There is a fundamental issue with citizen judge trials involving foreign defendants from the aspect of representative democracy on the grounds that the foreign defendant may not be involved in the community where the trial takes place¹⁴⁵. 1,202 defendants were foreigners and 130 interpreters were called in 2014¹⁴⁶. The major languages used by the interpreters were English, Chinese, and Spanish¹⁴⁷, but the quality of the interpreters was questionable¹⁴⁸. Poor interpretation damages the probative values of the evidence, both statements and hearsay evidence¹⁴⁹.

5.2.4 Impacts on the Citizen Judges

5.2.4.1 Educational Effects and Civic Participation

It was expected that experience of citizen judge trial would be educational and encourage former citizen judges to participate in civic activities¹⁵⁰. Furthermore, the JRC

¹⁴² Soldwedel.

¹⁴³ Interview, citizen judge, 01/06/2011.

¹⁴⁴ P Berman, 'The Globalization of Jurisdiction' (2002) 151 University of Pennsylvania Law Review 311–546, 466.

¹⁴⁵ H Fukurai, 'The Representative Jury Requirement: Jury Representativeness and Cross Sectional Participation from the Beginning to the End of the Jury Selection Process' in Valerie P Hans (ed), *The Jury System: Contemporary Scholarship* (Ashgate Publishing 2006).

¹⁴⁶ The Supreme Court, *supra* note 54, 85.

¹⁴⁷ *Ibid*, 86.

¹⁴⁸ M Mizuno, 'Interpreter-Induced Alterations to Court Speeches and Their Impacts on Impressions of Lay Judges: Fillers, Backtracking and Rephrasing' (2011) 8 Treatises and Studies by the Faculty of Kinjo Gakuin College 139–151.

¹⁴⁹ SN Kaneyasu, 'Foreign Suspects/ Defendants in Japan and Interpreters: Focusing on Written Statements Taken Outside the Court through the Intermediation of an Interpreter' (1999) 11 Forum of International Development Studies 91–108.

¹⁵⁰ JRC, *supra* note 73.

expected that sharing the trial experience with citizen judges as adjudicators would lead to the successful conduct of trials, a closer relationship between citizens and the judiciary and increased citizen judges' understanding of the judiciary¹⁵¹. A Supreme Court survey shows that 2,149 former citizen judges mentioned that their citizen judge duties were educational and 2,552 former citizen judges also mentioned that the courts and trials were more accessible than before the duties¹⁵². It highlights the point noted by a former citizen judge who suggested that the experience of citizen judge duty corrected his/her wrongful image and knowledge about the citizen judge system and the criminal justice system¹⁵³. All former citizen judges interviewed for this research said that, as a result, they began to have more interest in the system as well as Japanese governmental activities¹⁵⁴. Although there has been no empirical research into the relationship between the citizen judges' experience and the enhancement of their political activity, as Corey and Hans point out, there are potentially positive potential effects¹⁵⁵, while Fukurai found enhanced political activity after the experience of a member of the Public Prosecutorial Review Committee¹⁵⁶. The Supreme Court survey showed that 96.1% of former citizen judges believed that the citizen judges' experience was very good or good¹⁵⁷.

5.2.4.2 Mental Stress

There could be three reasons for mental stress arising from the experience of being a citizen judge. First is the possibility of distressing evidence presented in court, the second is the heavy responsibility of being a decision-maker, and the third is the burden of confidentiality about information gained. A former citizen judge was diagnosed as having Acute Stress Disorder after her duties as a citizen judge in 2013, and she claimed her duties violated Articles 13 and 18 of Constitution – the right to avoid bondage, and to life, liberty and the pursuit of happiness¹⁵⁸. A twenty-four hour telephone service was

¹⁵¹ Ibid.

¹⁵² The Supreme Court, *supra* note 39, 184.

¹⁵³ Ibid.

¹⁵⁴ Interviews, *supra* note 34.

¹⁵⁵ Corey and Hans.

¹⁵⁶ Fukurai, 'Comparative Analysis of Popular Legal Participation in Japan and the US: Differential Perceptions of Actual Jurors and College Students on the System of Lay Participation in Law'.

¹⁵⁷ The Supreme Court, *supra* note 36, 8.

¹⁵⁸ The Supreme Court, 24/07/2014, case no.689 of 2014(A).

established for consultation with counsellors to ease former citizen judges' mental stress and the service is free up to five times¹⁵⁹.

Secrecy runs through the entire citizen judge system, from the selection of citizen judges, their deliberation process, and after the trial. Article 101(1) of the CJA says:

No person shall publish the name, address and other information capable of identifying a current citizen judge, alternative citizen judge, citizen judges to be appointed or candidates for citizen judge or other potentially involved persons.

'Publish' in this context means in such a way that the general public would know about the selection of a citizen judge, including media coverage print publication, broadcasting, placing on the Internet and so on. In other words, the names of actual and potential judges must be kept anonymous. However, after the end of the case, publishing the fact that a person served as a citizen judge is not prohibited¹⁶⁰. It seems apparent that secrecy in the citizen judge system as well as the requirements of the contempt of court rules, as stated in the Act Concerning the Maintenance of Order in a Court of Law 1952, focuses on the disclosure of information and the maintenance of the courts' dignity rather than the finality of the verdict. Strict confidentiality has been kept between citizen judges and society. There is a possible punishment of ¥500,000 (£2,616) fine or up to 6 months imprisonment for breaking confidentiality, leading to unease at being selected as a citizen judge. The vagueness of the restrictions imposed on the citizen judges causes anxiety as does the severity of the punishment for breaking confidentiality. However, no former citizen judges or citizen judge candidates have had any sanction imposed on them - including fines - since the start of the citizen judge system in 2009. Therefore, it seems clear that sanctions were created for their deterrent effect.

¹⁵⁹ Japan Legal Support Centre, 'Citizen Judge System'

<http://www.houterasu.or.jp/service/hottopic/faq20110224_2.html> accessed 25 June 2016.

¹⁶⁰ The Supreme Court, 'Q&A' (2015) <http://www.saibanin.courts.go.jp/qa/c6_6.html> accessed 21 July 2016.

5.2.5 Impact on Society

It has been noted that although democratic concepts in the criminal justice system have existed - to some extent - since the jury system was introduced in the early twentieth century, and in particular, since the post-war reforms, there has been no improvement in public education regarding the law and democratic principles. The JRC affirmed that 'the citizen is proactive in administration and judiciary', and citizens should support and realise the justice system operates on their behalf and maintain keep in touch with the operations of the legal profession¹⁶¹. During the five-year preparation period before the introduction of the citizen judge system, the legal institutions, the government, the Japanese Federal Bar Association and the Supreme Court made efforts to promote public awareness of the introduction of the citizen judge system. The Japanese government advertised the system by means of publishing posters and leaflets, broadcasts and television programmes, making videos, making mascots, and holding mock trials and meetings nationwide. Approximately five billion yen (£33million) was spent on the campaign¹⁶².

The apparent aversion which a large number of the Japanese population, bear to the introduction of the citizen judge system is, to some extent, the result of general antipathy to adjudication and the sense of being burdened by it¹⁶³, and that it is the reserved operation of an elite. According to a study by Fukurai and Krooth regarding Japanese people's willingness to serve as citizen judges between 2008 and 2010, most surveys, conducted by the Ministry's office, the Supreme Court, and the National Broadcasting Corporation, indicated a lack of enthusiasm for participating in citizen judge trials. For example, 55.7% of respondents were reluctant to serve as citizen judges; however, two surveys of respondents who were actively involved in governmental work, indicated great enthusiasm for participating in trials¹⁶⁴. Three major reasons were identified as to why people are reluctant to participate in citizen judge trials. Firstly, they

¹⁶¹ JRC, *supra* note 73 ch.I, part 1, 3.

¹⁶² The Board of Audit, 'The Board of Audit of Japan' (*The Implications of the Saiban-in Seido Regarding the Publicity*, 2006) <The Board of Audit of Japan> accessed 12 July 2015.

¹⁶³ The Supreme Court, 'Survey from the Citizen Judge System National Forum' (Tokyo; 2006), 4.

¹⁶⁴ H Fukurai and R Krooth, 'What Brings People to The Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S.' (2010) 38 *International Journal of Law, Crime and Justice* 198–215, 201-4.

feel the mental burden of making decisions that control someone's future (45.1%). Secondly, they have no confidence in their ability to determine a verdict because it is a very difficult task (43%), and thirdly, they worry that they might be threatened by the defendant or people related in some way to the defendant/victim (34.6%). In contrast to the U.S., Japanese people appear to rarely see their personal needs as a reason to be reluctant to serve as a lay adjudicator, as Boatright suggests people's lifestyles and relationships are common reasons for avoiding jury service in the U.S.¹⁶⁵ By contrast, the Japanese criminal justice system has a history of being highly-'professionalised'¹⁶⁶, with limited lay participation and public education, hence lay attitudes are different. Public participation in the criminal justice system is more important for its legitimacy and duration than allegiance to legal professionals, whose directives and influences can seem to relate more to a fair verdict. Public education supporting the concept of lay adjudication and emphasising more community values than professional-driven values is one of the important challenges for the introduction of the citizen judge system.

The first trial under the CJA on 3rd of August, 2009, was an historical event. Approximately 2,300 queued for the 58 public gallery seats at the trial. It is clear that the introduction of the citizen judge system attracted the attention of the public. One aim of the citizen judge system – to increase citizens' awareness of the judiciary¹⁶⁷ - had thus been achieved.

The media attention may well have been motivated to increase public awareness. However, Japan does not allow cameras in the courtroom or the broadcasting of legal proceedings during trials, although camera filming is allowed for two minutes after the judges enter the courtroom and before the opening statement of the court, as stated in the 1999 Application Standard of Camera Coverage in the Courtroom. This remained the case in the citizen judge system, so filming in a citizen judge trial is carried out before the citizen judges enter the courtroom. In January 2008, the Guideline on Japanese Newspaper Coverage of the Citizen Judge System [*Saibanin Seido Kaishi ni atattenno Shuzai Hodo Shishin*] stated that careful consideration when reporting testimony was

¹⁶⁵Boatright.

¹⁶⁶Feeley, 'The Bench, The Bar, and the State: Judicial Independence in Japan and the United States'.

¹⁶⁷ The Judicial Reform Council, 'Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century'.

needed because of the privacy of the persons involved in the cases, and the comments of experts could have a prejudicial influence on readers and audiences.

In Japanese history, there has been a range of legislation restricting freedom of speech, in particular, before the Second World War¹⁶⁸, related to contempt of court¹⁶⁹. It defined interference with the course of justice as an action occurring when the courts and judges deliver their judgement, either in front of them or in another place, and includes verbal abuse, assault, being harassed or when other inappropriate behaviour is used. All such acts interfere with the courts' dignity and sentences of up to 20 days imprisonment or/and no more than ¥30,000¹⁷⁰ (£217.39)¹⁷¹ fine shall be imposed.

Since the introduction of the citizen judge system, a press conference has been hosted by the press club after the end of each case and citizen judges are invited to the conference. Their participation at the press conference depends on their consent. One of the reasons in favour of media coverage of the citizen judge system is to gain public attention and put pressure on citizen judges to consider their duties and responsibilities seriously and without bias¹⁷². The publicity and media coverage has contributed to the openness of the trial system as well as having implications for the citizen judge system. Therefore it is fair to say that since the introduction of the citizen judge system, more democratic values have been injected into the system, with more open justice and an increase in public awareness of trials and broadcast programmes related to the new system. Secrecy related to citizen judges' participation was brought into the citizen judge system in order to protect judicial accountability and privacy.

¹⁶⁸ For example, the Japanese government stated Temporary Seditious Documents Order 1936 [*Fuonbunsho Rinji Torishimari Hō*], Military Secrets Law 1937 [*Gunkihogo Hō*], Military Resource Protection Law 1939 [*Gunyou Shigen Himitsu Hogo Hō*], Temporary Speech Publication Assembly and Association Order 1941 [*Genron, Shuppan, Shukai, Kesshanado Rinji Torishimari Hō*].

¹⁶⁹ Act Concerning the Maintenance of Order in a Court of Law 1952 [*Hōteinado no Chitsujo ni kansuru Hōritsu*].

¹⁷⁰ Ibid, art. 2.

¹⁷¹ £1 = ¥138 at the rate of 17/07/2016.

¹⁷² S Miyazawa, 'Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives' (2014) 42 International Journal of Law, Crime and Justice 71–82, 77.

5.3 Death Penalty Cases and Citizen Judges' Participation

On 18th December 2015, the first death penalty sentences for two inmates on death row made by a citizen judge panel in 2011 and 2012 were carried out¹⁷³. The Minister for Justice declared the following in a press conference, that in relation to the executions of these two inmates who were sentenced by citizen judge trials:

*The majority of the public considered the death penalty was unavoidable for extremely heinous and wicked crimes, thus the abolition of the death penalty is not appropriate*¹⁷⁴.

Is this true? There is presently a serious concern about the death penalty in many countries around the world¹⁷⁵. This is most obvious from the human rights perspective of the defendant¹⁷⁶. These perspectives both require criminal justice policies for the public and there are concerns arising from potential errors in this system as well as human rights abuses¹⁷⁷. On the other hand, the supporters prioritise the values of the preservation of due process and efficient criminal control¹⁷⁸. There was public support for capital punishment, according to Research about the Conscious Understanding of the Role of Citizens and Judges in Sentencing [*Ryokei Ni Kansuru Kokumin to Saibankan No Ishiki Ni Tsuiteno Kenkyu*] in 2009¹⁷⁹. It showed that only 11% of randomly chosen Japanese citizens answered 'I do not agree with capital punishment under any circumstances', while 88.1% answered 'I agree with capital punishment in particular

¹⁷³ M Kaneko, 'Asahi Newspaper Digital: The Execution of the Death Penalty' (2015) <<http://www.asahi.com/articles/ASHDL33XRHDLUTIL00L.html>> accessed 21 June 2016.

¹⁷⁴ Ibid. For the execution of the death penalty sentence the approval of the Ministry of Justice is necessary in accordance with Article 475.

¹⁷⁵ For example, see, M Light and NP Kovalev, 'Russia, the Death Penalty, and Europe: The Ambiguities of Influence' (2013) 29 *Post-Soviet Affairs* 37–41; K Ikuta, 'On Capital Punishment and the Right to Life' (2015) 2 *Ritsumeikan Law Studies* 1–32; S Dando, 'Towards the Abolition of the Death Penalty' (1996) 72 *Indiana Law Journal* 7–20.

¹⁷⁶ M Lynch and C Haney, 'Capital Jury Deliberation: Effects on Death Sentencing, Comprehension, and Discrimination.' (2009) 33 *Law and human behavior* 481–496.

¹⁷⁷ L Ambler, 'The People Decide: The Effect of the Introduction of the Quasi-Jury System (Saiban-In Seido) on the Death Penalty in Japan' (2007) 6 *Northwestern Journal of International Human Rights* 1–23.

¹⁷⁸ PC Ellsworth, RM Bukaty, and others, 'The Death-Qualified Jury and the Defense of Insanity' (1984) 8 *Law and Human Behavior* 81–93.

¹⁷⁹ 'Research about the Conscious of Citizens and Judges in Sentencing [*Ryokei Ni Kansuru Kokumin to Saibankan No Ishiki Ni Tsuiteno Kenkyu*]' (Tokyo; 2009). In this survey, 766 criminal trial professional judges and 1000 citizens who were randomly chosen participated the research.

situations'¹⁸⁰. There are many reasons put forward as to why the punishment should be abolished because of constitutional challenges¹⁸¹, distortion of its deterrent effect¹⁸², and incompatibility with Japanese concept of death¹⁸³.

The death penalty reached by the citizen judge panel cannot be directly regarded as a public endorsement on the practice of the death penalty. Japan has retained the death penalty and the cases in which the public prosecutors demand the death penalty are subject to citizen judge trials, although Harada insisted that the criticism against lenient or severe penalties imposed by professional judges could be relieved by the citizen judges' participation in sentencing¹⁸⁴. According to Yamamoto, a stronger movement towards the abolition of the death penalty would occur because of the introduction of a citizen judge system¹⁸⁵. Between 2009 and 2015, 27 citizen judge trials reached death penal verdicts¹⁸⁶ and the death sentences was carried out on four prisoners in 2012. No execution was carried out, however, in 2013 and 2014¹⁸⁷. 128 defendants sentenced to death were detained to await execution in 2015¹⁸⁸. The long detention period of inmates on death row is a serious concern in terms of human rights and from a financial perspective. The cost of detaining inmates on death row is three to four times as much as an ordinary prisoner, which is 1,367 yen *per diem*¹⁸⁹.

¹⁸⁰ Ibid.

¹⁸¹ Capital punishment contravenes Article 36 of the Constitution prohibiting torture and cruel punishment.

¹⁸² R Weisberg, 'THE DEATH PENALTY MEETS SOCIAL SCIENCE: Deterrence and Jury Behavior Under New Scrutiny' (2005) 1 Annual Review of Law and Social Science 151–170.

¹⁸³ Ibid, 4.

¹⁸⁴ K Harada, *Sentencing in Practice* (Tokyo; Tachibana Shobo 2009), 334.

¹⁸⁵ H Yamamoto, 'An Analysis of the Japanese Public Opinion on the Death Penalty before the Introduction of the Citizen Judge System: About the Grounds for Opposition to the Death Penalty Based on JGSS Cumulative Data' (2009) 17 Kyoto University Sociology Bulletin 67–85.

¹⁸⁶ 'Citizen Judge Trials and Precedents' (2006)

<http://www.geocities.jp/masakari5910/citizen_judge_hanrei_shikei.html> accessed 21 June 2016.

¹⁸⁷ 'Statistics Related to Death Penalty' (2016)

<http://www.geocities.jp/masakari5910/satsujinjiken_shikei12.html> accessed 21 June 2016.

¹⁸⁸ Ibid.

¹⁸⁹ M Kamoshita, *The Treatment of Inmates [Jukeisha Shogu Dokuhon]* (Tokyo; Shogakukan Shueisha Production 2010), 82; H Kato and N Harise, 'The Open of Capital Punishment Execution Place Will Lead to Abolishment of the Punishment?' (2010) <<http://moneyzine.jp/article/detail/187841>> accessed 22 June 2016.

5.3.1 The Nagano Family Homicide Case

The Nagano Family Homicide case concerns three victims killed and approximately ¥ 416,000 (£3,014)¹⁹⁰ stolen in Nagano prefecture in April 2010. Five defendants were accused of robbery-homicide¹⁹¹ and concealing their bodies¹⁹² (See Appendix 7). The Nagano Family Homicide case attracted the attention of the public because Matsubara was the first time that the Supreme Court accepted a death penalty verdict from a citizen judge panel.¹⁹³ The evaluation of this case will focus on the influence of citizen judge participation.

This participation clearly appears to have influenced the speed of trials. The citizen judge trial procedure for Matsubara, from the selection of citizen judges to the declaration of the verdict, was carried out between 11th and 25th March 2011¹⁹⁴, only 15 days in total. The trials of the other two defendants took 47 days and 23 days¹⁹⁵. Before the introduction of the citizen judge system, potential death penalty cases suffered from extensively long hearings. For example, Asahara, leader of the Japanese religious group - Aum Shinrikyo – was the accused in multiple death penalty cases, the first trial opened on 24 April 1996 and on 15th September 2006 and the death penalty verdict was confirmed by the Supreme Court's rejection of his appeal¹⁹⁶. Thus, over 19 years passed between the first trial and the confirmation of the verdict, which would not have happened in a citizen judge trial process.

On the other hand, there was a considerable reliance on written dossier evidence by the citizen judge panel, according to the written judgements of all three death penalty cases in the Nagano Family Homicide proceedings, Matsubara, Ito, and Ikeda. For example, 8 out of 10 pieces of evidence came from the written dossiers of, the public

¹⁹⁰ Supra note 171.

¹⁹¹ Criminal Law, art. 240.

¹⁹² Ibid, art.190.

¹⁹³ 'Nagano Family Homicide Case' (*Sankei News*, 2016)

<<http://www.sankei.com/affairs/news/160329/afr1603290035-n1.html>> accessed 1 June 2016;

'Overturning Capital Punishment Reached by Citizen Judge Panel's Decision' (*Nikkei Asian Review*, 2014) <http://www.nikkei.com/article/DGXNASDG27047_X20C14A2CC1000/> accessed 1 June 2016.

¹⁹⁴ 'Nagano Family Homicide Case' (2016)

<http://www.geocities.jp/masakari5910/citizen_judge_death_penalty08.html> accessed 21 June 2016.

¹⁹⁵ Ibid.

¹⁹⁶ The Supreme Court Decision, 15/09/2006 no.290, 367.

prosecutor and the police in the Matsubara case¹⁹⁷. The other two cases of Matsubara's accomplices had the same tendency, while the defendants' oral testimony and confession statements from the investigative process were also accepted¹⁹⁸. Therefore, apart from the defendants' oral testimony and material proof, the traditional approach towards the use of written dossier evidence remains.

In addition, reviews of three written judgements in the Nagano Family Homicide case, in which the presiding judge was Judge Takagi for all three defendants¹⁹⁹, appear to reveal several common features. According to the Judicial Training Institution founded by the Supreme Court to conduct research into the professional judge culture and provide training for legal apprentices, the written judgment is intended to show *terminus ad quem*, the goal of the first trial²⁰⁰. Moreover, it has five functions. Firstly, the written judgment indicates the legitimacy of the verdict as the conclusion of the judicial process. Secondly, it presents the court's decision to the defendant, defence attorney, and public prosecutor. Thirdly, it provides any objects of deliberation for the appellate court. Fourthly, it clarifies the explanations and grounds for the verdict and offers the basis for respect or criticism of the victims and those related to the case as well as the public²⁰¹. Moreover, in the citizen judge trials, the written judgment has the function of asking the citizen judges to confirm the results and aims of their work.

It is noteworthy that reviews of the three written judgements in the Nagano Family Homicide case, where the presiding judge was Judge Takagi for all three defendants²⁰², revealed three features. The first is that the written judgement in the citizen judge trial consists of the same four concerns as in bench trials: factors constituting the crime, the list of evidence, the application of the law and regulations, and the reasons for the sentence. This is in accordance with Article 335(1) of the CCP, as mentioned in Chapter

¹⁹⁷ Written judgement, precedence no. L06650199, the list of evidence.

¹⁹⁸ Written judgement, precedence no. L06650755, L06650789, the list of evidence.

¹⁹⁹ Nagano District Court, 2011 (平成 22 年) (わ) no.96.

²⁰⁰ Judicial Training Institution, *Written Judgements at the First Trial and Appeal Trials for the Citizen Judge Trials [Saibanin Saiban Ni Okeru Daiisshin No Hanketsusho Oyobi Kososhin No Arikata]* (Tokyo; Hosokai 2009), 7.

²⁰¹ Ibid.

²⁰² Nagano District Court, 2011 (平成 22 年) (わ) no.96.

3, in order to focus on the facts of the crime and important points at issue. The second feature is that all three written judgments concluded with the same wording of the text:

*In conclusion, by evaluating the nature of the nature, motivation, and situations of a crime, the number of victims, the damage done to the victim, the social influences, the age of the defendant, his/her criminal record, and condition after the crime, all indicate the extent of the criminal responsibility of the defendant, although the defendant's current more positive situations and remorse have been taken account of as far as possible, the fact remains that the death penalty is unavoidable*²⁰³.

The wording of this conclusion highlights the fact that in order to apply the death penalty, it should be 'unavoidable' in the light of the nature, motivation, and character of the crime, the number of victims, the victim impact, social influence, age of the defendant, his/her criminal record, and condition after a crime, which are applied by the 'Nagayama criteria' as well as the new framework after the Hikari Prefecture Mother and Daughter Homicide case²⁰⁴. The Nagayama criteria refer to the nine factors needed to reach a death penalty judgment. They are the extreme and cruel measures used to kill in the light of the nature, motivation, and context of a crime, the number of victims, the damage or mutilation of the victim, social influence, the age of the defendant, his/her criminal record, and condition after the crime.²⁰⁵ In addition, the judgement of the Hikari Prefecture case declared that 'there is no way to avoid the death penalty'²⁰⁶. The framework means that if the case fits the Nagayama criteria, the punishment should be the death penalty, and the exception is the avoidance of the death penalty. Since 1997 when the criteria were set down, the law had been increasingly more severe until the introduction of the citizen judge system. The criticism of the lenient or severe penalties imposed by the professional judges could be deflected by the citizen judges' participation in sentencing²⁰⁷. Sentencing is in flux because it should be influenced by

²⁰³ Written judgements.

²⁰⁴ K Horikawa, *The Standards for Death Penalty: The Results of Nagayama Case* (Tokyo; Nihon Hyouron Sha 2009), ch.4, 274.

²⁰⁵ Nagayama case, ch. 4, 274.

²⁰⁶ The defendant was under 18 years old and the age cannot be an avoiding factor for the death penalty.

²⁰⁷ K Harada, *Sentencing in Practice* (Tokyo; Tachibana Shobo 2009), 334.

the social and criminal situations, which change with the times²⁰⁸. The abolition of the death penalty was expected to come nearer with the introduction of the citizen judge system or reduce death penalty sentencing. However, since the citizen judge system was introduced, fourteen people were given death penalty sentences, and only in one potential death penalty case was the defendant acquitted²⁰⁹. Although Masumoto²¹⁰ and other researchers claim that the 'Nagayama criteria'²¹¹, while comprehensive, are not actually put into practice as criteria to be satisfied, nevertheless, it seems that they are have been applied in citizen judge trials just as much as by professional judges.

Lastly, with the application of the criteria, the context of the written judgement is simpler and easily understandable by explaining the fact of crime in chronological order. For example, in the written judgment of the Matsubara defendant case,

*The defendant (Matsubara) made C fall into a comma, but he believed that he had to kill C's wife (G) to complete the killing of C because she concerned about C's condition. Then D (another defendant) put a rope around G's neck from behind and threw her down on the floor, while, D and E (another defendant) each took an end of the rope and pulled. As a result, G died from asphyxiation ...*²¹²

The explanation seems to be used with a story-telling style without complex words and legal terminology. Moreover, the written judgment refers to 'a bereaved family meeting with the three remains of the dead mentioning the victims' family memories and the loss of a husband, son and daughters and anger at the defendants; moreover, the bereaved family wanted capital punishment.'²¹³ It also mentioned the rejection of the defence attorney's claim that the defendant had opposed the marriage to his girlfriend and had been short of money for many years, and this long-term grudge against the

²⁰⁸ Ibid, 338.

²⁰⁹ The Supreme Court, supra note 14, 82.

²¹⁰ T Masumoto, 'How Should the Death Penalty System Be Implemented in the "Saiban-in" System?' (2010) 38 Nara University Journal 39–49, 48.

²¹¹ 'Nagayama criteria' is a guideline to evaluate if the case does not avoid the death penalty or not. The criteria are: 1) the severity of the crime; 2) the defendant's motive; 3) the cruelty and heinousness of the murder technique; 4) the number of victims (normally more than); 5) the feelings of the victims and survivors; 6) the societal impact of the crime; 7) the age of the defendant; 8) whether the defendant has criminal record; 9) the regrets of the defendant after the crime.

²¹² Written judgement, LO6650199, the facts of a crime, 2.

²¹³ Ibid.

victim was enough for him to avoid capital punishment²¹⁴. The contents of the written judgment clearly appear to be influenced by the discussions between members of the citizen judge panel, the timeline of the crime, logic of the extenuating circumstances for the crimes claimed by the defence and the final sentence.

Although a focus on specific members of the adjudicator panel in the written judgment is unreasonable, it is preposterous to regard the decision of citizen judge panel as public support for the death penalty. Koike points out in death penalty cases reached by citizen judge panel that appellate judges do not show particular respect for the citizen judges' panel decisions²¹⁵. In fact, the death penalty verdict on defendants in the Ikeda trial in the Nagano Family Homicide case was commuted by the High Court to life imprisonment and finalised by the Supreme Court in 2014 because he was not involved in the planning of the crime. Therefore, the death penalty was excessive²¹⁶. In addition to the Nagayama Family Homicide Case, some drug related cases, such as the Chocolate Tin Case²¹⁷, Mexico Case²¹⁸, Penang Case²¹⁹, and Kasai Airport Case²²⁰, raised similar arguments concerning the citizen judge panels' decisions and the 'belief-priority principle' tends to be the focus rather than the 'logic and empirical' principle²²¹. In addition, the logic and experience of professional judges was more heavily emphasised than the validity of the citizen judges' decisions²²². In Oshima's study evaluating the citizen judge panels' deliberations before an appeal, presented five different examples after careful consideration of their deliberations. The examples include errors in taking account of factors relating to sentencing, vague and inappropriate reasoning in the written judgements, and obvious different sentencing patterns compared to other, similar cases²²³.

²¹⁴ Ibid.

²¹⁵ S Koike, 'Case Study' (2014) 14 Criminal Law Journal [Japan] 78–84, 82. The Supreme Court, 733 (ㄿ) 2011, 20/06/2013.

²¹⁶ Tokyo High Court, 2014(ㄿ) no.332.

²¹⁷ The Supreme Court 13/02/2014, no. 66, 4, 482.

²¹⁸ The Supreme Court 16/04/2013, no.67, 4, 549.

²¹⁹ The Supreme Court 21/10/2013, no. 67, 7, 755.

²²⁰ The Supreme Court 10/03/2014, no. 68, 3, 87.

²²¹ Oshima, *supra* note 103, 381-2.

²²² Ibid, 383.

²²³ Ibid, 390.

Moreover, in the selection process, the citizen judge candidates are asked if they would decide not to vote for a death penalty notwithstanding any of the evidence and/or discussions and if he/she says yes, the candidates will be questioned. As Honjo pointed out, this would give an impression to the candidates that opposition to the death penalty was not good and the question would influence their fact-finding²²⁴. From a representative democratic perspective, the exclusion of people who are against a death penalty is questionable because the representation of death-penalty opponents should be included as a part of community. In addition, the citizen judge trials are based on a majority vote and therefore, the citizen judges or professional judges, who believe that the defendant is innocent, must participate the vote to decide a death penalty case. As Shert argued, if four out of nine members of the citizen judge panel think that there is another option than the death penalty, this would not satisfy the criterion that the death penalty is unavoidable²²⁵.

The evaluation of the Nagano Family Homicide Case and issues relating to death penalty sentencing as well as citizen judge panels' decisions being overturned by appellate courts seem to reveal impediments to citizen judges' participation. Adherence to the sentencing guidelines and judicial controls applied to the citizen judge procedure inhibits how actively citizen judges can participate or how submissive they must be. Death penalty cases tried by citizen judge panels could lead to the risk mentioned above of minimal participation. Moreover, Sher criticised the unanimity required of citizen judges' verdicts as leading to less citizen confidence (the herd instinct), less understanding, involvement and lack of full deliberation countermining citizen judges' common sense influence on the verdicts²²⁶. In addition, Masumoto points out the difficulty of the death penalty cases for citizen judges remaining 'neutral'²²⁷. As Steiner *et al* claim, there is a tendency for death penalty jurors' folk knowledge to affect their ability to reach death penalty decisions, while the death penalty case decision-making process is very particular and decisions should be made based on a 'reasoned moral

²²⁴ T Honjo, 'Due Process in Criminal Trials in Citizen Judge Era [Japanese]' (2010) 64 Criminal Defence 70–75, 73.

²²⁵ EM Shert, 'Death Penalty Sentencing in Japan under the Lay Assessor System: Avoiding the Avoidable Through Unanimity' (2011) 20 Pacific Rim Law & Policy Journal 635–658, 649.

²²⁶ *ibid.*

²²⁷ Masumoto, *supra* note 210.

choice' between life and death²²⁸. Moreover, citizen judges are asked to deliberate their moral positions in connection with their 'responsibility to the collective to decide on appropriate punishments for defendants'²²⁹. It is likely that there is not only a failure of citizen judge participation to have any active influence in death penalty cases, but there also needs to be a consideration of how the function of citizen judges can contribute to fair trials. As long as any doubts or concerns exist about citizen judges' participation in the death penalty trials, it is submitted that they should be excluded from the citizen judge trials.

5.4 The Successful Citizen Judge System

5.4.1 The Success of the Citizen Judge System

The satisfaction level of citizen judges with their duties and decisions seem to be closely related to their confidence in them. Moreover these feelings appear to be also connected to satisfaction and confidence with the citizen judge system as a whole. In the interviews I conducted for this research, the same question was asked to all 18 interviewees at the end of the interviews: 'Do you think the citizen judge system has been successfully put into practice?' The question aimed to inquire about their own experience with the citizen judge system, and the open question included views of other people's performance - co-members of citizen judge panels, professional judges, public prosecutors, defendants, defence attorneys, and the court staff. All the interviewees in this research answered that they believed that the citizen judge system was successful in practice. Although the question was very open and vague, the positive answers represent the current situation: the citizen judge system in practice seems to have fulfilled its expectations.

²²⁸ BD Steiner, WJ Bowers and A Sarat, 'Folk Knowledge as Legal Action: Death Penalty Judgments and the Tenet of Early Release in a Culture of Mistrust and Punitiveness' (1999) 33 *Law & Society Review* 461–505, 497.

²²⁹ SB Kaufman, 'Citizenship and Punishment: Situating Death Penalty Jury Sentencing' (2011) 13 *Punishment & Society* 333–353. 333.

All respondents answered that the citizen judge system was successful. There were eight different reasons given to explain why they thought it has been ‘successful’ (see table).

Table: Reasons why citizen judge system is successful

	Former Citizen Judges	Professional Judges	Public Prosecutors	Defence Attorneys	Law- makers	total
Community Involvement	1			2		3
Smooth Introduction of the new citizen judge system		2	1	2		5
Gathering public awareness					1	1
Satisfaction with citizen judges' (own) work	2					2
Education of citizen judges and the public	1				1	0
Confidence in the citizen judge system	1					1
Increased confidence in the criminal justice system						0
Bringing fresh insight into the criminal justice system		1		2		3
Other			1			1
Total	5	3	2	6	2	

Among the most frequent reasons mentioned by respondents was its smooth introduction. One lawmaker, who was a member of the Judicial Reform Council, felt that the smooth introduction of the citizen judge system was the result of the long-term

efforts by many people involved in the judicial reform and the introduction of the system inside and outside of the judiciary²³⁰. In addition, legal professionals felt the same, and they have been actively involved in the preparatory activities before the introduction. One public prosecutor indicated that nothing had been changed although he considered the citizen judge system as successful. He also believed that there was no problem with the bench trial and his work did not change compared to the pre-citizen judge system²³¹.

A former citizen judge interviewed for this research answered that 'it was the first time for me that I was a part of a community. I thought I would decide what I could do to make the community better.' One of the defence attorneys also felt that community involvement is important in the court in particular where it seems to be isolated from the community and it was in the bench trials²³². A citizen judge claimed that after the experience, 'I think I am kinder to others in the community although I also worried for young girls walking on the street at night because my case was a rape case.'²³³

None of the respondents felt that educating the citizen judge and the public and the increase in confidence in the criminal justice system could be included amongst the reasons for the success of the citizen judge system, although respondents raised these as advantages.

As an additional question, all respondents were asked the question 'do you think the citizen judge trials are better than the bench trials?'

	Former Citizen Judges	Professional Judges	Public Prosecutors	Defence Attorneys	Law- makers	total
Yes	3	2	0	4	1	10
No	1	1	1	0	0	3
I do not know	1	0	1	2	1	5

²³⁰ Interview, lawmaker, 17/06/2011.

²³¹ Interview, public prosecutor, 10/06/2011.

²³² Interview, defence attorney, 28/04/2011.

²³³ Interview, citizen judge, 01/06/2011.

According to a number of respondents, participation by citizen judges is a desirable outcome for both citizen judges and professional judges. As one of the professional judges stated, 'I have often found so many things though communication with citizen judges and preparation for the citizen judge trials.'²³⁴ Legal professionals tend to focus on achieving their duties and care immensely about whether their explanation was easily understandable. The discussion topics in meetings between former citizen judges, professional judges, public prosecutors, and defence attorneys in District Courts often related to this issue.

In addition, the satisfaction of citizen judges with their duties and decisions seem to be closely related to their confidence in them. Moreover, these feelings appear to be also interconnected with their satisfaction and confidence with/in the citizen judge system. This is similar tendency within Matthews, Bridgeman, and Briggs analysis of the attitudes of English jurors. This suggested the importance of four inter-related but distinct internal processes: perceptions, understanding, confidence, and satisfaction supported by sub-factors, such as technical, organisational, procedural and facilitation factors²³⁵. All former citizen judges interviewed for this research were satisfied and had confidence with/in their understanding ability, active participation, and independent decision-making ability, while they also had satisfaction and confidence with/in the citizen judge system and criminal justice system. A former citizen judge said:

During the hearing, the defendant maintained his right to silence, but the former citizen judges asked the question: 'The other accomplice is younger than you, but why did you refer to him with an honorific title (san)?' In Japan, it is normal to use an honorific titles when younger people address older people. The former citizen judges believe that this question triggered the defendant into making a statement and that question would not have been asked by professional judges. Moreover, the question impacted on the verdict²³⁶.

²³⁴ Interview, professional judge, 25/05/2011.

²³⁵ R Matthews, DL Bridgeman and D Briggs, 'Jurors' Perceptions, Understanding, Confidence and Satisfaction in the Jury System : A Study in Six Courts System' (London; 2004).

²³⁶ Interview, citizen judge, 13/05/2011.

The citizen judge had strong confidence in what he did and was very satisfied with it. On the other hand, a professional judge mentioned that 'to be honest, it is not difficult to manipulate citizen judges without their knowing, if I want to do it.'²³⁷ The overestimation of lay adjudicators regarding their abilities and qualifications seems to be an international tendency, as research in America²³⁸ and Australia²³⁹ shows. In particular, Ivkovic pointed that a greater tendency of overestimation was prevalent in the mixed judge model²⁴⁰. This concern could be outweighed by their attentiveness and honesty in their approach to their duties as well as through efforts of legal professionals to provide an environment in which citizen judges understand information and actively participate.

The majority of former citizen judges who answered the Supreme Court survey gave positive feedback about the courts' treatment of them. 73.9% of respondents felt that the court's treatment including the court staff's attitudes, the provision of information from the courts, and its building and equipment was appropriate²⁴¹. The results of the questionnaire survey agree with the citizen judges interviewed for this research, who also recognised the court staff's politeness and attention to citizen judges' needs. One of them commented on the well-equipped court facilities, such as the barrier-free architecture and the equipment in the deliberation room²⁴². The continued development of court facilities could improve citizen judges' motivation and satisfaction. However, this costs money that might be better spent on making sure all courts provide a minimum level of equipment. There are gap in the level of quality of court facilities between different courts. Moreover, in addition to the well-organised architecture, the courts encourage citizens with have physical impairments to participate and serve as citizen judges. The National Federation of Organisations for Disabled Persons conducted a survey of about 60 District Courts' facilities for disabled persons in 2011. The survey

²³⁷ Interview, professional judge, 14/05/2011.

²³⁸ NJ King, 'How Different Is Death-Jury Sentencing in Capital and Non-Capital Cases Compared' (2004) 2 Ohio State Journal of Criminal Law 195–214.

²³⁹ J Goodman-Delahunty, N Brewer, and others, 'Practices , Policies and Procedures That Influence Juror Satisfaction in Australia, No.87', vol 2007 (2007), 10.

²⁴⁰ SK Ivkovich, 'An Inside View: Professional Judges' and Lay Judges' Support for Mixed Tribunals' (2003) 25 Law & Policy 93–122, 107.

²⁴¹ The Supreme Court, 'Result Report of Questionnaire Data from Former Citizen Judges in 2015', supra note36, 53.

²⁴² Interview, citizen judge, 12/05/2011.

showed that all the courts had toilets for special needs and braille blocks and 98.3% had elevators²⁴³. It also found that the courts were in close communication with organisations such as a sign language interpreter organisations and constantly checked on facilities in order to provide appropriate support for disabled people²⁴⁴. No survey has been published about the actual number of the people with physical impairment selected as citizen judges.

In addition to the court staff and appropriate courts' facilities, the majority of former citizen judges also gave positive feedback about the professional judges' treatment of them. A respondent to the Supreme Court survey noted that he/she had thought the courts were austere and bleak places, but the professional judges were friendly and approachable, while the other respondents said the professional judges respected the citizen judges' opinions and this led them to express their opinions honestly²⁴⁵. A former citizen judge interviewed for this research expressed how friendly and respectful she found the professional judges and she also mentioned that a professional judge brought a cake made by his wife and shared it during the break²⁴⁶. On the other hand, there are some negative comments about the lack of professional judges' encouragement of citizen judges participation. For example, a respondent to the Supreme Court survey claimed citizen judges were not able to volunteer comments and felt a dilemma if he/she couldn't express his/her opinions in only a few sentences only when the professional judge asked the citizen judges his/her views²⁴⁷. The Supreme Court survey collected 192 positive and 55 negative pieces of feedback results regarding professional judges and court staff attitudes²⁴⁸.

5.4.2 Continuing Support and Reforms

5.4.2.1 Financial Support

Financial support by the government is a contributing factor affecting their being able to perform their functions. Adding to the large amount of financial support for publicity during the preparation period, a subsequent decrease in the budget for the practice of

²⁴³ National Federation of Organisation for the disabled Persons, 'An Investigative Report on People Who Have Physical Impairment Participation to Citizen Judge System' (Tokyo; 2011), 4.

²⁴⁴ Ibid, 7.

²⁴⁵ The Supreme Court, *supra* note 36, 209.

²⁴⁶ Interview, citizen judge, 01/06/2011.

²⁴⁷ *ibid*, 209.

²⁴⁸ *Ibid*.

citizen judge trials has been problematic. The Supreme Court estimated the annual expense would be 32 hundred million yen (£1720million) including citizen judges' daily stipends and transportation fares²⁴⁹. The budget for judicial reform has decreased since 2009 when the citizen judge system was started²⁵⁰. This seems to be an apparent reaction to the common accusation of the expensive cost of lay adjudication trials, as pointed out in Chapter 2. Comparing before and after the introduction of the citizen judge system, the expenditure of the courts decreased from 307 million yen to 306 million yen between 2004²⁵¹ and 2013²⁵², although it increased when the citizen judge system was introduced²⁵³. The budget for the courts has also decreased, although the preparation for the courts' facilities, such as the maintenance of equipment in the courtrooms and the deliberation rooms is a necessary expense. Every budget for the courts²⁵⁴ and the police²⁵⁵ has increased. Financial stability for the practice of citizen judge trials will be important, and this Japanese experience seems to demonstrate that the practice of a lay adjudication system is not costly.

5.4.2.2 A Government Motivation for Democracy

The Japanese government is a constitutional monarchy under the 1947 Constitution. It contains 47 prefectural and municipal divisions divided into three branches: the executive (the Cabinet), legislative (the Diet), and judicial branches (the courts)²⁵⁶, and the Emperor who has limited and primarily ceremonial duties. Japan has a parliamentary system of government consisting of the House of Representatives and the House of Councillors. The Liberal Democratic Party (LDP) [*Jiyu Minshu To*] was the dominant party

²⁴⁹H Fujita, *The Understandable Structure of the Citizen Judge System and the Criminal Procedure [Yokuwakaru Saibanin Seido to Keiji Soshou No Shikumi]* (Tokyo; Sanshu Sha 2008), 60.

²⁵⁰Ministry of Justice [Japan], 'The Changes of the Budget for the Judicial Reform' (2011) <<http://www.moj.go.jp/content/000077784.pdf>> accessed 9 September 2015.

²⁵¹Courts in Japan, 'Settlement of Accounts in 2004' (2005) <http://www.courts.go.jp/vcms_lf/H16kessan.pdf> accessed 9 September 2015.

²⁵²Courts in Japan, 'Settlement of Accounts in 2013' (2014) <http://www.courts.go.jp/vcms_lf/H25kessan.pdf> accessed 9 September 2015.

²⁵³Courts in Japan, 'Settlement of Accounts in 2009' (2010) <http://www.courts.go.jp/vcms_lf/H21kessan.pdf> accessed 9 September 2015.

²⁵⁴Tomiyasu Budget Examiner, 'Points for the Budgets of 2015 for Economic Trade, and Industry, Environment, Judiciary and the Police' (Tokyo; 2015), 23.

²⁵⁵*Ibid*, 26.

²⁵⁶Prime Ministry of Japan and His Cabinet, 'Fundamental Structure of the Government of Japan' (2007) <http://japan.kantei.go.jp/constitution_and_government_of_japan/fundamental_e.html> accessed 9 September 2015.

for more than 46 years, and because of this one-party domination, researchers have had doubts about the level of actual democracy in Japan²⁵⁷. A coalition government between the Democratic Party [*Minshuto*] and the People's New Party [*Kokumin Shinto*] was formed in 2010. After several changes, a coalition government between the LDP and *Komeito* has retained since 2012. The centralisation of power remains one of the greatest impediments to judicial reform efforts in Japan, undermining the implementation of democratic development policies promoting the decentralisation of the government through government-led judicial reform²⁵⁸. The Japanese history of centralised government has continued even after the establishment of the Act Regarding the Maintenance of the Decentralisation of Power in 2000²⁵⁹. The gaps between the heated public arguments and the aggressive adaptation of a bill by the parliament will be seen as far from being a democratic approach.

However, the Japanese government led the debate on the introduction of the citizen judge system with a massive positive publicity campaign, spending large amounts to enhance public education and awareness²⁶⁰. This is evidence of the government's positive motivation for having a citizen judge system as well as its outcomes, which are to democratise the criminal justice system. In other words, Japan is a liberal constitutional democracy supported by government branches. Moreover, because of the establishment of the citizen judge system, the Japanese government is regarded as having taken a political step to democratise the judicial system²⁶¹.

²⁵⁷JAA Stockwin, 'Reshaping of Japanese Politics and the Question of Democracy' (2002) 9 Asia-Pacific Review 45–59, 49.

²⁵⁸J McClanahan, 'Citizen Participation in Japanese Criminal Trials: Reimagining the Right to Trial by Jury in the United States' (2011) 37 North Carolina Journal of International Law and Commercial Regulation. 725–792, 760-1.

²⁵⁹ Act about the Maintenance of Decentralisation of Power, Act no. 87 of 16/7 2000. The current government faces a range of security threats, in particular, the government's security policy relating to the new defence guidelines of the US-Japan Security Treaty of 1951, which will enhance the right to the collective defence of the Self-Defence Forces. See A Mohammed, 'U.S., Japan Unveil New Defense Guidelines for Global Japanese Role' (*Reuters*, 2015) <<http://www.reuters.com/article/2015/04/28/us-usa-japan-defense-idUSKBN0NI08O20150428>> accessed 9 September 2015.

²⁶⁰Z Corey and VP Hans, 'Japan's New Lay Judge System: Deliberative Democracy in Action' (2010) 12 Asian-Pacific Law & Policy Journal 72–94, 73.

²⁶¹Z Wang and H Fukurai, 'Popular Legal Participation in China and Japan' (2010) 38 International Journal of Law, Crime and Justice 236–260, 237.

5.4.2.3 Support by Legal Institutions and Legal Professionals

After the lay adjudication's introduction, support from each legal institution has grown. However, there are still some local organisations and individual legal professions that disagree with the citizen judge system²⁶². The Public Prosecutors Office and the Ministry of Justice²⁶³, the Supreme Court²⁶⁴, and the JFBA²⁶⁵ have established a website and review committees²⁶⁶ for information about the citizen judge system.

The Supreme Court set up an advisory panel of well-informed independent personalities regarding the implications of the citizen judge system [*Saiban-in Seido no Unyō ni Kansuru Yushikishakondankai*], consisting of eight members, five scholars, two defence attorneys, a public prosecutor and a journalist. It held meetings with experienced citizen judges in the District Courts in forty seven prefectures as well as discussion meetings participated in by citizens, legal professionals, and experienced citizen judges. In addition, the JBFA published a proposal for the reform to the citizen judge system including expanding the cases tried by the citizen judge trials, reform of evidence rules for disclosure, and the introduction of the dichotomised deliberation procedure [*Tetsuzuki Nibun Seido*], which is the idea that culpability and sentencing should be deliberated separately²⁶⁷. Moreover, the Citizen Judge Network [*Saiban-in Network*] has constantly provided information about the citizen judge system, organised discussion meetings amongst former citizen judges and defence attorneys, and gathered citizen monitors to observe citizen judge trials²⁶⁸.

²⁶²They did demonstration marches to present their disagreements for the citizen judge system towards the Supreme Court. See, No SaibaninSeidoInko Web Movement [Saibaninseido ha iranaiinko no web daiundo]; <http://saibanin-iranainko.com/>; No SaibaninSeido Movement [Saibaninseido ha iranaiDaiundo], <http://no-saiban-in.org/>; Takayama Law Firm, <http://www.takayama-law.com/saiban-in.html>.

²⁶³See 'About the Citizen Judge System' <http://www.moj.go.jp/keiji1/saibanin_index.html> accessed 9 September 2015.

²⁶⁴ See <http://www.saibanin.courts.go.jp/>

²⁶⁵ See, http://www.nichibenren.or.jp/ja/citizen_judge/index.html

²⁶⁶For example, Adversary panel of Experts regarding the Citizen Judge System [Saibaninseido no UnyonikansuruYusikishaKondankai] by the Supreme Court; See, http://www.courts.go.jp/saikosai/iinkai/saibanin_kondan/index.html;

²⁶⁷ JFBA, 'A Proposal for the Reform of Citizen Judge System After 3 Year of Its Introduction' (2012) <http://www.nichibenren.or.jp/activity/document/opinion/year/2012/120315_5.html> accessed 21 June 2016.

²⁶⁸ Saiban-in Network [Saiban-in Netwaku].

The overall number of citizen judge trials is low and may continue to decrease because of the reforms to the CJA in 2015. The amendment to the CJA states that broad-based and lengthy cases will be excluded from being tried in citizen judge trials, although it does not clarify how many days would make a trial too long to be a citizen judge trial. The 2015 amendment will thus inevitably lead to a decrease in the number of citizen judge trial cases. As mentioned in Chapter 4, the small number of lay adjudication trials are common features in other lay adjudication systems²⁶⁹, but the long-standing practice of lay adjudication trials greatly influences not only the development of the system itself but also the relationship between the citizens and their government²⁷⁰. Therefore, it is important to maintain the practice of citizen judge trials and make efforts to develop the system, as the international historical peaks and valleys in the practice of lay adjudication systems indicate that these are a common occurrence²⁷¹. Moreover, there has been a gradual decrease in the motivation to become a citizen judge and the appearance rate of new citizen judge candidates over the last seven years. Improving public understanding and hence motivating the public to take up citizen judge' duties is necessary in line with encouraging democratic principles within society.

What can be concluded from these findings? This research has revealed the significant effect of the introduction of the citizen judge system on democratising the criminal procedures as well the fundamental level of public involvement in the legal system now through citizen judge participation supported by the careful support of the judiciary. An important finding in this research concerning the proposed evaluative criteria is that the Japanese government has somewhat contradictory policy aims for the criminal justice system in maintaining both its bureaucratic authority while democratising the system. In addition, it could be said that the enhancement of citizen judges' participation while preserving secrecy in the citizen judge system led by confidentiality, is also stressful and can seem to be in conflict.

²⁶⁹ Lloyd-Bostock and Thomas, 'Decline of the "Little Parliament": Juries and Jury Reform in England and Wales'.

²⁷⁰ *ibid.*

²⁷¹ The historical ups and downs of various lay adjudication systems mentioned in Chapter 1 and 2. Also, for example regarding the English Jury history, see, JS Cockburn, *A History of English Assizes, 1558-1714* (Cambridge; Cambridge Univ Press 1972); S Anand, 'The Origins, Early History and Evolution of the English Criminal Trial Jury' (2005) 43 *Alberta Law Review* 407–432.

Despite the legal professionals' efforts and cooperation, it will be important to open empirical research access to the citizen judge system for academic purposes. The secrecy which runs through the citizen judge system is significant because of the twin rationales for protecting citizen judges' privacy and judicial accountability. Leakages of information in lay adjudicators' deliberation can endanger 'the finality of verdicts' and damage public confidence with not only the verdicts but also the procedures and even the existence of lay adjudication²⁷². However, the restricted citizen judges' participation and the judicial control over citizen judges' participation in terms of procedural and practical circumstances seem to be necessary to be observed by citizens separated from legal professionals and the government. In England, Lord Justice Auld supported 'the need to know argument' regarding the English jury system and recommended the enablement of research into the relationship between the information provided and individual juries' deliberations²⁷³. Accessible data relating to the citizen judge system has been assembled by the Supreme Court, and academic researchers have relied on simulation research ²⁷⁴ or small qualitative research ²⁷⁵ with limited budgets and researchers. Confined research access and limited data conducted by the Supreme Court will hinder attempts to address existing problems and the overall development of the citizen judge system.

Conclusion

There are certainly some absolute and positive points to note in relation to the introduction of the citizen judge system as well as its practice. The citizen judge system enabled direct civic participation into the Japanese criminal trial procedures and has been complimented by the majority of former citizen judges and legal profession judges who experienced citizen judge trials and who have described the citizen judge system as 'successful'. There are entirely understandable reasons for these favourable reactions

²⁷² J Jaconelli, *Open Justice: A Critique of the Public Trial* (Oxford; Oxford University Press 2002), 241.

²⁷³ A Auld, 'Review of the Criminal Courts of England and Wales' (London; 2001), 168.

²⁷⁴ M Naka, Y Okada, and others, 'Citizen's Psychological Knowledge, Legal Knowledge, and Attitudes toward Participation in the New Japanese Legal System, Saiban-in Seido' (2011) 17 *Psychology, Crime & Law* 621–641.

²⁷⁵ M Aichi, 'On the Saiban-in System in Japan' (2004) 38 *Chukyo Hogaku* 501–530.

to the smooth introduction and practice of the citizen judge procedures because the judiciary cooperated and made an intense effort to make the introduction successful. Furthermore, the citizen judge system succeeded in establishing a new legal framework which has helped to secure direct civic participation in serious criminal cases in Japan, which did not exist before at all.

Moreover, applying the evaluative criteria proposed in this thesis, the citizen judge system is a successful lay adjudication system in the light of the representativeness of the citizen judge panel as well as the citizen judges' attentiveness to the procedures in respect of their competence to understand information and the independence of their decision-making. At the same time, their attentiveness and competence seems to be based on heavy reliance on the professional judges within the collaborative structure of the citizen judge panel. There are concerns that powerful judicial control over citizen judges' participation can lead to 'sham' citizen judge participation, manipulated by professional judges.

Furthermore, the shift from the inquisitorial to the adversarial approach in the criminal trial procedure was achieved by introducing the principles of orality and immediacy. However, the introduction of citizen judges has not impacted on the conviction rate or sentence ranges. Moreover, adherence to the traditional legal culture has led to the role of professional judges remaining central, although the existence of citizen judge in the citizen judge panel has influenced the consciousness of professional judges, to some extent. The presentation skills of public prosecutors and defence attorneys have been focused on supporting citizen judges' understanding, and there is a capacity gap between the two, possibly resulting in inequality of arms between them. This also could lead defendants to be placed in weaker positions.

Many of problems surrounding the citizen judge system relate to issues which are part of the wider judicial, social, and political dilemmas affecting criminal procedures in Japan. Its careful and detailed judicial administration emphasises organised and legal professional-centred procedures rather than enhanced citizen judges participation but has nevertheless succeeded in allowing sufficient participation to enable the citizen judge system to function as a part of an appropriate democratic institution.

However, the research also raised some of the less attractive aspects of the citizen judge system, for example, that citizen judges' participation can risk being controlled by the judiciary because of the lack of free discussion and deliberation due to pressures by and on the professional judges. In this respect, citizen judges' participation is limited to restricted collaboration and transparency derived from the characteristics of long-standing issues in the Japanese criminal procedures, strong judicial control and lack of democratic principles.

Most citizen judges indicated that their experiences were positive in my interviews, as the Supreme Court's survey also shows²⁷⁶. They also referred to professional judges' pleasant and friendly attitudes in discussing and deliberating both in the courtroom and deliberation room²⁷⁷. It is likely that the nature of the Japanese criminal procedures, as well as furthering the unique culture of Japanese society and judiciary may well sustain the practice of the citizen judge system within the sight or control of the judiciary. However, it will be necessary to enhance the independence of citizen judges, and emphasise civic participation not only in criminal procedures but also within national government institutions. Ultimately, the citizen judge system appears in practice in Japan to be a successful lay adjudication system, suggesting that it is an agent for democratising criminal procedures. But it also reveals an exclusive reliance on judicial control, one of the features essential to citizen judges' participation in practice but, could be its fatal curtailment and inhibitor.

²⁷⁶ The Supreme Court, *supra* note 15.

²⁷⁷ Interviews, *supra* note 34.

CHAPTER 6 CONCLUSION

This study set out to evaluate the citizen judge system in order to determine whether or not its introduction and practice was a successful development of the criminal trial procedure that attempted to democratise the Japanese criminal justice system. In addressing this issue, this study seeks to contribute to the theoretical debate on lay adjudication as the mechanism for democratisation in criminal procedures as well as to consider the practical limitations of lay adjudication in Japan.

As noted in Chapter 1, the introduction of the lay adjudication system followed the international tendency towards democratisation in criminal justice, encouraged by globalisation and Westernisation in non-Western countries. Moreover, the Japanese judicial reform, which was initiated in 1999, was designed to introduce international standards into the criminal justice system by engaging democratic concepts. As part of democratisation, the citizen judge system was introduced. Unfamiliarity with democratic concepts was derived from a lack of understanding of the relationship between the State and its citizens. Japan has undergone several democratisation processes in its history, however, and most of the international concepts of human rights and procedural fairness standards are established in the Constitution and protected by law. It is therefore important for Japanese society to acknowledge that citizens obtain guaranteed freedom, human rights, and equality, as well as also bearing responsibilities, in the criminal justice system.

According to Munday, any form of lay adjudication system ‘offers a legal panacea, and the political decision to directly involve the people in the administration of justice’¹, and democratisation in the ‘executives, legislative, and the judiciary’ has been a continuous ambition, since historical theorists claimed that it would be a barrier to oppressive governments². In contrast, a critical issue regarding lay adjudication is

¹ R Munday, ‘What Do the French Think of Their Jury? Views from Poitiers and Paris’ (1995) 15 Legal Studies 65–87, 87.

² For example, Weber, Tocqueville, Mill, Montesquieu, Rousseau, Duff, Christie and others decreed the functions of lay adjudicators were a safeguard against repressive governments. See AW Dzur, *Punishment, Participatory Democracy, and the Jury* (New York; Oxford University Press 2012).

whether or not the lay adjudication system actually does function as a tool for democratising the criminal justice system. There are contrasting theoretical views on the democratic values of lay adjudication and how far the lay adjudication system in practice may be undermined because of doubts over the legitimacy of judgments reached by the consciousness of lay adjudicators. This is possibly affected by prejudice and biased thoughts, not by evidence, and by a reliance on the legislative role and judicial controls of government or legal professionals.

Chapter 2 proposed criteria with which to examine the citizen judge system, evaluating the theoretical background of lay adjudication as a mechanism for promoting democracy, and the related range of requirements for a fair trial. It also argued that lay adjudication underpins interdependent principles within the concepts of democracy and a fair trial. It would appear that the justification for introducing a lay adjudication system could be achieved by establishing the legitimacy of the criminal justice system through gaining the support and acceptance of society.

In this respect, the success of a lay adjudication system is tied to the extent to which lay adjudicators participate, and the degree of their participation can be evaluated to some extent by its representativeness of the community from a democratic perspective. Moreover, the fundamental conditions of a lay adjudication system are based on the concept of a deliberative democracy, and the participation of 'attentive' and 'competent' lay adjudicators is essential. Because of the difficulty of evaluating the level of attentiveness and competence of lay adjudicators' who participate, it was argued that consideration of lay adjudicators' satisfaction, which is the key to achieving legitimacy, could be used. The evaluative criteria that I have proposed, and elucidated in Chapter 2, drew on positive socio-legal perspectives of the legal system and suggest that the practice of a lay adjudication system will be in line with the core principles of both the legal traditions and criminal justice policies. It was also argued in Chapter 2 that lay adjudication systems often share common challenges although they are within different legal systems, because of the shared purpose of bringing democratic values into the criminal justice system. Moreover, the main motivation for introducing or retaining a lay adjudication system is the enhancement of the legitimacy of the criminal justice system through lay participation. The evaluation criteria, established via a review of existing

literature on various lay adjudication systems, also shows the importance of the four separate phases of the lay adjudication system procedure: the pre-trial arrangement conference procedure, the selection process of lay adjudicators, the decision-making process and after the trial, all of which affect the practice of lay adjudication systems, as well as having potential impact on other parts of the criminal justice system.

Chapter 3 illustrated the Japanese criminal justice procedural and social challenges resulting from implementing the citizen judge system. It showed the mixed legal traditions that shape the current Japanese criminal justice procedure and the unique challenges faced in emphasising adversarial principles in the procedure. The Japanese criminal justice system lacks judicial independence, systematically violates the principle of equality of arms between the prosecution and the defendant and is dominated by professional judges. The citizen judge system was expected to be able to mitigate these challenges. The chapter also contained an overview of historical developments in the Japanese criminal justice system, including the jury system between 1928 and 1943, and the contemporary relationship between low crime rate and powerful control of a central government.

It is arguable whether or not it is realistic to evaluate the enhancement of participation of lay adjudicators, as well as of the legitimacy of the criminal justice system through the real practice of the citizen judge system, while acknowledging that Japan is not a transitional country in the same situation as the post-Soviet countries. Moreover, the Japanese criminal trial procedure already included adversarial principles and the Japanese public already held the criminal justice system and legal professionals in high esteem. Consequently, it is reasonable to pose the question: what has the practice of the citizen judge system contributed, in terms of issues targeted, to improve the criminal trial procedure? It is clear that there were cogent reasons for the introduction of the citizen judge system as part of the reforms to the Japanese criminal justice system shifting away from 'gentle authoritarianism'³. To an extent, the citizen judge system was deemed to be unnecessary because Japanese society was accustomed to relying on the administration of justice and legal professionals as tools to maintain

³ I Kitamura, 'The Judiciary in Contemporary Society: Japan' (1993) 25 Case Western Reserve Journal of International Law 263–275, 270.

crime control and due process of law. As explained in Chapter 3, since the eighteenth century, Japanese criminal justice reforms have attempted to create an internationalised and modernised criminal justice system to meet international standards. To do this, constitutional and legislative reforms were undertaken with reference to foreign systems, namely French, German and American ones. Western substantive and procedural laws with a civil law tradition were brought in and adapted to Japanese historical traditions, becoming the basis of the current Japanese criminal procedural concepts. Introducing Western legal solutions has been historically instrumental in the development of the Japanese criminal justice system.

The characteristics of Japanese society and the Japanese people are often expressed as collectivism and authoritarianism, because they tend to prioritise harmonisation in the community and obedience to authority. Moreover, there was a separation between the lives of the judiciary and the lay people because of the professionalism of the judiciary. In other words, the lack of communication between the judiciary and the public was a considerable problem. Judicial reform in 1999 aimed at enhancing communication, with two targets: the development of a legal professional training and recruiting system, and public education. Japan appeared to meet the conditions to be capable of effective practice of a lay adjudication system because of the homogeneous nature of Japanese society and public, judicial, financial and political supports.

Chapter 4 and 5 investigated whether the citizen judge system can be considered a successful lay adjudication system according to the proposed evaluation criteria in Chapter 2 and expected impact targets, in terms of criminal procedural principles, that were discussed in Chapter 3. It is obvious that the Citizen Judge Act (CJA) was drafted in reference to foreign systems, such as the French, German, American, and English systems. As a result, the citizen judge procedure has hybrid characteristics from both the mixed judge and the jury models, although it can be categorised as a mixed judge model, which is defined in this research as a collaborative structure between professional judges and citizen judges in the lay adjudicator panel. Moreover, the CJA shares some similar features with other lay adjudication systems, such as the limitations of subject criminal cases tried by citizen judges, random selection of citizen judges, the

acceptance of majority verdicts and strict confidentiality being imposed on citizen judges.

There have been significant problems with the CJA regarding the introduction of democratic principles, largely because of its incompatibility with the participation of citizen judges and the principle of substantial truth. In addition, it is apparent that there is strong judicial control over the participation of citizen judges, which has moderated its impact on (former) citizen judges, criminal justice and the public.

Chapter 4 raised issues of concern in current citizen judge systems in light of the responsibilities of citizen judges in cooperation with professional judges. It was pointed out that the CJA has succeeded in establishing a citizen judge procedure that could possibly enhance the participation of citizen judges by entitling citizen judges to positions equal to professional judges for hearing, deliberating evidence in the decision-making process, voting and reaching a verdict together. In addition, the CJA has also succeeded in setting a procedure to provide a way to reach appropriate representatives and to engage citizen judges, by introducing a random selection by lot and giving those chosen the right to question and take notes in the courtroom and deliberation room. It has been argued, however, that the CJA has failed to respond to the challenges which the Japanese criminal justice procedure has faced. The domination of professional judges, from the pre-trial arrangement conference procedure to the after-trial, appears to be problematic. I have argued that the possible domination of professional judges over the participation of citizen judges increases the potential for manipulation by the professional judges and for the system to represent only a small presence of democratic involvement.

In Chapter 5, the practice of the CJA was discussed, showing the impact of its application. The Supreme Court survey showed the actual practice of citizen judge trials, although far fewer trials occurred than were initially expected. The survey also showed the diverse background of citizen judges in terms of their genders, ages and occupations, although the excusals of citizen judge candidates tended to be accepted leniently, which could restrict the pool of candidates available for lot. All former citizen judges interviewed for this study believed that they were able to understand information obtained throughout their duties, including evidence, applicable laws and professional

judges' explanations. They also believed that they and their co-citizen judges had actively participated in both the courtroom and the deliberation room. The same positive feedback can be found in the Supreme Court survey. In addition, all former citizen judges interviewed for this study believed that they reached their decisions independently from co-members of the citizen judge panel, both co-citizen judges and professional judges. Participation, representativeness, and attentiveness therefore appear to be successfully maintained by both citizen judges and legal professionals.

Moreover, this study showed that all 18 interviewees believed that the current citizen judge system was successful. Former citizen judges believed that the system was a success because of their satisfaction with their work and duties, while most legal professionals believed the same because of its smooth introduction. The high level of satisfaction with and confidence in the citizen judge system led to the high level of satisfaction also found in the criminal justice system.

Chapter 5 also argued, however, that there were significant issues related to the superior powers of the prosecution and the professional judges' overwhelming power in the procedure, with limited allowance made for the participation of citizen judges relative to their procedural responsibilities and duties. A point to note is that there was more emphasis on the pre-trial arrangement conference procedure of preparing written dossiers, which suggests possible reliance on the dossiers rather than oral evidence presented in the court. Moreover, professional judges in the appeal court could overturn the verdict reached by a citizen judge panel, suggesting attempts to control the decisions of citizen judge panels. In addition, the application of the citizen judge trial procedure in death penalty cases has created incongruity in the representativeness of the citizen judge panel, as well as a distorted decision-making procedure. The difference between the public image of professional judges and their friendliness in-person may lead to feelings of admiration in citizen judges. The concentration of power with the prosecution and professional judges, together with the inexperience of the citizen judges, may exacerbate extant issues in the central administration of justice. In this way, judicial reform efforts to democratise the judicial system may actually have been undermined.

Because of constitutional challenges, the citizen judge system has not been able to show that participating in a serious criminal case as a citizen judge is a part of citizens' rights. Furthermore, in its failure to reduce the professional orientation of the criminal procedure, the citizen judge system creates uncertainty and inconsistency in the participation of citizen judges in the criminal procedure, when judged from the point of view of democracy. It appears that the CJA has succeeded in introducing the participation of citizen judges and has emphasised adversarial principles in the criminal procedure, but it has not provided sufficient power to citizen judges with which to counterbalance that of the professionals. In this respect, the CJA has failed to link the participation of citizen judges to perceptions of democracy. As Inoue has suggested, the citizen judge system has become a mere façade⁴.

Despite the Japanese government's primary strong motivation to include lay participation in the criminal trial procedure, it has not carried out the judicial reform through any far-reaching investigative procedure or evidential rules. Without reforms of the whole criminal justice procedure and related legislation, the practice of the citizen judge system could perhaps actually increase uncertainty and doubts about manipulation of the participation of citizen judges, which could damage its legitimacy.

In summary, on the basis of the research presented here, it is argued that three major changes would improve the operation of the current citizen judge system and aid in the achievement of its objectives. These proposed changes are:

- 1) the introduction of a panel composed of only citizen judges, or at least allowing the citizen judges time to discuss a case with co-citizen judges without the presence of professional judges;
- 2) the removal of death penalty cases from the jurisdiction of citizen judge trials;
- 3) the establishment of an independent third-party observation structure to evaluate the practice of the citizen judge system without interfering in the administration of justice.

⁴ K Inoue, *Stop! The Citizen Judge System [Tsubuse Saibanin Seido]* (Tokyo; Shincho Sinsho 2008).

In this research, I argued for citizen judges to be given trust in their competence to listen to and deliberate a case along with professional judges. There are clearly both conscious and unconscious judiciary and legal professionals' controls over citizen judges throughout a citizen judge procedure. For example, the courts have considerable responsibilities at the selection stage to make a list of candidates and finalise the selected citizen judges, although dismissals of candidates and *voir dire* as well as challenges are established in the CJA. As discussed in Chapter 3, powerful prosecutorial discretion and heavy reliance on dossier, such as confession, obtained at the investigative stage appear to be strong bureaucratic controls in the Japanese criminal justice procedure. Moreover, the professional judges' instructions for citizen judges and presence on citizen judge panels are constitutionally inevitable as well as significant to provide judicial instructions. However, citizen judges are entitled to discuss cases independently following 'freedom of thought and conscience'⁵, as Takeshima claimed⁶.

A discussion time amongst citizen judges would provide them an opportunity to organise their thoughts, expressing and exchanging their opinions freely and checking their understandings of a case, evidence and the procedure without any pressure from professional judges. This time would satisfy the citizen judges' independence and contribution underpinned by the principles of democracy, disengaging citizen judges from judicial control. The independent discussion would help citizen judges improve their discussion skills. Also, the time would encourage them to focus on presented evidence in the courts, while professional judges have a tendency to rely on written dossiers. Furthermore, the independent deliberation time might be reserved for the introduction of the jury model, and some researchers have proposed introducing the citizen judge system (the mixed judge model) into Japan. The time without the presence of professional judges would raise the possibility of functioning as a representative of their communities. However, there are three main challenges to adopting the suggestion. First, discussion among only citizen judges might be against the 1947 Constitution as the same reasons provoked arguments about the introduction of citizen

⁵ The 1947 Constitution, art. 19.

⁶ C Takeshima, 'Reconsideration of Citizen Judge System in Japan - An Analysis and Consideration from the Standpoint of the Freedom of Conscience - [Saibanin Seido Ni Tuiteno Saiko]' (2017) 29 The Waseda Journal of Social Sciences 56–71, 67. She claimed the contradictions between the duty of citizen judges and the concept of 'freedom of thought and consciousness'.

judges⁷. Second, it would be difficult to say that all citizen judges would have the ability and willingness to constructively deliberate a case with their peers without professional judges' instructions. Third, discussions amongst only lay adjudicators would be, more or less, influenced by co-lay adjudicators, as much psychological research about lay adjudicators' decision-making claimed.⁸ Moreover, in Sanders' analysis of magistrate courts in England, Sanders' pointed out dangerous lay adjudicators' over-deferential attitude to professional judges in mixed judge systems. Moreover, he emphasised equal importance of legal theory and principles, on which academic research such as the Auld report and the Runciman Commission tends to focus, as well as core values of fairness, democracy and efficiency.⁹ Therefore, the suggested independent discussion procedure—which is that only citizen judges discuss a case—should be limited and regarded as a preliminary phrase before a deliberation with professional judges.

Social issues are vital conditioning factors for the practice of the citizen judge system, a view supported by many international scholars on lay adjudication, such as Hans¹⁰, Fukurai¹¹, Jackson¹², and Machura¹³. The findings of the current study accord with Jackson and Kovalev's insistence on the importance of public education regarding the rights and duties of lay adjudicators as a means of supporting the empowerment of lay adjudicators, as well as the whole lay adjudication system¹⁴. The experience of the introduction of the citizen judge system in Japan does not align, however, with

⁷ Please see Chapter 4, 4.4.1. The 1947 Constitution provides that the judiciary should be composed of professional judges, who are appointed by the Cabinet.

⁸ See Y Tinsley, 'Juror Decision-Making : A Look Inside the Jury Room', vol 4 (Leicester; 2000); JA Holstein, 'Jurors' Interpretations and Jury Decision Making' (1985) 9 *Law and Human Behavior* 83–100.

⁹ A Sanders, 'Core Values , the Magistracy , and the Auld Report' (2002) 29 *Journal of Law and Society* 324–341.

¹⁰ VP Hans, 'Jury Systems Around the World' (2008) 4 *Annual Review of Law and Social Science* 275–297, 279.

¹¹ H Fukurai and K Kurosawa, 'Impact of the Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan' (2010) 7 *US-China Law Review* 1–18, 17.

¹² JD Jackson, 'Paradoxes of Lay and Professional Decision Making in Common Law Criminal Systems' (2001) 72 *Revue internationale de droit pénal* 579–594, 581.

¹³ S Machura, 'Fairness, Justice, and Legitimacy: Experiences of People's Judges in South Russia' (2003) 25 *Law & Policy* 123–150, 146.

¹⁴ JD Jackson and NP Kovalev, 'Lay Adjudication and Human Rights in Europe' (2006) 13 *Columbia Journal of European Law* 83–124, 123.

Abramson's proposition that a lay adjudication system may work if the society accepts the 'political function' of lay adjudication, which is 'to preserve public confidence in the justice of the verdict', leading to the legitimacy of the verdict, without unquestioningly accepting the verdicts of professional judges¹⁵. The introduction of the citizen judge system in Japan has certainly resulted in increased legitimacy of the verdict, but this legitimacy comes from the citizen judges' endorsement of the professional judges' verdict. Legitimacy should instead be located in the lay adjudicators' verdict alone. Moreover, familiarity with the concept of democracy, the lay adjudication system and civic duties should be enhanced through public education. This will take time, however. There is much evidence regarding the inadequacies of existing lay adjudication systems, notwithstanding that developmental analysis and reform has been in progress for many centuries. Evaluating the results of public education with the introduction of the citizen judge system will take more time and will be dependent on continued educational programmes and societal and judicial commitment to the practice of the system.

On a practical level, the following lessons that should have relevance to those engaged in criminal trial procedural reform in the future emerge from the evaluations in this study of the citizen judge system. Firstly, there is justification for concluding that lay adjudication in criminal procedures can be successfully engineered in order to democratise and enhance the legitimacy of the criminal justice system. Secondly, sources for readily-available toolkits, such as the UNODC Criminal Justice Assessment Toolkit, can be useful fundamental evaluation points with which to check that the introduction and practice of a lay adjudication system complies with international standards for the requirements of a fair trial. As is suggested for transitional countries, however, the toolkit should be used only as a guide for possible legislative strategies that can be subsequently assessed for 'balance' and relevance, rather than as a tool for producing a template for a system which can be put into practice.

Thirdly, it should not be assumed that a lay adjudication system is always able to democratise a criminal justice system. The practicality of such a system demands a balance between various factors. The system will likely be considered to have both

¹⁵ J Abramson, 'The Jury and Democratic Theory' (1993) 1 *Journal of Political Philosophy* 45–68, 60-1.

favourable and criticisable points but reasonable mechanisms, if employed on the basis of a sensible balance in the legal system. The practice of a lay adjudication system should improve the function of lay adjudicator panels and the legitimacy of the criminal justice system, and requires full and proper consideration of a number of fundamental issues, namely:

- 1) an in-depth knowledge of theoretical perspectives of lay adjudication, as elucidated in Chapter 2, which should provide a valuable insight into lay the participation of adjudicators and the legitimacy of the criminal justice system as a tool for democratising the system, as well as understanding what the necessary conditions for these successful functions and outcomes are;
- 2) a full appreciation of the history and legal traditions of the criminal justice system where a lay adjudication system is practised, in order to determine what obstacles might impede successful participation of lay adjudicators and how such obstacles can be overcome;
- 3) an acknowledgement that a lay adjudication system that lacks the appropriate trust in competence and engagement of lay adjudicators may result in an unsuccessful and constrained criminal trial procedure, rather than democratising it. It may create injustice and undermine the role of lay people and the fundamental concerns which sustain essential rights in the criminal procedures, including the independence of the judiciary and the equality of arms between the parties in the procedure.

Clearly the introduction of a lay adjudication system as a reform tool for democratising the criminal justice system may not always be the most reasonable means of promoting legitimacy in the criminal justice system. Lay adjudication is, however, as Devlin pointed out, 'a symbol of participatory democracy', a practical mechanism capable of providing legitimacy to the criminal justice system, and capable of facilitating the incorporation of the internationally-recognised principles of a fair trial and democracy, as exemplified by the introduction of the citizen judge system in Japan. Limitations to the practice of the citizen judge system should be understood, and it should be recognised that its mythological 'symbolism' will depend on the sensitivity with which it is practiced. The citizen judge system has to be practical and capable of

striking a balance with legal traditions to provoke potential developments within the criminal justice system. Lay adjudication is likely to remain a pervasive symbolic aspect of democratic criminal justice system development. If the citizen judge system is employed in a balanced manner, as a mechanism for reflecting the public interests in the Japanese criminal justice system, it can certainly become an essential and successful aspect of future criminal trial procedures.

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Appendices

Appendix 1: Interview Questions for Citizen Judges

1. Facts: Name, Gender, Age, The date of the trial, sentence
2. Do you think you participated actively in courtroom?

Possible follow-up questions

- a) Did you take a note in courtroom?
- b) Did you ask a question in courtroom?

If answer is 'no',

- a) Why were you not able to participate actively?

3. Do you think you participated actively in deliberation?

Possible follow-up questions

- a) Do you think you participated actively in deciding guilty/not guilty?
 - Were you comfortable to discuss with professional judges at the stage?
- b) Do you think you participated actively in deciding the sentence?
 - Were you comfortable to discuss with professional judges at the stage?

4. Did you have a difficulty in understanding the law?

Possible follow-up questions

- a) Do you think the case was complicated?
- b) Was the presiding judge's instruction easy to understand?

5. Did you have a difficulty in understanding the evidence?

Possible follow-up questions

- a) What kind of evidence was presented?

6. Do you believe that you made a decision independently without the pressure of professional judges/presiding judges?

Possible follow-up questions

- a) Did you feel the pressure of professional judges?
- b) Did you feel the pressure of other lay members?

7. Do you think you contributed successfully to the trial as a lay assessor?

Possible follow-up questions

- a) Do you think if only professional deliberated the case, the result would be different?

8. Do you have any comments?

Appendix 2: Interview Questions for Legal Professionals

(Public Prosecutors, Professional Judges, and Defence Attorneys)

1. Facts: Name, Gender, Age, Legal Professional Experiences
2. Do you think citizen judges participated actively in courtroom?

Possible follow-up questions

 - c) Did you take a note in courtroom?
 - d) Did you ask a question in courtroom?

If answer is 'no',

 - b) Why do you think were they not able to participate actively?
3. Do you think citizen judges participated actively in deliberation?

Possible follow-up questions

 - c) Do you think citizen judges participated actively in deciding guilty/not guilty?
 - d) Do you think citizen judges participated actively in deciding the sentence?
4. Do you think citizen judges had a difficulty in understanding the law?

Possible follow-up questions

 - c) Do you think the case was complicated?
 - d) Was the presiding judge's (your) instruction easy to understand?
5. Did you think citizen judges had a difficulty in understanding the evidence?

Possible follow-up questions

 - b) What kind of evidence was presented?
6. Do you believe that citizen judges made a decision independently without the pressure of professional judges/presiding judges?

Possible follow-up questions for professional judges

 - c) Did you think you gave citizen judges the pressure of professional judges?
 - d) Did you think citizen judges got the pressure of other lay members?
7. Do you think citizen judges contributed successfully to the trial as a adjudicator?

Possible follow-up questions

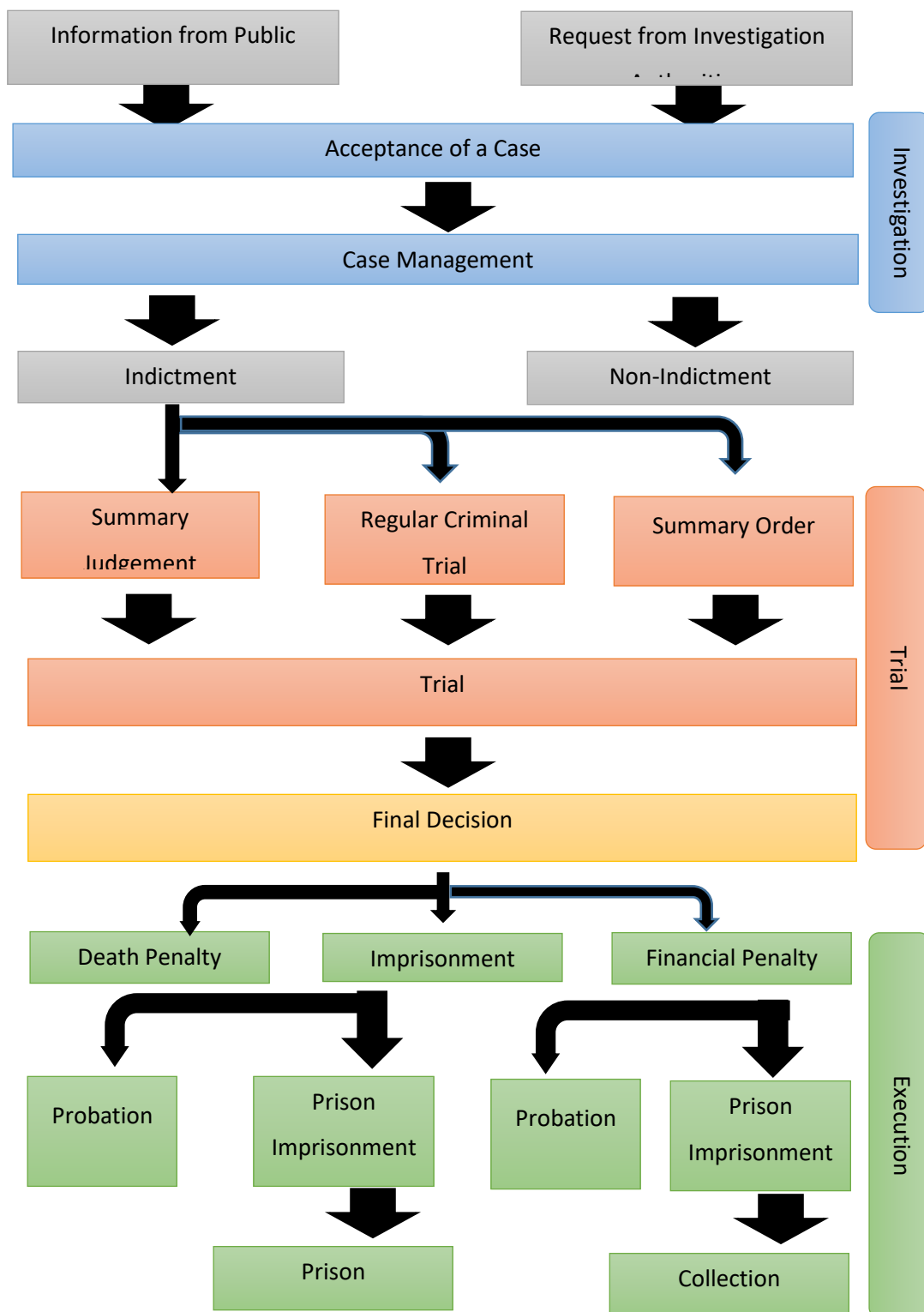
 - b) Do you think if only professional deliberated the case, the result would be different?
8. Do you have any comments?

Appendix 3: Interview Questions for Lawmakers

(Lawmakers)

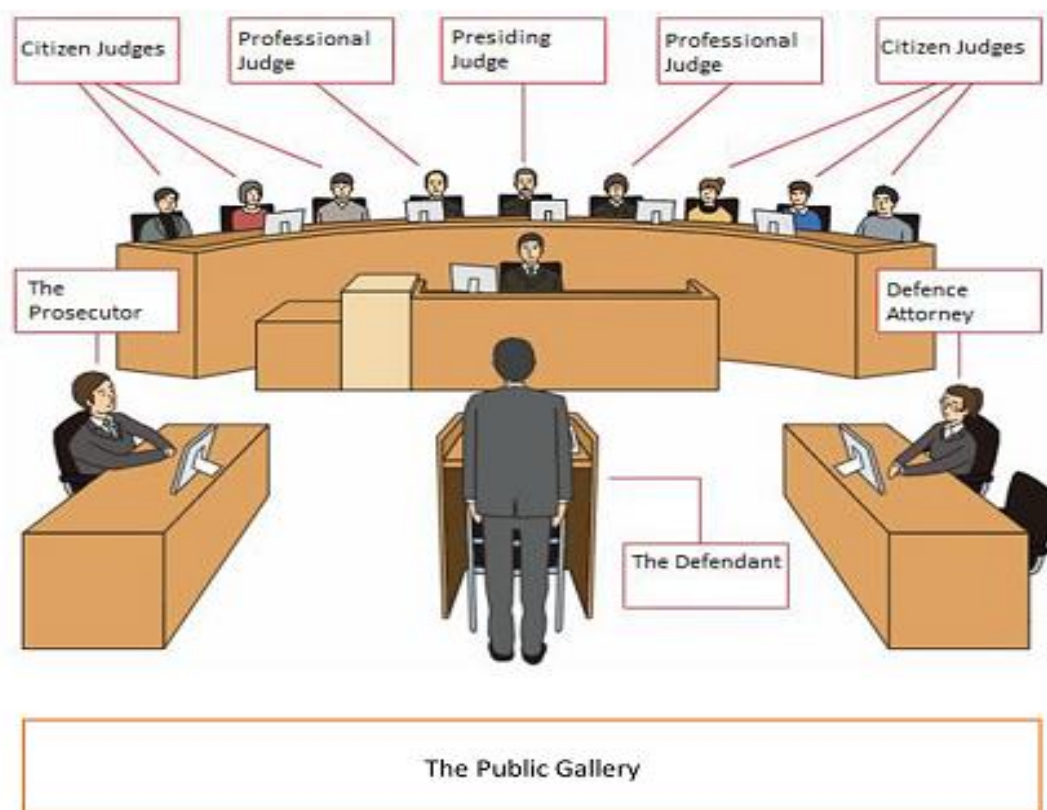
1. Facts: Name, Gender, States
2. A) How did you reach the idea to introduce the lay judge system which is hybrid between the mixed bench system and the jury system?
B) Are there specific expectations from the lay judge system which the mixed bench system and the jury system cannot achieve?
3. What were the barriers to implementing the lay judge system?
4. A) Did you expect the impact of the lay judge system on the Japanese criminal justice system?
B) If so, what was the impact?
C) Has the impact actually happened?
5. A) Do you think there are points in the system which should be re-examined?
B) If so, what are the points?
6. Do you think the Japanese lay judge system has been successful?
7. Do you have any comments?

Appendix 4: A Flowchart of the Japanese Criminal Procedure¹



¹ Ministry of Justice [Japan], 'Criminal Cases Flowchart' [Japanese]
http://www.moj.go.jp/keiji1/keiji_keiji09.html accessed 7 April 2016, translated by the author.

Appendix 5: The Citizen Judge Trial Courtroom¹



¹ The figure was translated and edited by the author from O Niikura, 'A Change by the Citizen Judge System' (*Aoyama Gakuin University*) <http://www.aoyama.ac.jp/research/insight/column_niikura/> accessed 1 July 2015.

Appendix 6: The Historical Developments Related to the Citizen Judge System

1868	The Birth of the Meiji Regime
1872	The Iwakura Mission
1880	The Establishment of the Chizaiho (CCP)
1880	The Establishment of the Criminal Law (CL)
1889	The Establishment of the Meiji Constitution
1890	The Establishment of the Commercial Law The Amendment of the CCP
1892	The Establishment of the Civil Law
1893	The Establishment of the Attorney Act
1907	The Establishment of the Criminal Law
1922	The Amendment of the CCP
1928	The Start of the Jury System
1943	The Suspension of the Jury system
1945	The End of the Second World War
1947	The Establishment of the Constitution
	The Amendment of the Criminal Law (CL)
1948	The Establishment of the Code of Criminal Procedure
1949	The Enforcement of the Code of Criminal Procedure
1999	The Establishment of the JRC
2001	The Amendment of the CL The Amendment of the CCP
2002	The Establishment of the CCC
2003	The Amendment of the CL
2004	The Establishment of the Citizen Judge Act (CJA)
2005	The Amendment of the CL The Amendment of the CL

2006	The Amendment of the CL
	The Amendment of the CCP
2007	The Amendment of the CL
	The Amendment of the CCP
2009	The Enforcement of the CJA
2010	The Amendment of the CL
	The Amendment of the CCP
2011	The Amendment of the CL
	The Amendment of the CCP
2012	The Amendment of the CCP
2013	The Amendment of the CCP
	The Amendment of the CL
2015	The Amendment of the CCP

Appendix 7: Nagano Family Homicide Case [Nagano Ikka Sannin Satsujin Jiken]

Court	Case no.	Defendant	Date	charge	Sentence
Nagano County Court	H22(わ) 96	Ito/Matsubara/Ikeda	27/12/2011 25/03/2011 06/12/2011	murder attended with robbery abandoning a corpse	Death Penalty/28 years
Tokyo High Court	H24(う) 572	Ito	20/02/2014	murder attended with robbery abandoning a corpse	Death Penalty
	H24(う)859	Matsubara	22/03/2012	murder attended with robbery abandoning a corpse	Death Penalty
	H24(う)332	Ikeda	27/02/2014	murder attended with robbery abandoning a corpse	Death Penalty
The Supreme Court	H24(あ)646	Matsubara	02/09/2014	murder attended with robbery abandoning a corpse	Death Penalty
	H26(あ)447	Ito	26/04/2016	murder attended with robbery abandoning a corpse	Death Penalty
	H24()332	Ikeda	27/02/2014	murder attended with robbery abandoning a corpse	Life Imprisonment

The Case: The Nagano Police received a call about an unusual odour from a storage unit. A policeman found a male corpse (X) in a car in the storage unit. The police found that the cause of death was intracranial injury and the tenant of the storage unit, 62-year old company owner, was missing. His employees, Tomohiro Matsubara, Kazufumi

Ito, and Kaoru Ikeda were questioned and arrested by the police, as were their friends, D and E¹⁴⁴⁰, as it turned out there were four victims who were killed. The prosecution demanded capital punishment for three defendants, life imprisonment, and two years and six months imprisonment for the other two. The citizen judge panel reached the following decision: capital punishment for three defendants (A, B, and C), 28 years imprisonment (D) and two years imprisonment (E). However, as a result, two defendants, A and B were sentenced to death, C was given life imprisonment, and the sentences of D and E were eighteen years and two years, respectively.

¹⁴⁴⁰ The two names were not published in public.

Appendix 8: The Four Phrases of the Citizen Judge Procedure

1. Pre-Trial Arrangement Conference Process
 - a) Pre-trial arrangement conference procedure among the prosecutors, professional judges, and defence attorneys
 - b) Accessibility of Citizen Judges to the information discussed in the pre-trial arrangement conferences
2. Selection Process of Citizen Judges
 - a) Random selection methods
 - b) Responsibility for making a list of candidates
 - c) Qualifications and disqualifications for being citizen judge
 - d) Challenge procedures (excusals, voir dire procedure)
3. Decision-Making Process
 - a) The trial procedure (the right to the opening speech)
 - b) Rights and duties of citizen judges (questioning witnesses and the defendant, and taking notes during the trial)
 - c) Rules for the presentation of evidence
 - d) Judicial Instructions by professional judges/Cooperation between citizen judges and professional judges
 - e) Verdicts
 - I. Deliberation process
 - II. Unanimity/Majority verdicts
 - III. Legal Reasoning
4. After the Trial
 - a) Right to appeal
 - b) Confidentiality