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Articles

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

*Noboru Yanase**

1. Introduction

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

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

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

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

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

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

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

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

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

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

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

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

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

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

1.2. Data Sources

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

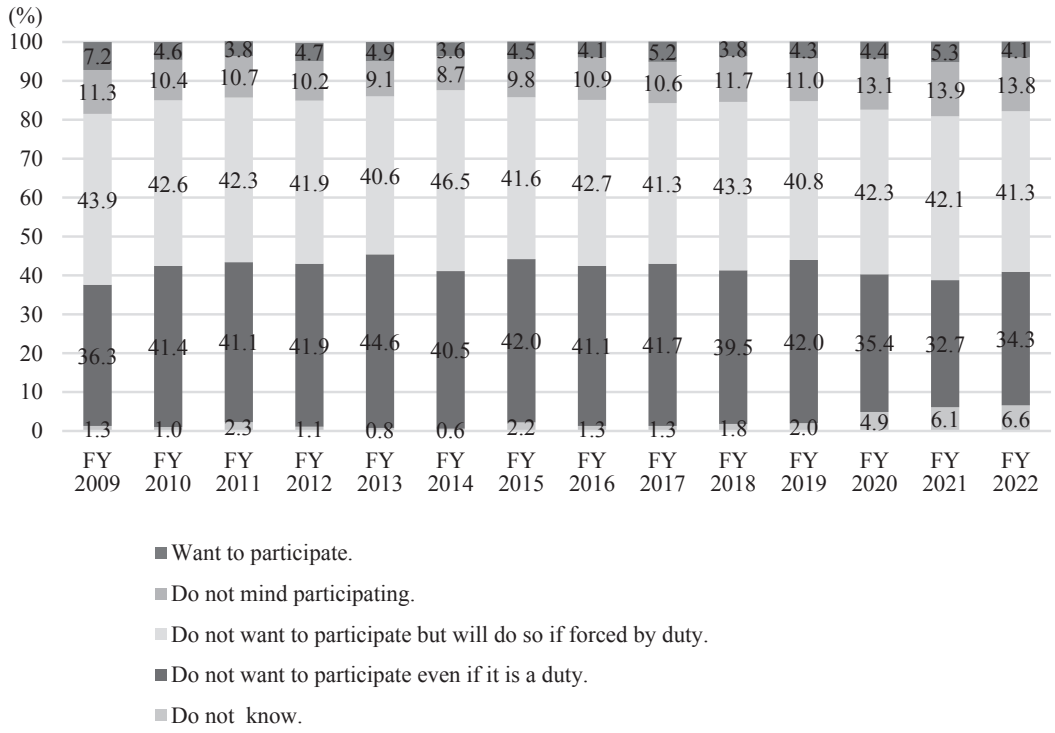


Figure 1 illustrates the 14-year trend in the willingness of citizens to participate as *saiban-ins*. Over the past 14 years a 4:6 ratio between the responses of those who are extremely reluctant to participate as *saiban-ins* and the other responses has been consistently observed, with no dominant majority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

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

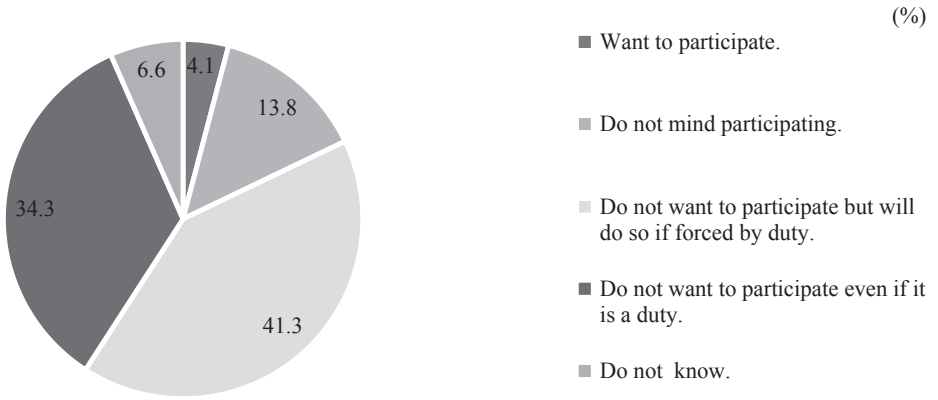


Figure 2 depicts the willingness of citizens to participate according to the FY 2022 Public Opinion Survey. Overall, 17.9% of the respondents were willing to participate (the sum of those who either "Want to participate" or "Do not mind participating"), and 75.6% were reluctant to participate (the sum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

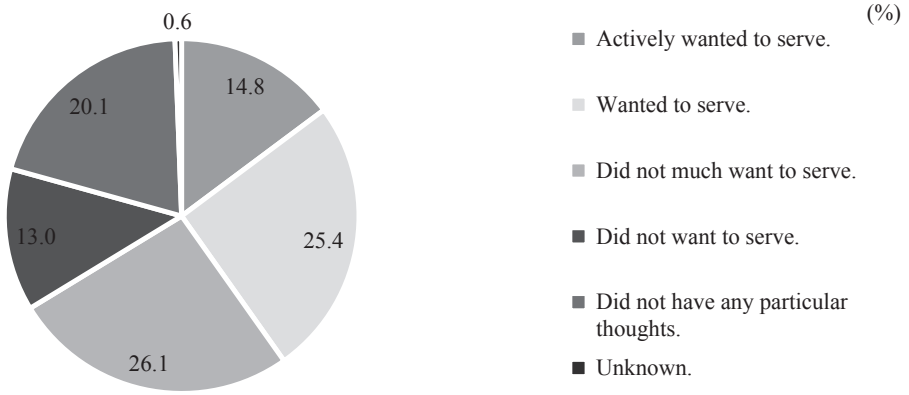
The total percentage of citizens who answered, "Want to participate," "Do not mind participating," or "Do not want to participate but will do so if forced to by duty" was 59.2%. This rate considerably exceeded the rate of respondents who expressed an unwillingness to participate even if it was a duty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

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

that participation is a legal obligation.[7)]

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

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



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

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

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

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

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

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

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

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

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

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

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

2.2.1. Appointment Procedures for S*aiban-ins*

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

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

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

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

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

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

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

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

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

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

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

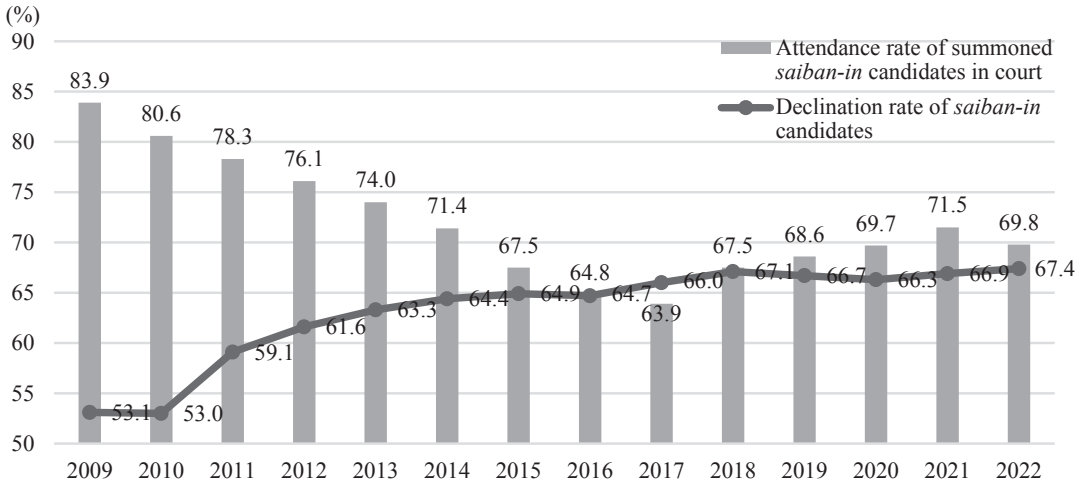


Figure 4 illustrates the declination rate of *saiban-in* candidates and the attendance rate of summoned *saiban-in* candidates in court.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

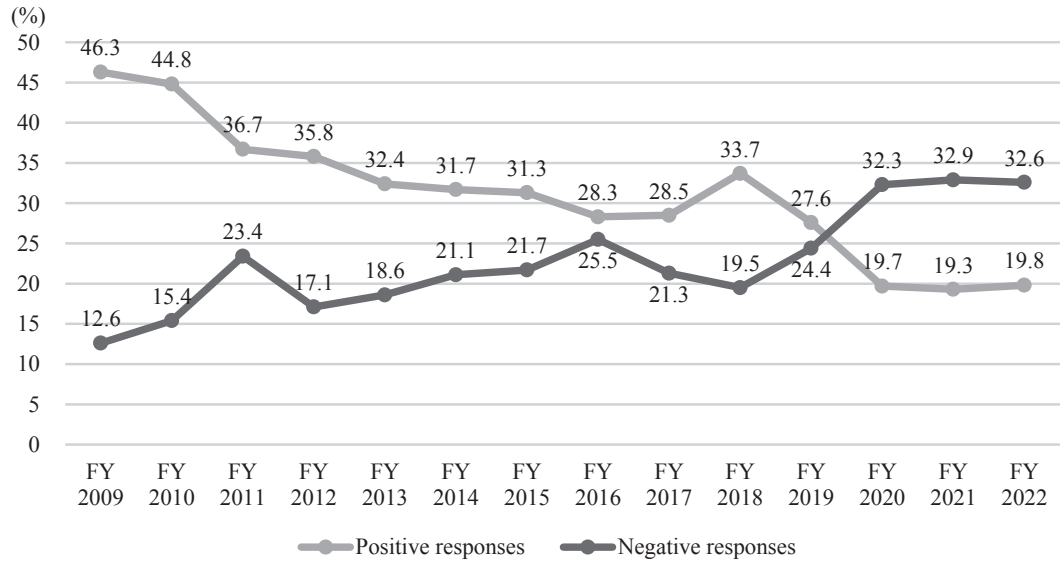
3.1. Citizens' Understanding of and Trust in the Judiciary

3.1.1. Citizens' Understanding of the Judiciary

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

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

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



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

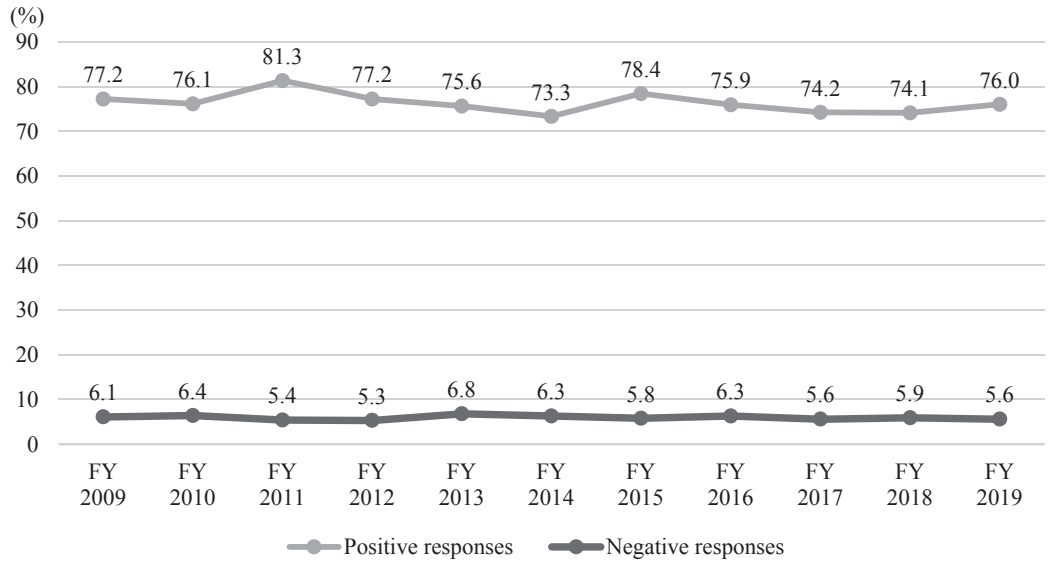
Ii assumes that a decrease in the rate of respondents who agreed that the

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

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

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

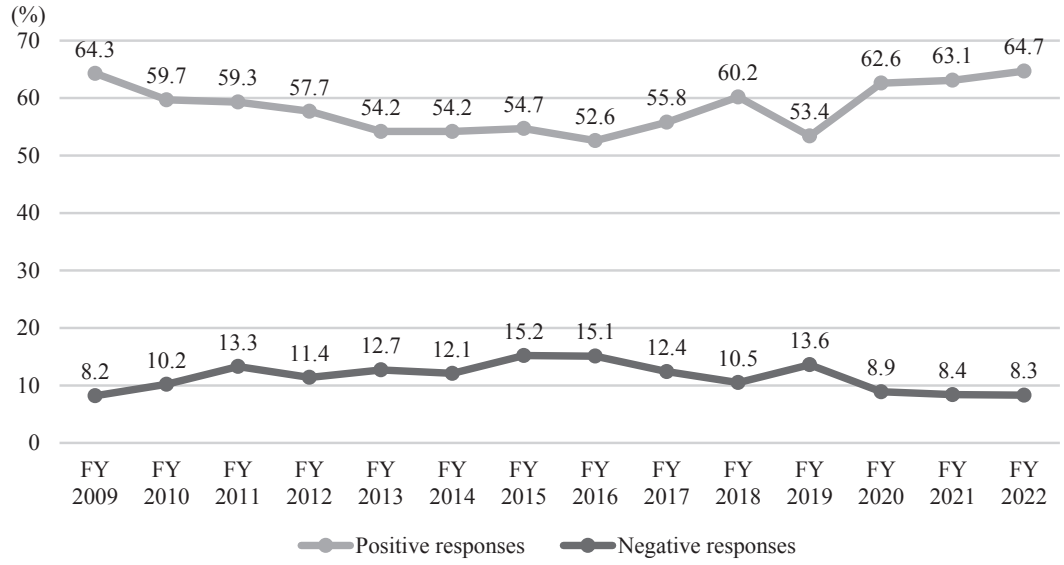
Figure 6 : Do you agree that the procedures and contents of criminal trials in Japan before the introduction of the *saiban-in* system were difficult or hard to understand?



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

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

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



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

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

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

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

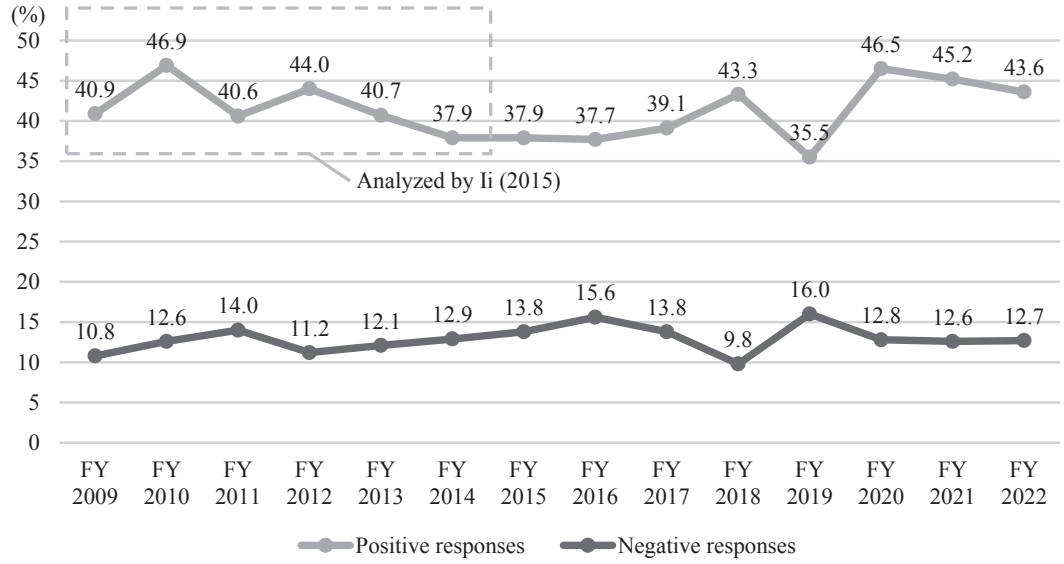
Notably, Figure 5 shows that the positive impression of the currently implemented *saiban-in* system, that is, that it has made the procedures and contents of trials easier to understand, sharply decreased from 2018 to 2020. The sharp decrease in positive responses to the impression that *saiban-in*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

3.1.2. Citizens' Trust in the Judiciary

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

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

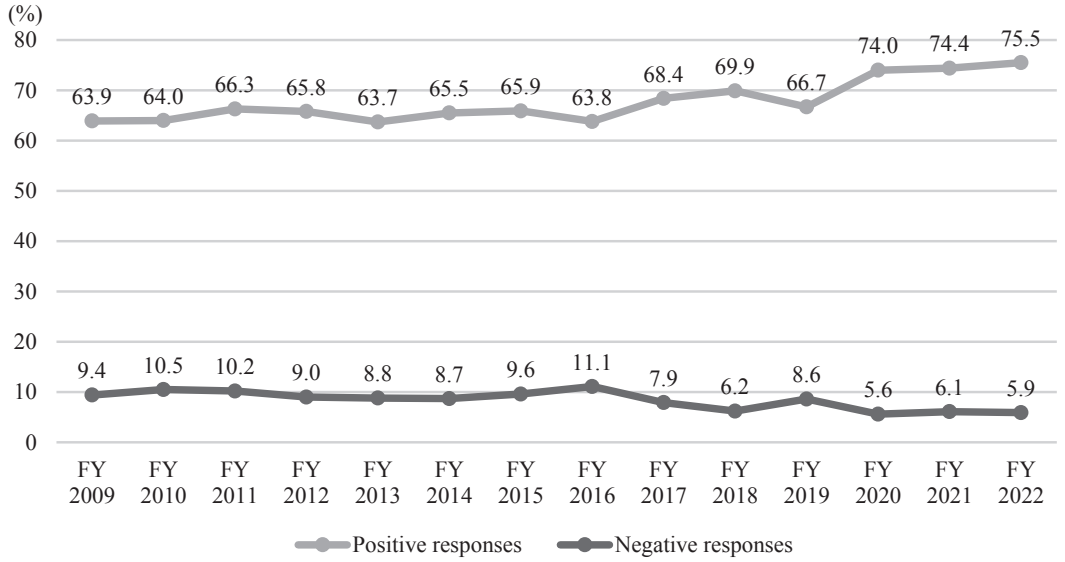
Figure 8 : Do you agree that trials under the currently implemented *saiban-in* system have become more trustworthy?



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

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

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



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

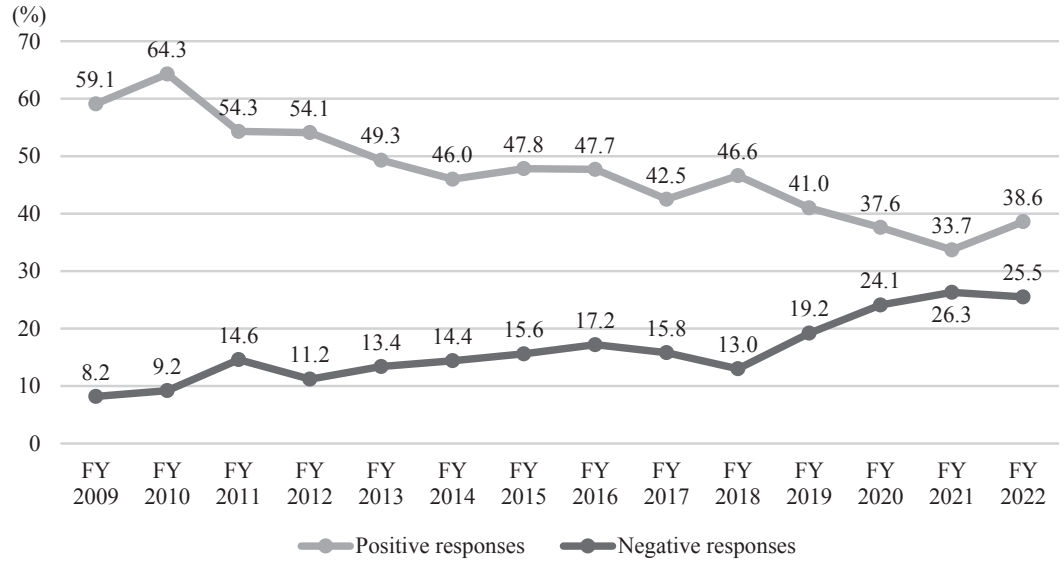
3.2. Citizens' Sense of Ownership in Public Affairs

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

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

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

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

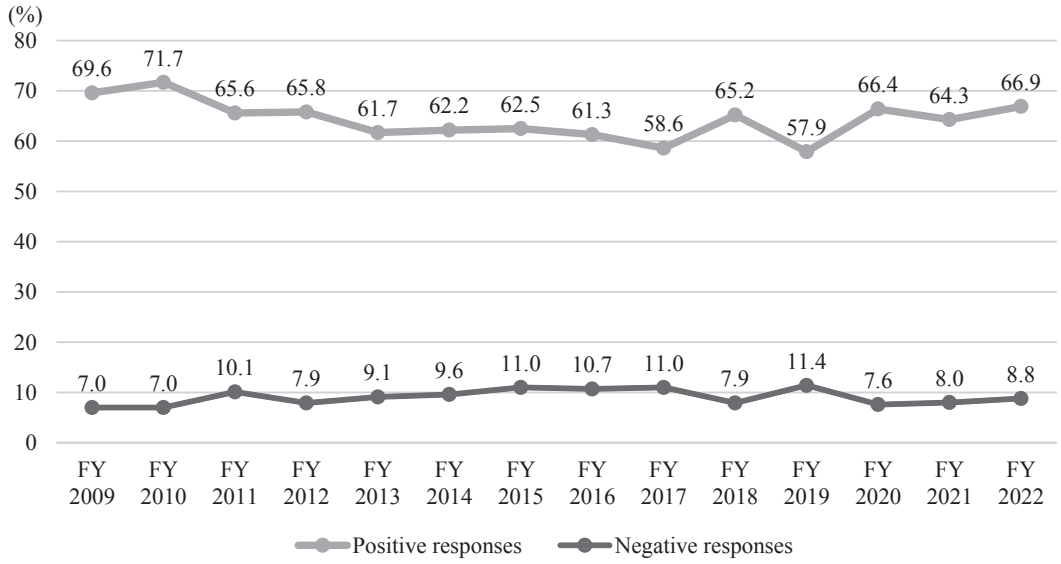


On the basis of the decrease observed in the rate of positive responses (the sum of "Agree" and "Slightly Agree") to this question from 59.1% in FY 2009 to 46.0% in FY 2014, Ii (2015: 148) claims that "the response rates raise doubts on the accomplishment of the purpose of the *saiban-in* system under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

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

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

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



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

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

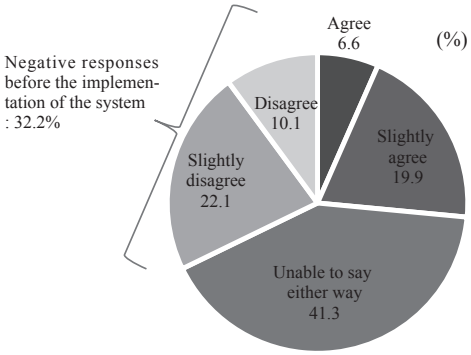


Figure 12b : Impressions of the current system regarding the sense of ownership in public affairs (FY 2019)

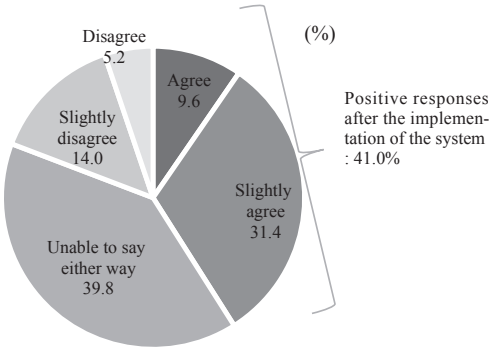
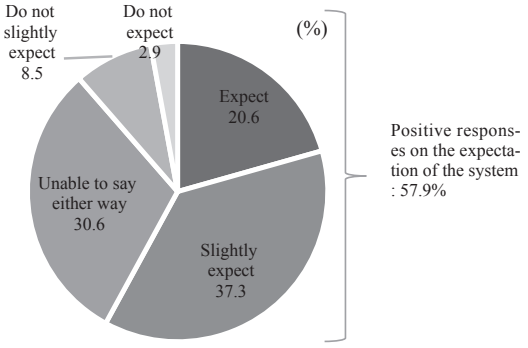


Figure 12c : Expectations of the system regarding the sense of ownership in public affairs (FY 2019)



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

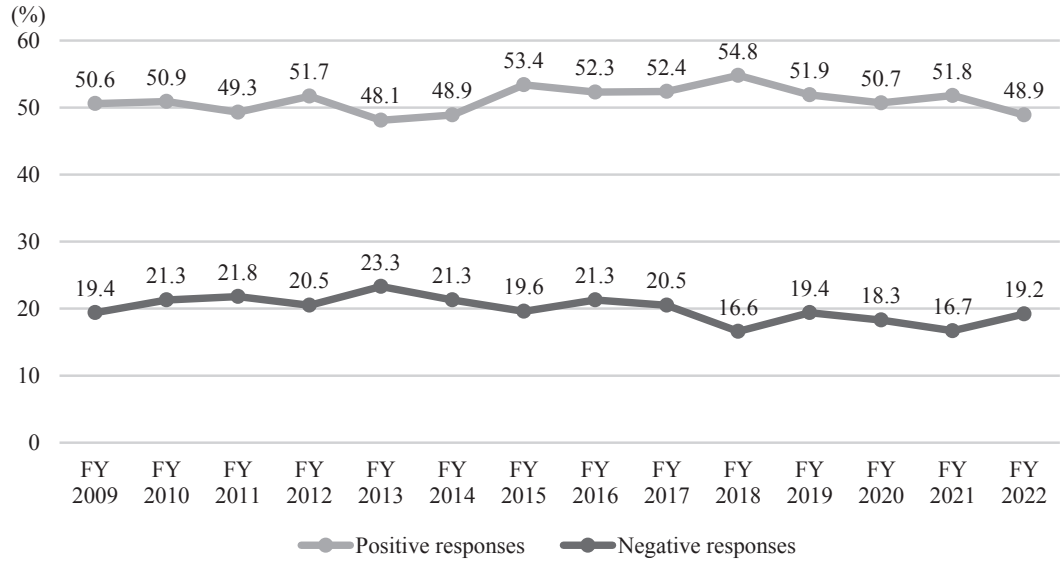
The Public Opinion Survey in FY 2019 posed the following question: "Do you agree, in considering the criminal trials in Japan before the introduction of the *saiban-in* system, that citizens were interested in public affairs such as criminal trials and the judiciary and thought of them as their own problems?"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

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

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

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

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



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

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

4. Conclusion

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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The Allocation of Party Subsidy in a Predominant Party System: The Japanese Case

*Naoya Asai**

Introduction

This study argues that the concentration of party subsidies in Japan is due to the cartelization of parties. Specifically, one party is dominant in terms of funding. Considering this context of party subsidies and cartelization of parties in Japan, this study focuses on the claim that junior partners who formed a coalition government with the Liberal Democratic Party (LDP) caused the repeal of the cap on the amount of subsidies.

The Japanese party system is a predominant party system. This type of party system exists "to the extent that, and as long as, its major party is consistently supported by a winning majority (the absolute majority of seats) of the voters" (Sartori 1976=2005: 173). Furthermore, "three consecutive absolute majorities can be a sufficient indication, provided that the electorate appears stabilised, that the absolute majority threshold is clearly surpassed, and/or that the interval is wide" (175-177). Giovanni Sartori argued that if "one or more of these conditions do not obtain, a judgement will have to await a longer period of time to pass" (177).

I do not know if researchers of Japanese politics consider the party system in Japan as a predominant system. However, the LDP has won elections since 2012[1)]. Countries such as Italy, Sweden, Israel, and India were noted to have predominant party systems. While these countries experienced changes in their party systems, the current Japanese system meets the criteria for the predominant system. This is a remarkable difference from the situation in other countries and is a rare case globally.

The concentration of political resources is a characteristic of a predominant party system. Specifically, the system is characterized by access to power, access to the bureaucracy, and political funding, among other factors. Focusing on funding, in Japan, the LDP receives a large amount of money and enjoys the most of party subsidies. This is because the LDP continues predominant.

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1) LDP won elections in 2012, 2014, 2017, and 2021-.

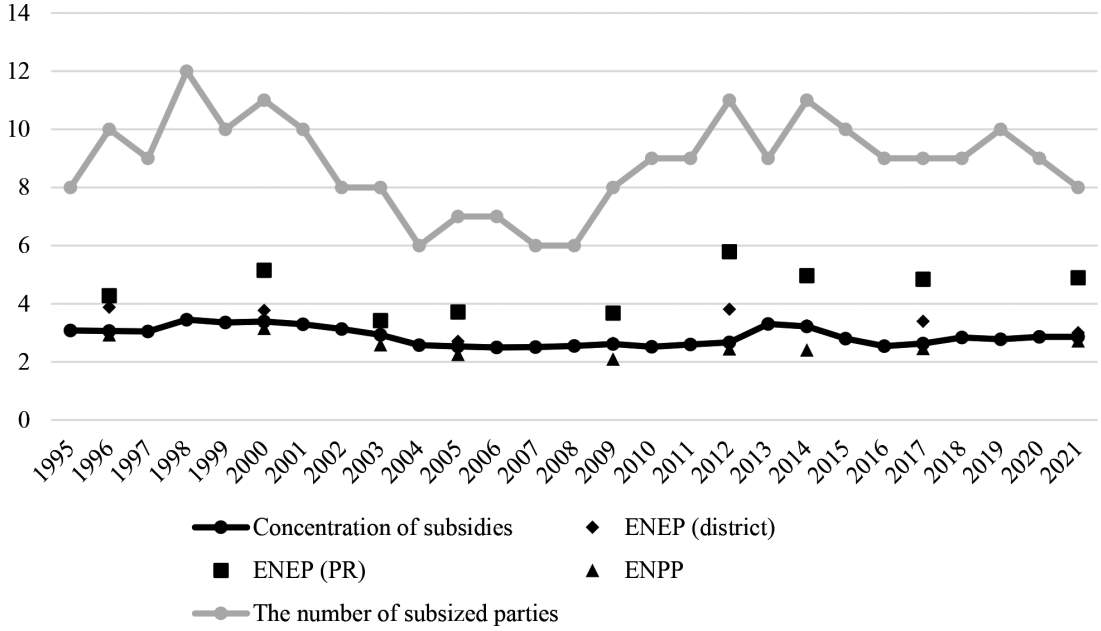
The predominance stems from the party's integration with the era. In this sense, a predominant party's resources do not come from existing rules, but from the political process. While one may argue the same regarding the concentration of political funds, the nature of party subsidies differs. Fund allocation is institutionally regulated. Meanwhile, for other resources, concentration correlates with predominance; for instance, subsidies are concentrated onto the LDP because it is the largest party. In other words, for party subsidies, parties may be able to remove the "inequality of results".

Yet, why does the bias in party subsidies remain? This study argues that this is because small parties other than the LDP (including those that have ceased to exist) created the current system to obtain funds, which resulted in the predominance of the LDP. This means that the logic of the cartel party theory worked more strongly than the logic of the predominant party system. The removal of the cap on party subsidies enabled each party to rely on subsidies and share incentives to maintain the current system. This has resulted in the bias in the subsidies allocated to them. Furthermore, the cartel-like behavior of the former governing parties facilitated the later bias in allocations, especially the LDP's predominance in party subsidies. In Japan, the introduction of the party subsidy system, elimination of the cap on the amount of subsidies allocated to political parties, and dependence on subsidies are systematically facilitated the cartelization of political parties in terms of funding. In turn, this has resulted in the bias in subsidies toward a small number of parties. In other words, the concentration of party subsidies is not only a consequence of the predominant party system, but also of the cartelization of political parties.

Institutional aspects and outcomes in the Japanese case

The amount of the subsidy allocated is determined by the number of Diet members and percentage of votes cast in parliamentary elections. Although the subsidy amount per vote is not determined, the subsidy is generally allocated proportionally to the number of effective political parties.Besides effective numbers of electoral and parliamentary parties, Figure 1 shows the relative concentration of subsidies for each party by calculating the effective number of parties to annual amount of subsidies received by each party in Japan. The effective number of parties is less than four in the electoral districts and approximately two to three in the Diet. For subsidies, the number of parties is often less than 3. Japanese party subsidies distribute funds fairly, without considering the characteristics of the party organization, such as the length of time a party has been active or the number of party members (Piccio & van Biezen 2018; Norris 2005).

Figure 1 Party subsidy concentration and the effective number of parties[2)]



However, we can take another view: the emergence of a dominant party causes bias in subsidies, as subsidies increase or decrease according to the number of incumbents and number of votes won. For example, in 2021, eight parties received subsidies, while the concentration value was 2.8 when the effective number of parties was considered for the subsidies. Thus, funding is concentrated in the hands of two to three parties. This indicates bias along the party lines of power. Indeed, Sartori (1976=2005: 178) noted, "in the predominant systems, the disparity of resources between the party in power and the parties out of power is likely to be greater than in other pluralistic systems." This reflects the inequality in subsidies in the predominant party system.

The concentration of political party subsidies leads to unequal funding among political parties. Whie there are qualitative regulations regarding the receipt and disbursement of funds for election campaigns, there are almost no quantitative restrictions on the total amount of funds. Furthermore, few restrictions are applied for party subsidies, and each party is free to decide how much money to use. The state supports the freedom of political parties to the extent possible and recognizes their character as private associations. However, given the bias in subsidies and absence of spending caps, public subsidies can contribute to resource inequality among political parties. This situation is a consequence of political cartelization through party subsidies.

2) This was based on Asai (2022).

Reducing the criteria for party subsidies

Two predominant views exist on the position of party subsidies: they contribute to the maintenance or development of democracy, and they have the opposite effect. The former is based on the premise that political parties are indispensable to the practice of democracy. This is expected to ensure fair competition among parties, regardless of their resources, prevent wealthy supporters and groups from exerting excessive influence, and increase transparency in political financing. By contrast, the latter is a critical view in the context of cartel parties (Katz and Mair 1995; 2009; 2018). Established parties attempt to obtain resources with the primary goal ensuring their own survival. These attempts discourage the emergence of new entrants and lead to the preservation of established parties' traditional positions. The fairness of inter party competition, and openness and diversity of politics are weakened by the system of party subsidies as long as it favors established parties. Party subsidies can both increase or decrease party competition.

Because the two positions on party subsidies do not mean that one is appropriate and the other is not, theoretically neither possibility can be ruled out. Even if the impact of one is empirically confirmed in practice, it depends largely on the system design. For instance, differences among countries have become apparent. A temporal change may have occurred in the way that the system was once effective in dealing with inter-party rivalry but has since become less effective. Unexpected effects of the system may or changes in the system may be made. Thus, it is useful to distinguish between the ideological debate on party subsidies and accumulation of empirical knowledge. Empirically, both diachronic and synchronic analytical perspectives can be useful.

Piccio and van Biezen (2018) examined the eligibility criteria for political party subsidies in various countries and found that even if conditions favoring established parties were in place at the time of introduction, the requirements tend to decrease over time.[3)] The authors also examined spending limits in elections as a system that could inhibit the emergence of new or smaller parties. In general, the requirements for receiving party subsidies include the number of votes and seats: either the percentage or number of votes received are used as a proxy for the number of votes received. Piccio and van Biezen (2018) drew attention to this point and pointed out that

3) They also examined spending limits in elections as a system that could inhibit the emergence of new or smaller parties.

the requirements for receiving subsidies in European countries have tended to be relaxed, as the threshold for votes has been lowered and the threshold for the number of seats has been eliminated (Table 1). For example, in Germany and Greece, the threshold for the percentage of votes received has been lowered. In Portugal and Sweden, the requirement for having at least one parliamentary seat has been eliminated so that people can receive subsidies even if they do not have a member in parliament (Piccio and van Biezen 2018). The examples found in these countries represent a shift from the cartel (exclusive) character of the party-subsidy system to an equal one.

Table 1 Eligibility criteria for public funding

	t_0	t_1
Seats	Belgium, Bulgaria, Croatia, Cyprus, Estonia, Finland, France, Germany, Ireland, Luxembourg, Netherlands, Poland, Portugal, Serbia, Slovenia, Spain, Sweden	*Belgium*, *Croatia*, Finland, Netherlands, **Serbia**, Spain
Votes	Austria, Czech Republic, Denmark, Greece, Hungary, Iceland, Italy, Latvia, Lithuania, Norway, Romania, Slovakia	Austria, **Bulgaria**, **Cyprus**, **Czech Republic**, Denmark, **Estonia**, **France**, **Germany**, **Greece**, Hungary, Iceland, **Ireland**, Italy, Latvia, Lithuania, **Luxembourg**, *Norway*, **Poland**, **Portugal**, *Romania*, *Slovakia*, **Slovenia**, Sweden
N=29	Seats: 17 Votes: 12	Seats:6 Votes: 23

Note: In bold - decreasing thresholds; in italics - increasing thresholds.
Source: Piccio and van Biezen (2018).

If cartel tendencies increase over time relative to whether established parties gain an advantage over new parties, the system limits the number of parties eligible for subsidies. Piccio and van Biezen (2018) noted that the system has changed from being cartelized to an equal one, and that the criteria have decreased. A diachronic view reveals a move backward from cartelization. Party subsidies can shift toward promoting competition rather than collusion after a certain amount of time has passed since their introduction.

However, Japan has no constitutional court to impose institutional changes. In the European context, if I draw on Piccio and van Biezen's findings, the interaction of political parties around a coalition may bring about institutional change. I argue that institutional reform was initiated by political parties that formed coalitions, which in turn strengthened the cartel structure of established parties in Japan.

The distribution of political party subsidies is skewed and entrenched

(see Figure 1). The direct cause is the system used to determine the funding distribution. The amount allocated to each party is calculated by dividing the total amount into two parts: one based on the number of Diet members and the other based on the percentage of votes cast. In the calculation based on the number of members, the amount is calculated by dividing the number of members belonging to the party in question by the number of all members belonging to the party that submitted the notification. For the calculation by the percentage of votes cast, one-half of the total amount is further divided into two parts: one each for the electoral and proportional categories. Each of these is multiplied by one-quarter and then multiplied by the percentage of votes cast for the party in question in each election. For the regular election portion, the average of the last election and two previous elections is multiplied such that, in effect, the amount allocated is not reduced to zero even if one member belongs to the party. Funds are allocated four times per year (Table 2).

Table 2 Allocation calculation of subsidies[4)]

Division			Calculation of subsidies to each party	
Divided by the number of Diet members (one-half of the total amount) …A			$A\times\frac{\text{number of the relevant party}}{\text{total number of the submitted parties}}$	①
Divide by the percentage of votes (one-half of the total amount) …B	General election (House of Representatives, last time) (last time)	Constituency	B×1/4×percentage of votes	②a
		proportional representation	B×1/4×percentage of votes	②b
	General election (House of Councilors last time and two times before)	proportional representation	B×1/4×average percentage of votes (last time and two times before)	②c
		constituency	B×1/4×average percentage of votes (last time and two times before)	②d
Allocation			①+②(sum of “a” to “d”)	

Source: Ministry of Internal Affairs and Communications
(https://www.soumu.go.jp/senkyo/seiji_s/seitoujoseihou/seitoujoseihou04.html)

Because the percentage of votes received is only for parties that have submitted a notification regarding the grant, the portion for parties that have not submitted a notification is allocated to other parties. In Japan, the Communist Party of Japan denies the party subsidy system and refuses to receive subsidies: therefore, the party’s allotment is returned to other

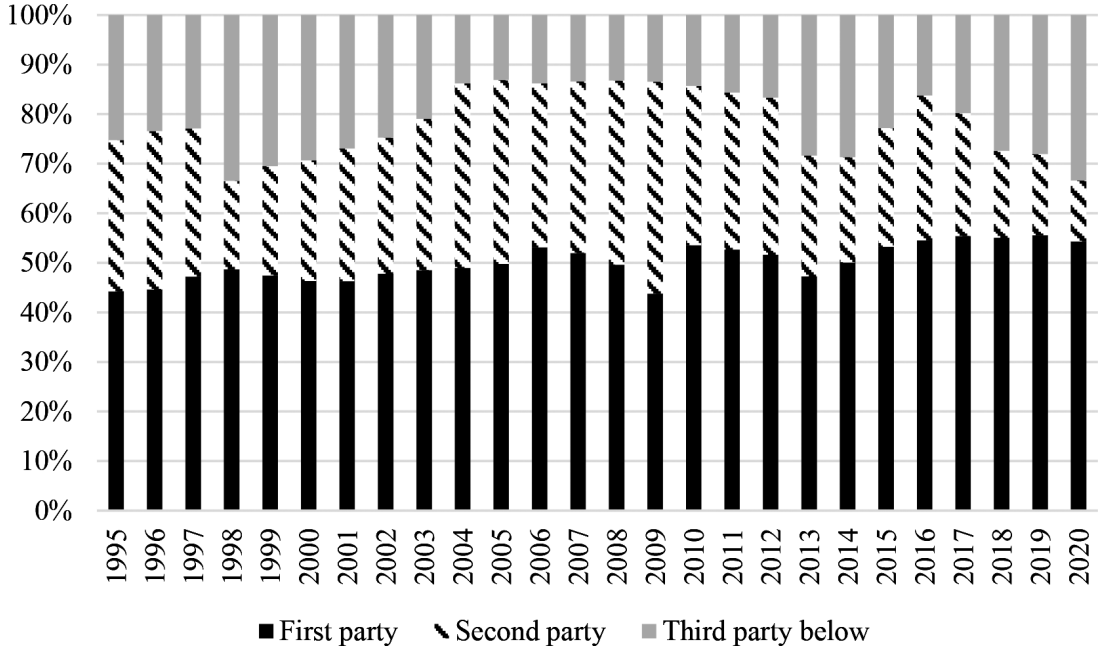
4) This was cited from Asai (2022).

parties' subsidies. Each party is subsidized proportionally according to its strength, ensuring the equality of opportunity for the parties in the Diet.

Here, I focus on the inequality of outcomes that accompanies the equality of opportunity. The concentration of grants also results in unequal amounts of available funds. For example, the LDP spent $15,291,694 per year (1995-2020) on personnel expenses from grants, compared to $4,170,462 (1997-2017) for the DPJ and $695,077 (2013-2020) for the Ishin. In addition, Japanese political parties are allowed to carry over their subsidies; as of 2020, the LDP has $166,818,480, the Constitutional Democratic Party of Japan (CDP) has $13,901,540, and the Japan Innovation Party (JIP: Nippon Ishin) has $9,036,001[5]. Thus, equality of qualifications creates substantial bias.

The LDP receives nearly half of all party subsidies, with other parties sharing the remaining half (Nassmacher 2006: 448). A similar trend was observed between 2009 and 2012 when the Democratic Party of Japan (DPJ) came to power; it received about half of the total amount of subsidies. Figure 2 shows the percentages of first, second, and third parties and below in the distribution of party grants from 1995 to 2020 (Asai 2023). The amount received by the first party has remained at around 50% of the total (Nassmacher 2001: 26); after 2006, the amount allocated to the first party exceeded 50% in most years. According to Nassmacher (2001), smaller parties can criticize major parties for the bias in the distribution of subsidies.

Figure 2 Subsidy allocations

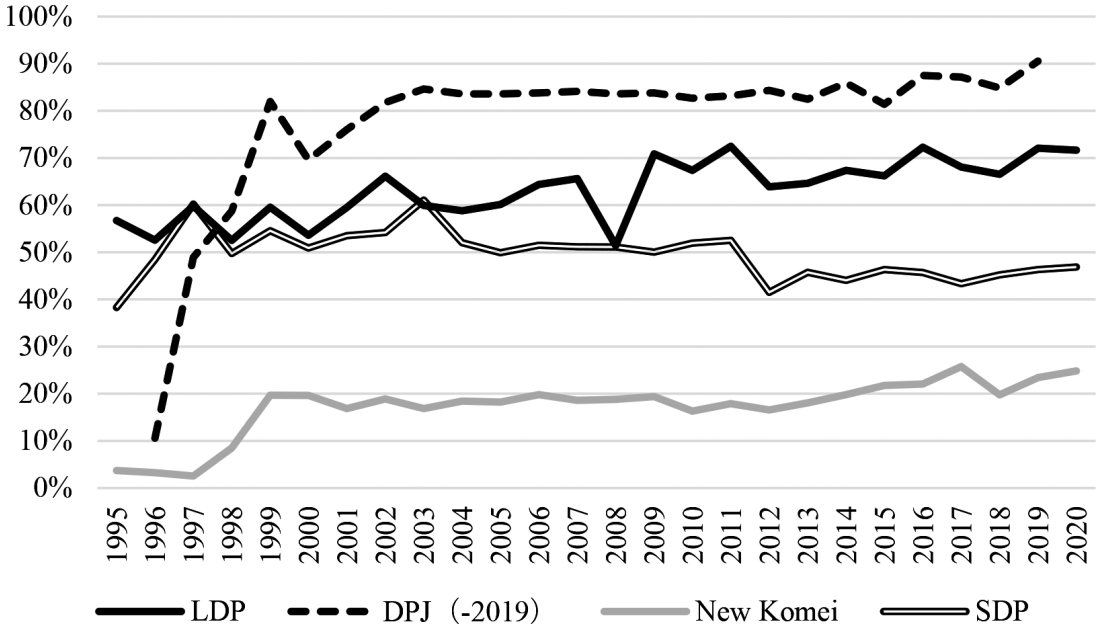


5) All these values are approximate.

This overlaps with findings of Piccio and van Biezen (2018). Although not a requirement for receiving the subsidy, if unequal aspects of political party subsidies are recognized, disadvantaged parties may seek to change the existing system. According to Nassmacher (2001: 16), one may critically view the distribution of subsidies in Japan.

However, established political parties have not criticized the current allocation method for political party subsidies in Japan, and there has been no movement to change the system. Thus, it seems that they tolerate this allocation bias. This is because all parties depend on subsidies. Figure 3 shows the share of subsidies in the annual revenues of parties that have received subsidies for more than 20 years. The LDP and DPJ have continuously recorded more than 50%; in the case of the Social Democratic Party (SDP), it is more than 40%. Komeito has the lowest value among the four parties listed here (approximately 20%). Still subsidies are the main source of revenue for political parties.

Figure 3 Subsidies as a percentage of each party's annual revenues[6)]



A similar trend emerges in Europe. For example, in countries such as Spain, Hungary, and Belgium, subsidies have reached their high 70s as a percentage of party revenue. Of the 18 countries studied by Piccio and his colleagues, 11 exceeded 50%; in the three countries of Canada, Germany, and the Netherlands-party spending accounted for a larger share of party

6) This was based on Asai (2022).

revenue than subsidies. In European countries, subsidies accounted for a growing share of party revenues, rising 68.3% in Ireland and 37.1% in Italy 1990-2012 (van Biezen and Kopecký 2018: 86-89). Comparing old parties with new parties showed that the share of subsidies increased over time. Further, using 1990 as the boundary between old and new parties, the authors find that new parties have a higher share of income from private donations than established parties (van Biezen and Kopecký 2018).

As shown in Figure 3, the Japanese value is 51.12%; however, the average value increases when new parties are added. All parties that emerged after the introduction of the party subsidy system had income structures based on subsidies. The parties that emerged after 1995 have been primarily funded by party subsidies for most of their existence.

The only change in income is toward a focus on party subsidies and not on voluntary funding. This pattern arises because private funding at the time of party formation is either lost after the second year or, if maintained, is limited to an amount that does not reach the level of subsidies. The decrease in funds from party members and supporters stems from the inability to sustain or expand party fee payments and business income. Some newly emerged parties have succeeded in raising funds from their supporters in their first year but have not been able to sustain or expand their financial resources.

Based on the above, I draw observations. First, Japan's party subsidy system has resulted in a fixed revenue structure for each party. The subsidy-centered revenue structure of all parties demonstrates that the amount of grants received by each party is larger than that of any other item. The current system does not provide large funding to smaller parties. Large funds are granted to each party for its ability to raise money.

Furthermore, since 1995, the funds granted to the first and second parties have remained above 80% of total grants. Smaller parties have the potential to criticize the current system in that their allocations are smaller than those of major parties. However, they are not likely to act critically in the current system as the grants support party funding.

Second, new parties are formed without their sources of funding. A high percentage of grants implies a very small amount of private funding; moreover, the allocated subsidy is large compared to private funding. After the second year of their formation, all parties become subsidy driven. Thus, parties are established without securing party members who pay party fees or support groups that make donations.

New parties are formed by incumbents moving from one party to another and are not initiated by a particular social movement or organization (Yamamoto 2015). The incumbent members can obtain stable and substantial

funding by determining how and when to form a party. They anticipate obtaining grants and can easily establish new parties without the need to establish a path to secure funding. Incumbents have a lower threshold for forming new parties than actors outside of the Diet. This suggests that a political party subsidy system encourages the formation of new parties (Iwasaki 2011; Yamamoto 2015). However, Japanese politics has unique features which mean that few entrants have emerged from outside the Diet: new parties do not have extra-parliamentary organizations as their parent organizations, and subsidies are not allocated unless a party has seats. Thus, the Japanese subsidy system is actually not effective in encouraging new entrants to challenge the system, and new parties that gain seats are easily dependent on subsidies.

Until the introduction of the party subsidy system, parties were financed primarily by party fees and donations; to date, party revenues have been primarily from grants. Once a party subsidy system is in place, it is unlikely that subsidies will cease abruptly or that the amount allocated will fluctuate significantly. As long as each party meets the requirements for receiving grants, the grants will be a constant source of funding.

Repeal of the caps on grants

The Japanese system creates high barriers for new participants from outside the Diet because they must hold a seat to be eligible for the subsidy. However, once a party meets the requirements, it can receive subsidies for up to six years as long as it holds a seat. Most parties, both those that introduced the program and new parties that have emerged since then, rely on subsidies as their main source of funding. Looking at the distribution of subsidies, parties with small allocations in a situation where they want to seek to rectify the system. However, the reason why no party, other than the Communist Party which criticizes the system, raises this issue is that each party is dependent on subsidies for both its income and expenditures. Calls for a change in the status quo do not necessarily lead to an expansion of the party's interests. The existing parties implicitly agree to maintain the current system, thus creating an equilibrium. Each party secures its funding by accepting the bias.

When the system was introduced, each party's subsidy was capped. However, when the cap was removed, each party increasingly began rely-

ing on the subsidy.[7] In other words, the bias in subsidies is due to the dependence of each party, and the repeal of the cap enabled each party to become so dependent. At the inception of party subsidies, a provision limited the grants allocated to each party to two-thirds of the previous year's revenue (hereafter, the two-thirds provision). As grants were not included in the previous year's revenues, the denominator was the amount of voluntary funds collected by each party, and two-thirds of that amount was the maximum subsidy it could receive. The two-thirds provision was intended to avoid dependence on state subsidies for party revenues. The two-thirds provision was applied to the 1995 funding grant but was eliminated that same year, with the current form of the grant in place since 1996. It was only after the elimination of the two-thirds provision that political parties began seeing increasing grants as a percentage of their annual income. Thus, the choice to eliminate the ceiling led to the present bias.

During 1996-2020, the average grant received by the first party was $104,956,627.[8] To receive the same amount of grants if the two-thirds provision had been applied, they would need to obtain $156,392,325 in voluntary funding. Most parties cannot meet this criterion. For instance, the LDP's annual revenue averaged $160,562,787 from 1996 to 2020, with party grants accounting for around 60% of this amount. The total of the three main voluntary sources of revenue, party fees, contributions, and business income, averaged only $36,839,081. If the two-thirds provision had been maintained, the LDP would not have received $104,261,550 in grants.

If the provision had remained in place, each party would have had to secure more private financial resources than it does today to receive the full subsidy. The provision was introduced through mutual agreement between the ruling and opposition parties, and its elimination reversed the principle of avoiding reliance on subsidies. At the very least, there is no consistency between the 1994 and 1995 decisions, in which an agreement was reached to cap the amount to be allocated to subsidies.

The two-thirds provision was initiated by the LDP in the debate over the introduction of a party subsidy system. However, this provision was also abolished under the LDP's coalition government. A comparison of the history of the introduction of the two-thirds provision and its subsequent abolition reveals that the LDP had an inconsistent attitude. When the LDP introduced the party subsidy system, it sought to establish this provision. However, when the Political Party Subsidy Law was revised in 1995, the

7) This is based on Asai (2023), who discussed the issue from the perspective of Japanese politics, including behavior in opposition parties.
8) 1995 was excluded because the upper limit applied.

LDP, as the ruling party, voted to repeal the provision and took it upon itself to abolish the regulations it had created.

One may assume that LDP's change in attitude was because they may have prioritized their merits. The two-thirds caps grants and encourages each party to secure its own financial resources. To receive the full allocated grants, the LDP would need more than the planned amount of its financial resources. Indeed, it requested more than 12 billion JPY from its support groups to ensure revenue performance. At that time, the total amount of political donations was on the decline, and the LDP did not find it easy to secure funding. The elimination of the provision was a favorable condition for the LDP because it would curb the cost of securing funds.

Meanwhile, some reasons may explain the LDP's reluctance to make this change. First, the self-serving nature of established parties was criticized during the introduction of the party subsidy system. The LDP needed to be cautious about public opinion trends. Second, it increased its income through contributions and donations after returning to power. Of course, it would have been preferable if conditions had not been imposed. However, the party's return as the ruling party suggests that conditions were becoming more financially favorable for the LDP. Third, other parties received smaller grants in 1995. The LDP may have intended sought to create difficulties for other parties in securing funding. When the debate over the introduction of this provision was underway, the parties were aware that they would have to secure revenues equal to two-thirds of the planned grant amount to receive the full amount. Taking the initiative to change the system would be irrational for the LDP, as it would benefit other parties struggling more to raise funds than the LDP. Given these points, it does not seem appropriate to consider that the LDP actively led the institutional change by focusing on policy effects.

One may argue that the LDP did not actively change its attitude for policy reasons, but rather passively agreed to it for different reasons. In other words, the LDP may have been compelled to agree to eliminate this provision. A possible factor could be the pressure from its coalition partners, the SDP and Sakigake.[9] As Koß (2011) and Scarrow (2006) pointed out, party subsidy systems and inter-party relations are intertwined. Thus, we can assume that some change occurred in the LDP's relations with other parties over the repeal of the provision.

As noted in the previous section, the pressure to maintain the coalition

9) The SDP has used this name since 1995; before, it was known as the Socialist Party of Japan.

may have driven the changes in the party subsidy system. Piccio and van Biezen (2018) focused on points related to entitlement requirements and how allocations are calculated. Meanwhile, pressure among coalition parties may prompt changes not only in the requirements for entitlement and method of calculating the amount of allocation but also in a wide range of provisions. Accordingly, changes to the party subsidy system would be driven by coalition parties even not by the major parties within the coalition. When the two-thirds provision was abolished, the LDP, which held the largest number of seats among the ruling parties in the coalition, changed its attitude. In other words, there may have been pressure from the Socialist Party and Sakigake, which had a coalition with the LDP.

Specifically, at that time, the LDP had returned to power by forming a coalition between the Socialist Party and Sakigake. Rather, the LDP was eager to return to power and even formed a coalition with the Socialist Party, with which it had been at loggerheads for a long time. Besides this pursuit for public office, other factors contributing to the formation of the LDP's coalition government included the fact that the possibility of policy compromise was being considered, and that a human network had been formed between the parties. A senior LDP official at the time stated that the party could not have returned to power without a coalition with the Socialist Party.

The LDP's primary goal of pursuing public office was reflected in its decision-making process under its coalition government. Although the LDP had more than twice as many seats as the SDP, it did not take the lead in coalition government's decision-making. The three parties collaborated to reach a consensus. The LDP also voted to abolish the two-thirds provision as a result, since it was an issue of concern for the Socialist Party. Thus, LDP's change in attitude was a consequence of interactions between the parties in the LDP's coalition, especially with the Socialist Party. Following the collapse of the non-LDP/non-communist coalition, the LDP recognized the need to build a cooperative system with the ruling party to manage the coalition government.

Pressure from partner parties

The issue of the elimination of the rule was first raised by the Socialist Party and Sakigake when their grants were reduced. The Socialist Party's grant was reduced because its planned allocation for 1995 exceeded two-

thirds of its 1994 revenue.[10] To avoid a reduction in the following year, it needed to increase its revenues; however, its ability to collect money was not strong and it could not expect a significant increase in its revenues. Rather, The Socialist Party (SP)'s income was gradually declining, despite occasional fluctuations. The SP then began considering the idea of eliminating the two-thirds provision to receive the full grant. Together with Sakigake, which was struggling with the same situation, the Socialist Party stepped forward to advocate for systemic reform and attempted to secure the funds by eliminating the cap. Both parties legitimized the repeal of the provision using the logic that continuing collection activities would run counter to political reforms. The first opposition party also supported the elimination of the cap. No consensus was reached among the ruling parties, and disagreement among the ruling coalition parties surfaced when the LDP opposed the repeal of the provision, and the SP and Sakigake agreed. If the remaining parties aligned themselves against the opposition's proposal, the proposal of the SP and Sakigake would be defeated. However, the LDP's priority was to remain in power. Hence, it was necessary to avoid aligning the opposition parties with their partner parties, as this would cause a rift between the ruling parties. The culmination of these factors put the LDP on the back foot. Consequently, it complied with its coalition partners' requests and agreed to repeal the cap.

Conclusion

Japanese party subsidies have not resulted in the relaxation of the criteria for access, as in Europe. The system remains as it was when it started, with subsidies provided within the parliament. Under the current system, parties have a funding structure that relies on subsidies, which also remain the main source of funding for expenditure. Thus, party funding, in terms of both income and expenditure, is shaped by party subsidies (in total).

The repeal of two-thirds provision cap, which shaped party funding, has not received much attention with respect to party funding in Japan. However, repealing the cap is an important institutional change because it defines two features of party funding in Japan today. First, parties now rely heavily on subsidies. The upper limit stipulated that the subsidy would be capped at two-thirds of the previous year's income so that the subsidy could never exceed 50% of the total. Second, parties can now obtain funds through the subsidy program, even if they have no independent financial resources.

10) The SDP was reduced by $4,865,539.

This is especially true of political parties that emerged after the start of the program. Regardless of whether a party originated as an offshoot of an established party or as an extra-parliamentary force, it can obtain funding by achieving certain results in elections. This allows parties to operate as political parties without the presence of supporters or support groups.

The single-party dominance of funds discussed here is particularly relevant to the first point. When one only views the distribution of subsidies, the other parties are in a situation where they should seek to correct the system. However, all parties depend on subsidies for both income and expenditure, and calls for changes to the system do not necessarily increase the parties' profits. Furthermore, the dominant party is the LDP. Together with the Kōmeitō party, with which it forms a coalition, the LDP continues to secure a certain percentage of its funds. Opposing parties, in particular, are in a position to demand amendments. Yet, they are also dependent on subsidies for both income and expenditure under the current system. Thus, opposition rather chooses to maintain the status quo rather than call for a change in the system. In exchange for their viability, they allow the LDP to gain a one-party advantage in funding.

I argue that the removal of the cap made this dependence possible, which was triggered by the request of coalition parties of the LDP. In other words, cartelized (self-serving) actions in pursuit of short-term profits have resulted in the state of one-party dominance today. Today, Sakigake has disappeared, and the Socialist Party is dying. In contrast, the LDP has won election after election since 2012. Essentially, Japanese politics has returned to what can be understood as the predominant party system. The LDP's current financial dominance is, due to its electoral wins. However, from an institutional perspective, it is the result of pressure from parties that now have no political influence.

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AFLOAT AND AIRBORNE: A DUAL EXAMINATION OF IMO AND ICAO PERSPECTIVES ON UNMANNED VEHICLES*[1]

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Abstract

At a time of rapid technological advancement, unmanned ships and aircraft offer great potential in the maritime and aviation sectors. This article considers the regulatory environment for unmanned ships and aircraft, examining how international regulatory approaches can shape the frameworks in these areas. This article compares IMO's classification approach for unmanned ships based on autonomy levels with ICAO's operation-centred and risk-based approach for unmanned aircraft. IMO's regulations for unmanned ships are based on levels of autonomy. Although this approach offers some advantages, it may impose limitations in keeping pace with technological progress. On the other hand, ICAO's approach offers flexible and adaptable regulations by grouping operations according to risk levels. This method offers the ability to adapt to the rapidly changing aviation industry.

ICAO's operation-centred approach could be an inspiration for IMO. This approach ensures that regulations are flexible, adaptable and risk orientated. It can also facilitate rapid adaptation to new technologies and the updating of operational standards.

In conclusion, international regulatory approaches are of great importance in the process of establishing legal regulations for unmanned vehicles. ICAO's operation-centred and risk-based approach can guide IMO's regulations for unmanned ships. Analysing similar approaches in both sectors can help to develop future regulations in a more effective and harmonised manner.

Keywords: Unmanned ships, Unmanned aircraft, Regulatory approaches, IMO, ICAO.

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1. Introduction

1.1. Scope of the Article

Wherever the human imagination touches, there lies a marvellous potential. Having witnessed the technological magic of unmanned vehicles, the law is obliged to guide this magical journey. Although aviation innovations have taken the law to higher altitudes, unfortunately, the same cannot be said for maritime law. In this article, how aviation law deals with unmanned aircraft technology and maritime law deals (or fails to deal) with unmanned ship innovations will be analysed comparatively and how aviation law can be a good example for maritime law in this regard will be discussed.[1)]

In the legal doctrine, some authors have used the words 'autonomous' and 'unmanned' interchangeably and have indicated this. As explained later in the current article, the International Maritime Organization (IMO) refers to 'autonomous ships', while the International Civil Aviation Organization (ICAO) prefers the term 'unmanned aircraft'. Since the use of the word 'unmanned' has a wider scope[2)], this concept will be included in this article. Because there are both 'autonomous' and 'remotely piloted vehicles' under the umbrella of 'unmanned vehicle'.[3)] Therefore, we believe that it would be more accurate to prefer the word 'unmanned' which has become widespread by taking into account the current ICAO regulations.

As explained below, unmanned aircraft are widely used in civilian and military fields, the wider community is conscious of their presence and their legal framework is more developed.[4)] Many countries have enacted laws and regulations to regulate the use of unmanned aircraft in areas such as airspace management, civil aviation rules, privacy, and data protection.[5)] International law also plays an important role in relation to the military use

1) Breunig, J. and others, (2018). Modeling Risk-Based Approach for Small Unmanned Aircraft Systems, 3.

2) Autonomy should be kept as a descriptive phrase, but one should differentiate between "full autonomy" and "constrained autonomy," with the second being more suitable for ships currently Rødseth, Ø., Wennersberg, L., and Nordahl, H. (2022). Levels of autonomy for ships. *Journal of Physics: Conference Series*, 2311.

3) Veal, R., and Tsimplis, M. (2017). The Integration of Unmanned Ships into The Lex Maritima. *Lloyd's Maritime and Commercial Law Quarterly*, 303.

4) Liu, H. (2023). Maritime and Aviation Law: A Relational Retrospect and Prospect on Unmanned Ships and Aircraft. In *Regulation of Risk* (Leiden, The Netherlands: Brill | Nijhoff), 472.

5) Chatzara, V. (2023). Unmanned Air Transports: The Use of Drones and Legal Issues Arising Thereof. In K. Noussia and M. Chanmunon (Eds.), *The Regulation of Automated and Autonomous Transport* (Springer), 43; Kopardekar, P., and others. (2016). Unmanned Aircraft System Traffic Management (UTM) Concept of Operations. *AIAA Aviation Forum and Exposition*, Washington DC, 13.06.2016, 3, available from https://ntrs.nasa.gov/citations/20190000370, accessed 28.08.2023.

of unmanned aircraft.[6)]

On the other hand, autonomous ships are a newer technology and legal regulations are not as solid as for unmanned aircraft.[7)] The legal framework for autonomous ships is based on the law of the sea, international maritime rules and laws regulating the maritime space of coastal states.[8)] However, in the case of autonomous ships, the legal regulations in this field are still in the developmental stage and there is no fully standardised framework at the international level.[9)]

Since the legal regulations of autonomous ships are generally less developed compared to unmanned aircraft, it is very important to make a comparative analysis. This analysis is useful for several reasons:

First, there are some deficiencies in the legal regulations on unmanned ships. These deficiencies, which may include issues such as security, liability, and certification, require improving the legal framework of unmanned ships.[10)] A comparative analysis with unmanned aircraft identifies legal gaps in autonomous ships and encourages regulation and the creation of a more comprehensive legal framework in these areas.

Second, unmanned aircraft can be an example and a source of inspiration for unmanned ships. Comparative analysis transfers advances and best practices in the aviation industry to the legal regulations of unmanned ships. In this way, the legal framework in unmanned ships can be made more effective and up to date by taking advantage of advances in the aviation sector.

Third, it is important that unmanned ships and aircraft adapt to the needs of future use. Legal regulations need to be updated according to rapidly de-

6) For a long time, the United Nations has debated autonomous weapon systems, which have the potential to violate several ethical and legal laws by using with unmanned aircraft systems. As the product of these discussions, in 1980, the Convention on Certain Conventional Weapons (CCW), also known as the Convention on Inhumane Weapons was adopted, along with three appended protocols. See, Convention on Prohibitions or Restrictions on the Use of Certain Conventional Weapons which may be deemed to be Excessively Injurious or to have Indiscriminate Effects. (1980). 1342 UNTS 137.

7) Liu (2023), 472.

8) Dremliuga, R., and Mohd Rusli, M. H. B. (2020). The Development of the Legal Framework for Autonomous Shipping: Lessons Learned from a Regulation for a Driverless Car. *Journal of Politics and Law*, 13(3), 300.

9) One reason for that, at the time when most of the law of the sea and maritime law treaties were adopted, autonomous vessels were considered a distant idea. See, Dremliuga and bin Mohd Rusli (2020), 296; Boviatsis, M., and Vlachos, G. (2022). Sustainable Operation of Unmanned Ships Under Current International Maritime Law. *Sustainability*, 2.

10) Zhu, L., and Xing, W. (2022). Policy-Oriented Analysis on the Navigational Rights of Unmanned Merchant Ships. *Maritime Policy and Management*, 49(3), 457.

veloping technology and changing needs.[11] Comparative analysis helps to determine how current legislation can adapt to these developments. Thus, unmanned ships can be used in accordance with future requirements and legal regulations can be updated in a timely manner.

For these reasons, as will be discussed in this article, it is important to make an analysis comparing the legal regulations of unmanned ships with unmanned aircraft. This analysis provides benefits in many areas such as detection of legal deficiencies, learning and improvement, adaptation to future needs. Thus, it contributes to the creation of a more fair, consistent, and modern legal framework.

1.2. Rising of Unmanned Vehicles in Skies and Seas

The use of unmanned technology has a relatively long history in the aviation industry.[12] While they were initially used mostly for military purposes[13], the use of fully autonomous aircraft in passenger transportation is also expected to begin in the not-too-distant future.[14] Research has demonstrated that aviation accidents mainly stem from human factors[15] and according to some experts in aviation industry, the use of unmanned aircraft will help minimize accidents.[16]

11) Henderson, I. L. (2022). Aviation Safety Regulations for Unmanned Aircraft Operations: Perspectives from Users. *Transport Policy*, 192.

12) While today's perception of unmanned aircraft may conjure up images of objects built with sophisticated technology, the hot air balloon flown by the Montgolfier brothers in 1783 did not require the control of a pilot. Höhrová, P., Soviar, J., and Sroka, W. (2023). Market Analysis of Drones for Civil Use. *LOGI – Scientific Journal on Transport and Logistics*, 14(1), 55.

13) According to records, Europe experienced its first air warfare in the summer of 1849 when Austrian forces besieging Venice bombarded the city with pilotless hot air balloons. Kozera, C. A. (2018). Military Use of Unmanned Aerial Vehicles. *Safety and Defense*, 4(1), 18 Holman, B. (2009). The First Air Bomb: Venice, 15 July 1849 *Airminded*, available from https://airminded.org/2009/08/22/the-first-air-bomb-venice-15-july-1849/ , accessed 05.07.2023.

14) The world's first self-flying, all-electric, four-passenger eVTOL air taxi was unveiled by Wisk Aero, an Advanced Air Mobility (AAM) and autonomous electric flights company, in the fall of 2022. https://wisk.aero/aircraft/, accessed 05.07.2023.

15) Shappell, S., and others. (2007). Human Error and Commercial Aviation Accidents: An Analysis Using the Human Factors Analysis and Classification System. *Human Factors*, 49(2), 227–242. Additionally, human factors can be quite varied. For instance, pilots check themselves with the 'IMSAFE' checklist before a flight. The letters in this acronym stand for illness, medication, stress, alcohol, fatigue and emotions; respectively. See, Federal Aviation Administration. (2020). *Aviation Instructor's Handbook* (FAA-H-8083-9B); Mendonca, F. A. C., Keller, J., Levin, E., and Teo, A. (2021). Understanding Fatigue within a Collegiate Aviation Program. *The International Journal of Aerospace Psychology*, 31(3), 183.

16) Unmanned aircraft may help prevent unintended accidents as well as deliberate disasters. The Germanwings Flight 9525 disaster, in which the co-pilot deliberately crashed the plane for suicide in 2015 and caused the death of 150 people, can be cited as an example. See for detailed information, Pasha, T., and Stokes, P. R. A. (2018). Reflecting on the Germanwings Disaster: A Systematic Review of Depression and Suicide in Commercial Airline Pilots. *Frontiers in Psychiatry*, Vol 9, 1.

Unmanned aircraft, which have many areas of use such as military operations, fire suppression, logistics, agricultural use, humanitarian aid in emergencies, meteorology, film production, space exploration, help humanity with their unique technologies.[17)]

Unmanned vehicle technology must have an affinity for the colour blue, as it has begun to dominate the seas as well as the skies. Autonomous ships are ships that can navigate without human intervention and are used for various purposes.[18)] They provide a wide range of benefits from cargo transport to marine research, underwater exploration, maritime safety and fleet management.[19)] Autonomous ships offer advantages such as increased productivity and reduced labour costs.[20)] They also provide a continuous flow of data, making them ideal for gathering and analysing information in maritime-related areas.[21)] They increase occupational safety and energy efficiency while reducing human error.[22)] These developments aim to provide more effective, safe and sustainable solutions in the maritime industry.[23)]

In the maritime industry, the use of unmanned vehicles is much more nascent than in the aviation industry.[24)] The world's first unmanned commercial shipping operation took place on May 7, 2019, when a box of oysters collected in Essex, UK, was delivered to customs officials in Ostend,

17) Gautam, T., and Johari, R. (2023). Drone: A Systematic Review of UAV Technologies. In S. Tanwar and others (Eds.), *Proceedings of Fourth International Conference on Computing, Communications, and Cyber-Security* (CCCS 2022) (Lecture Notes in Networks and Systems, vol 664, Springer, Singapore, 147.

18) Utne, I., Rokseth, B., Sørensen, A., and Vinnem, J. (2020). Towards supervisory risk control of autonomous ships. *Reliability Engineering and System Safety*, 196, 106757.

19) Kretschmann, L., Burmeister, H.-C., and Jahn, C. (2017). Analyzing the Economic Benefit of Unmanned Autonomous Ships: An Exploratory Cost-Comparison Between an Autonomous and a Conventional Bulk Carrier. *Research in Transportation Business and Management*, 25, 76.

20) Maritime experts note that the shipping industry is risky, and its workers have limited supply. According to these authors, autonomous ships are also protective of workers and labour. See, Negenborn, R. R., and others. (2023). Autonomous ships are on the horizon: here's what we need to know. *Nature*, 615, 30; Kretschmann, Burmeister and Jahn (2017), 76.

21) Dremliuga and bin Mohd Rusli (2020), 296.

22) According to maritime experts, human error factor is one of the key reasons of transportation accidents at sea. See, Michael Boviatsis and George Vlachos (2022), Sustainable Operation of Unmanned Ships Under Current International Maritime Law, Sustainability, 1, 7369, 2. An example of human error in the maritime sector is the Suez Canal blockage. The giant container ship "Ever Given" crashed into the shore in the Suez Canal on 24 March due to poor visibility caused by sandstorms and bad weather conditions. https://www.bloomberg.com/news/features/2021-06-24/how-the-billion-dollar-ever-given-cargo-ship-got-stuck-in-the-suez-canal, accessed 06.07.2023; Vio, I., and Brdar, M. (2022). Maritime Autonomous Surface Ships – International and National Legal Framework. *Pomorski Zbornik*, 62, 144.

23) Felski, A., and Zwolak, K. (2020). The Ocean-Going Autonomous Ship—Challenges and Threats. *Journal of Marine Science and Engineering*, 8(1), 41, 1.

24) Liu (2023), 471.

Belgium, by a 12 metres unmanned ship with an aluminium hull.[25] Thanks to technological developments such as surveillance, analysis, sensor technology and navigation software, autonomous control of much larger ships is becoming possible.[26] The Soleil, a Japanese ferry, became the first major ship to operate without human assistance in January 2022. The ship berthed, unberthed, turned, reversed, and guided itself for 240 kilometres across the Iyonada Sea from Shinmoji in northern Kyushu.[27]

Increasing interest and research in autonomous vehicles also leads to economic development of the sectors.[28] According to statistics, the worldwide unmanned aircraft marketplace had a value at $6.29 billion[29] in 2021 and is expected to rise at a compound annual growth rate (CAGR) of 19.3% between 2022 and 2031, reaching $37.06 billion by 2031.[30] The global marketplace for autonomous ships is estimated to be worth $85.84 billion in 2020, and is expected $165.61 billion by 2030, with a CAGR of 6.8% between 2020 and 2030.[31]

In both areas of economic growth and investment, legal regulations are needed to ensure the safe and ethical use of these technologies, to address privacy and security concerns, ensure compliance with international law and prevent potential conflicts.[32]

2. Maritime Law Aspect

2.1. Overlapping with the 'Ship' Definitions

To start with, since United Nations Convention on the Law of the Sea

25) https://www.gsdm.global/maritime-autonomous-surface-ships-mass-and-framework-development-challenges/, accessed 05.07.2023.
26) Liu (2023), 471.
27) Negenborn and others (2023), 30.
28) Felski and Zwolak (2020), 1.
29) All $ symbols used in this study refer to United States dollars.
30) S., A., and Mutreja, S. (2022). Autonomous Aircraft Market by Aircraft Size, Maximum Take-off Weight, Application, End-Use: Global Opportunity Analysis and Industry Forecast, 2021-2031, available from https://www.alliedmarketresearch.com/autonomous-aircraft-market-A07121, accessed 06.07.2023.
31) Jadhav, A., and Mutreja, S. (2020). Autonomous Ships Market by Level of Autonomy, Ship Type, Component and Fuel Type: Global Opportunity Analysis and Industry Forecast, 2020-2030, available from https://www.alliedmarketresearch.com/autonomous-ships-market, accessed 06.07.2023.
32) Consider the case of an unmanned aircraft that may mistakenly break down private land and cause damage. Similarly, if the scope of this scenario is broadened to include an unmanned aircraft entering the airspace of a foreign State without authorisation, a violation of international law will result. Similarly, the unauthorised entry of an autonomous ship into the maritime territory under the jurisdiction of another State would also constitute a violation of international law.

(UNCLOS)[33], the most important instrument of international maritime law, uses the terms ship and vessel interchangeably, it can be said that these concepts have essentially the same meaning.[34] In this study, the use of the term ship is preferred.

To understand whether unmanned ships are within the scope of existing international maritime law regulations, first, it is necessary to examine the definition and determine whether it overlaps with the 'ships' within the scope of the agreements.[35] However, it is challenging to assess whether unmanned ships will fall into this category because there is no uniform legal definition of 'ship' in UNCLOS, other treaties, or customary international law.[36]

The main difference of unmanned ships from ships that constitute the main object of international maritime law regulations is the presence of seafarers.[37] Therefore, it should be examined whether the presence of a seafarer on the board is an integral factor for a floating object to be classified as a 'ship'.

For a better understanding of the issue, it would be useful to analyse whether unmanned ships are excluded from the 'ship' definitions in documents regulating international maritime law. In International Convention for the Prevention of Pollution from Ships (MARPOL)[38], the fundamental international instrument governing the prevention of ship-caused pollution of the marine environment, 'ship' is defined as,

> *"...a vessel of any type whatsoever operating in the marine environment and includes hydrofoil boats, air-cushion vehicles, submersibles, floating craft and fixed or floating platforms."*

Another important document in international maritime law is the Convention on Civil Liability for Oil Pollution Damage (CLC).[39] The CLC was enacted to ensure that those who suffer oil pollution harm because of maritime casualties involving oil-carrying ships receive proper compensation.

33) United Nations Convention on the Law of the Sea. (1982). 1833 UNTS 3.
34) McKenzie, S. (2020). When Is a Ship a Ship? Use by State Armed Forces of Uncrewed Maritime Vehicles and the United Nations Convention on the Law of the Sea. *Melbourne Journal of International Law*, 21(2), 2.
35) Vio and Brdar (2022), 144.
36) McKenzie (2020), 2.
37) Zhu and Xing (2022), 448.
38) 1978 Protocol Relating to the 1973 International Convention for the Prevention of Pollution from Ships (MARPOL 73/78). (1978). 1340 UNTS 61.
39) Protocol of 1992 to amend the International Convention on Civil Liability for Oil Pollution Damage, 1969. (1992). 1956 UNTS 1.

In Article 2, 'ship' is defined as,

> *"...any sea-going vessel and seaborne craft of any type whatsoever constructed or adapted for the carriage of oil in bulk as cargo..."*

The definition of 'ship' in Convention on the International Regulations for Preventing Collisions at Sea (COLREGs)[40], which is one of the most important works of IMO and determines the 'rules of the road' or navigation rules that must be followed by ships and other vessels at sea to prevent collision between two or more ships, is as follows:

> *"The word 'vessel' includes every description of watercraft, including non-displacement craft and seaplanes, used or capable of being used as a means of transportation on water."*

Another definition of 'ship' is included in the United Nations Convention on Conditions for Registration of Ships[41], finalised in 1986, which attempts to define the elements necessary for the registration of ships in a national register.[42] Pursuantly, 'ship' means,

> *"...any self-propelled seagoing vessel used in international seaborne trade for the transport of goods, passengers or both..."*[43]

Since not all floating objects can be entitled to international rights and obligations, international instruments contain definitions setting out the conditions for their classification as 'ships'. Although the definitions may vary slightly due to the purpose of the documents, a close definition is reached when the definition of 'ship' in the main instruments regulating

40) Convention on the International Regulations for Preventing Collisions at Sea (COLREGs). (1972). 1050 UNTS 16.

41) United Nations Convention on Conditions for Registration of Ships. (1986). However, the Convention has not yet entered into force because it has not reached the number of States Parties required for its entry into force. Nevertheless, since it is an important endeavour for the national registration of ships, the definition of ship is included in this article.

42) Kasoulides, G. C. (1989). The 1986 United Nations Convention on the Conditions for Registration of Vessels and the Question of Open Registry. *Ocean Development and International Law*, 20(6), 543-576.

43) United Nations: Convention on Conditions for Registration of Ships (1987). *International Legal Materials*, 26(5), 1229–1250. http://www.jstor.org/stable/20693153, accessed 10.07.2023.

international maritime law is examined.[44] None of the ship descriptions in the documents contain an explicit requirement for human presence on board, nor do they explicitly exclude the existence of autonomous ships.[45]

However, the fact that these documents do not exclude autonomous ships while defining 'ship' is not due to their intention to include autonomous ships within their scope, but simply since autonomous ships did not exist at the time the documents were drafted. Although it may seem economical and expeditious at first sight to take advantage of the wide ship scope of the Conventions and bring autonomous ships under the umbrella of these regulations, there are no provisions that can provide appropriate answers to the nature and characteristics of autonomous ships.[46] Because, as will be explained in the following sections of our article, these instruments contain regulations for manned ships. In other words, there is a serious deficiency in the existing regulations for autonomous ships.[47] To tackle this issue, IMO carried out a study to assess scope of autonomous ships which will be discussed in detail.[48] How the regulations for unmanned aircraft in aviation law can be a good example for maritime law will be discussed in our article.

2.2. IMO Regulatory Scoping Exercise on MASS

The International Maritime Organization (IMO) has conducted a significant study to investigate the compliance of autonomous ships with existing regulations.[49] In June 2017[50], the Maritime Safety Committee (MSC) of the

44) Ship definitions in other instruments regulating international maritime law do not exclude autonomous ships. For instance, according to the definition given in the Hague-Visby Rules, ship means "any vessel used for the carriage of goods by water". Similarly, the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter 1972, or the London Convention for short, defines both ships and aircraft together as follows: "Vessels and aircraft means waterborne or airborne craft of any type whatsoever. This expression includes air-cushioned craft and floating craft, whether self-propelled or not." Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter. (1972). 1046 UNTS 120.

45) Boviatsis and Vlachos (2022), 3.

46) Zhu and Xing (2022), 459.

47) Karlis, T. (2018). Maritime Law Issues Related to the Operation of Unmanned Autonomous Cargo Ships. *WMU Journal of Maritime Affairs*, 17, 126.

48) Vio and Brdar (2022), 144.

49) Jo, M. C., and others (2020). Study on the Potential Gaps and Themes Identified by IMO Regulatory Scoping Exercise (RSE) for the Use of Maritime Autonomous Surface Ships (MASS). In *IOP Conference Series: Materials Science and Engineering* 929(1), 1; Zhu and Xing (2022), 458.

50) The beginning of the discussion of ship automation within IMO actually dates back to almost 6 decades ago. At the 8th MSC meeting in 1965, the term 'ship automation' was discussed and the term was used broadly to include complete/partial automation systems and remote control. See, Jo and others (2020), 2; Kim, T. E., and others. (2022). Safety challenges related to autonomous ships in mixed navigational environments. *WMU Journal of Maritime Affairs*, 21(2), 142.

Organization started a "regulatory scoping exercise" to establish the scope of applicability of its regulation tools and their potential reach regarding Maritime Autonomous Surface Ships (MASS).[51] After 4 years of start, at the 103rd session of the Committee[52], the Outcome of the regulatory Scoping Exercise for the use of MASS has accepted containing a review of the extent to which the current regulatory structure under the authority of the MSC might be shaped to tackle MASS activities.[53]

The Committee defined the MASS as "a ship which, to a varying degree, can operate independent of human interaction" for the aims of the exercise.[54] During the execution of the exercise, the autonomy of the ships was divided into four separate levels, which made the process easier and more convenient. Pursuantly, the levels of autonomy, without any hierarchy between them[55], are defined as follows:

- 1st Degree, ship with automated processes and decision support: In this category, to run and manage shipboard systems and operations, seafarers are present. Although there may be seafarers on board who are prepared to take charge, some operations may be automated and occasionally run unattended.
- 2nd Degree, remotely controlled ship with seafarers on board: The ships are managed and run from a different place under this category. There are seafarers on board who can assume command and manage the systems and operations of the ship.
- 3rd Degree, remotely controlled ship without seafarers on board: Ships in this category are controlled and operated from different places, and on board, there are no seafarers.
- 4th Degree, fully autonomous ship: The operating systems of ships in the last category of autonomy levels, can make decisions and determine actions by themselves.

The scoping exercise procedure consisted of two phases. The first phase, which was completed in September 2019, was generally to identify existing and potentially usable instruments. For this purpose, IMO documents con-

51) Karlis (2018), 120.
52) The session is held between 5 and 14 May 2021.
53) Outcome of the Regulatory Scoping Exercise for the Use of Maritime Autonomous Surface Ships (MASS). International Maritime Organization, Maritime Safety Committee MSC.1/Circ.1638, 3 June 2021. Available from https://www.imo.org/en/MediaCentre/PressBriefings/pages/MASSRSE2021.aspx, accessed 20.08.2023.
54) MSC.1/Circ.1638 (2021), 3.
55) This is clearly stated in the exercise report. It is even indicated that MASS can operate at one or more levels of autonomy during a single journey. See, MSC.1/Circ.1638 (2021), 4.

taining provisions on maritime safety, security, compensation, liability, etc. were labelled in 4 different types. These types are as follows:
- Apply to MASS and prevent MASS operations; or
- Apply to MASS and do not prevent MASS operations and require no actions; or
- Apply to MASS and do not prevent MASS operations but may need to be amended or clarified, and/ or may contain gaps; or
- Have no application to MASS operations.[56)]

Following the completion of the first phase, the second phase was to analyse and determine the most appropriate and effective way to organise MASS operations. In carrying out this analysis, inter alia, human, technological and operational factors were taken into account and the following conclusions were reached:
- equivalences as provided for by the instruments or developing interpretations; and/or
- amending existing instruments; and/or
- developing new instruments; or
- none of the above as a result of the analysis.

Since the scope of our study is unmanned ship, it is mainly limited to autonomous vehicles at the third and fourth degrees according to IMO classification.[57)] However, from a general point of view, IMO's autonomy-based rating system is open to criticism in various aspects. Firstly, from a technical point of view, various question marks concern regulators and operators. An unmanned ship may be operated by a system of several components that perform different tasks with different levels of human intervention.[58)] This complexity can make classification based on levels of autonomy difficult to apply. Especially from a legal perspective, it is important to ensure the variability and compatibility of autonomy levels between these components.

The rapid advancement of technological developments brings further challenges to classification based on levels of autonomy. This has important implications, especially from a legal perspective. The level of autonomy of a device or technology is usually related to the capabilities of that device. However, as technology is constantly evolving, the level of autonomy of a device can change in a short period of time.[59)] For example, while an un-

56) MSC.1/Circ. 1638 (2021) Annex, 4-5.
57) Kim and others (2022), 148.
58) McKenzie (2020), 6.
59) Kim and others (2022), 154.

manned ship may initially have a limited level of autonomy, it may reach a higher level of autonomy with software updates or new hardware additions.

This poses a major challenge for regulators. Regulators should closely follow technological developments and update regulations frequently. Otherwise, existing regulations will quickly become outdated and unable to keep pace with technology. This can pose a significant risk in terms of security and legal liability.

For businesses, this situation may increase uncertainty. Businesses purchase technologies that comply with existing regulations and plan to use these technologies for a certain period of time. However, when technology advances rapidly, businesses may have multiple levels of autonomy when using these technologies. This increases the difficulty for businesses to maintain compliance with existing regulations and operational continuity.

Additionally, a rating system based on the level of autonomy may be inadequate when different operations are involved for the same ship.[60] During a marine pollution monitoring and clean-up operation, the unmanned ship may have a high level of autonomy because it may need to make quick and independent decisions to detect and clean up pollutants. However, this same ship may need a lower level of autonomy during a harbour security mission, as more human intervention and coordination may be required.

This complexity may make law enforcement difficult. There may be separate regulations and equipment requirements for each level of autonomy. For example, unmanned ships with a high level of autonomy may require more monitoring and certification, while unmanned ships with a low level of autonomy may require more human intervention and operational control.

From a legal perspective, this makes it complex to assess the legal compliance of operations and enforce regulations. It also raises important questions about the safety and liability of operations. It is therefore important that the legal framework is flexible and harmonised to effectively address different levels of autonomy and maritime operations.

Furthermore, legal complexity may arise when there are different phases of a single operation that are covered by more than one level of autonomy. For example, an unmanned ship may have high levels of autonomy during a coast guard mission because it must have the ability to scan, detect and respond. However, the same unmanned ship may need a lower level of autonomy in in-port transport operations, as this may require more human intervention and compliance with local regulations.

In legal terms, the categorisation of such complex operations and the

60) Kim and others (2022), 155.

enforcement of regulations is a major challenge. Managing different levels of autonomy and developing appropriate regulations for each level can be a major effort for regulators and businesses. Moreover, this process is time-consuming and can be complicated by the diversity of operations. This complexity can also create challenges for assessing the legal compliance and liability of operations. Determining which levels of autonomy can be used in which circumstances and for how long can create legal complexity.

Besides, categorisation based on autonomy levels may have some shortcomings in terms of risk analysis and management.[61] One of these deficiencies is that a given level of autonomy may not fully reflect the potential risk of an operation. The nature of operations may involve different levels of risk, but autonomy levels may not adequately address this complexity. Legally, the risk analysis and management of such operations may require a more comprehensive approach rather than relying solely on categorisation based on autonomy levels. It should be remembered that each operation has a unique risk profile and that these risks are based on more than the level of technological autonomy. Legal regulations should be applied more flexibly, taking into account the risks, objectives and environmental impact of operations.[62]

In conclusion, categorisation based on levels of autonomy may have shortcomings in terms of risk management and legal regulations would adopt a broader perspective to better reflect the complexity and risks of operations. This could provide a better framework for ensuring both the safety and legal compliance of operations.

In the next section of this paper, ICAO's model regulations for unmanned aircraft, which are based on an operation-centred and risk-based approach, will be examined in detail and the aspects of this approach that can be adopted by the maritime industry will be discussed.

3. Aviation Law Dimension

3.1. The Term "Unmanned Aircraft"

A decent and detailed classification of manned aircraft is found in Annex 7 of the Chicago Convention.[63] In the Annex, ICAO also refers unmanned aircrafts as "an aircraft which is intended to be operated with no pilot on

61) Kim and others (2022), 150.
62) Breunig and others (2018), 20.
63) Annex 7 to the Convention on International Civil Aviation, Aircraft Nationality and Registration Marks, Sixth Edition, July 2012, ICAO, 2.

board shall be further classified as unmanned".[64] According to this definition, an unmanned aircraft can be categorised in any of the ICAO classifications, e.g., aeroplane, helicopter, or glider.[65] On the other hand, some authors in the legal doctrine have correctly noted that unmanned aviation can be divided into various categories.[66] These categories consider factors like whether the pilot is remotely present, the degree of autonomy, and if the term encompasses just the aircraft or the entire system as well. Additionally, there's a varying degree of complexity among these categories.[67]

As the use of new technology increases day by day, it is an option for regulators to integrate unmanned aircrafts into existing regulations. However, while taking this step, the extent to which the existing rules are compatible with the aims and objectives of unmanned aircraft operations should be taken into consideration.[68] In cases where it is determined that new regulations are needed, it should be kept in mind that the new rules to be introduced should not undermine the structure of the existing ones.[69]

The following quotation from a decision of the Supreme Court of Oregon in 1960 illustrates the necessity and importance of the law catching up with technology:

> *"If the mind of man can invent and operate a flying machine, it ought to be able to devise a rule of law which is adequate to deal with the problems flowing from such inventiveness. This is the challenge of the common law."*[70]

The process becomes more complex and time-consuming if the concerns raised by various parties are numerous, both in the case of integration into existing regulations and when new regulations are to be introduced. According to some, it is simple to understand why the establishment of legislation and regulatory framework regarding this topic is complicated and

64) Apart from Annex 7, in the Article 8 of Chicago Convention refers to 'pilotless aircraft'. Pursuant to the Article, *"No aircraft capable of being flown without a pilot shall be flown without a pilot over the territory of a contracting State without special authorization by that State and in accordance with the terms of such authorization. Each contracting State undertakes to insure that the flight of such aircraft without a pilot in regions open to civil aircraft shall be so controlled as to obviate danger to civil aircraft."*.

65) Scott, B. I., and Nunes de Pinho Veloso, G. (2022). Chapter 2: Terminology, Definitions and Classifications. In *The Law of Unmanned Aircraft Systems Second Edition* (Ed. Benjamyn I Scott, Wolters Kluwer, Alphen aan den Rijn), 9.

66) Scott and de Pinho Veloso (2022), 9.

67) Scott and de Pinho Veloso (2022), 9.

68) Henderson (2022), 192.

69) Morrison and others (2021), 276.

70) Atkinson v. Bernard, Inc., 223 Or. 624, 355 P.2d 229 (Or. 1960), available from https://law.justia.com/cases/oregon/supreme-court/1960/223-or-624-3.html, accessed 29.07.2023.

still under advancement given the quick advancement of unmanned aircraft technology, the widening range of uses, and the plethora of safety, security, and privacy issues that occur.[71)]

3.2. Model UAS Regulations

Although ICAO is the most important international aviation organization, it is not an international aviation regulator.[72)] This means that ICAO standards cannot override the national regulations of states. Accordingly, national regulations are the rules that air transport operators are legally required to comply with in the airspace and airports under the sovereignty of the States concerned.[73)]

While national regulations have the supremacy in terms of unmanned aircraft, ICAO's work on the regulation of this field is admirable. A regulatory framework for unmanned aircraft systems (UAS) that fly outside of IFR International airspace was requested by member states of ICAO.[74)] In order to find similarities and efficient procedures that would be in line with the ICAO aviation structure and that a wide variety of States may put into effect, the ICAO studied the current UAS legislation of several States.[75)] As a result of this work, ICAO Model UAS Regulations Parts 101[76)], 102[77)] and

71) Morrison and others (2021), 276; Chatzara (2023), 45.
72) Elfita Agustini, Yaya Kareng, and Ong Argo Victoria (2020). The Role of ICAO (International Civil Aviation Organization) in Implementing International Flight Safety Standards. In *Excellent Human Resource for the Sustainable Safety of Inland Water and Ferries Transport in New Normal Era-International Webinar (IWPOSPA 2020)*, KnE Social Sciences, 100-114.
73) Chatzara (2023), 55.
74) Liu (2023), 488.
75) Morrison, C., and others (2022). Transnational Organizations in Drone Law and Policy. In *Anthony Tarr and others (eds)*, Routledge, 290.
76) ICAO Model UAS Regulations Part 101 (2020), available from https://www.icao.int/safety/UA/Documents/Model%20UAS%20Regulations%20-%20Parts%20101%20and%20102.pdf, accessed 22.08.2023.
77) ICAO Model UAS Regulations Part 102 (2020), available from https://www.icao.int/safety/UA/Documents/Model%20UAS%20Regulations%20-%20Parts%20101%20and%20102.pdf, accessed 22.08.2023.

149[78] were formed.[79]

In the description of the Model Regulations, it is stated that these documents do not replace the Chicago Convention or its Annexes, nor are they to be interpreted in any way to interfere with the legal structures of States.[80] In line with this, it was also noted that the legal requirements presented in the documents may not be the same for each State, taking into account the differences in the legal structures of States, and that States are free to adapt the model regulations to their specific needs.[81] From a general perspective, they are designed to provide States with model language that will make it easier to implement UAS rules.[82]

In a general summary, Part 101, which is designed for low-risk operations and states that all unmanned aircraft must be registered, covers situations where unmanned aircraft weighing 25 kg or less operate within limited parameters.[83] Part 102, on the other hand, focuses on such operations employing unmanned aircraft that weigh over 25 kg or less than 25 kg yet fail to comply with requirements of Part 101.[84] Lastly, proposed regulations are outlined in Part 149 for the certification and execution of Approved Aviation Organizations, which are expected to carry out activities like providing operator competency licenses, allowing the use of unmanned aircraft, and authorizing unmanned aircraft activities.

In this section of this study, these model regulations prepared by ICAO will be examined. In our opinion, these model regulations provide useful guidance to member states when developing or updating their unmanned

78) ICAO Model UAS Regulations (2020), Part 149, available from https://www.icao.int/safety/UA/Documents/Model%20UAS%20Regulations%20-%20Part%20149.pdf, accessed 22.08.2023.

79) Joint Authorities for Rulemaking on Unmanned Systems (JARUS), an assembly of specialists formed in 2007 with the aim of suggesting certification, specifications, and operational regulations to those with an interest like the ICAO, local aviation authorities, and regional authorities for their attention and use, is the source of the regulatory framework for unmanned aircraft. JARUS also has published a work in 2019 proposes a risk-based concept for performance-based regulations of unmanned aircraft operations. Pursuant to this document, a risk-based approach is described in terms of three operational categories, which are Category A (Open), that stands for very low risk operations, Category B (Specific), which stands for limited risk operations, and Category C (Certified), which stands for traditional high-risk operations. The document is available from http://jarus-rpas.org/wp-content/uploads/2023/06/jar_10_doc_UAS_Operational_Cat.pdf, accessed 29.08.2023. For more information see, Liu (2023), 488; Morrison and others (2022), 290.

80) Part 101 and Part 102, Description, 1: Part 149, Description, 1.

81) For instance, Model Flying New Zealand (MFNZ) is awarded special privileges under Part 101, allowing their members to undertake activities at their own sites that would otherwise be prohibited by the laws. For detailed information, see, Henderson (2022), 195.

82) Morrison and others (2022), 290.

83) Henderson (2022), 194.

84) Morrison and others (2022), 291.

aircraft regulations. This is because these model regulations can be used to ensure consistency and harmonisation between different countries by providing an internationally harmonised framework. At the same time, they reflect the latest developments in the unmanned aircraft industry and are up-to-date and responsive to contemporary issues. This helps member states to make up-to-date and appropriate regulations and supports the safe and effective conduct of unmanned aircraft operations.[85] On the other hand, there are aspects of the documents that need to be improved or that can be considered deficient, which will be discussed in the following chapters.

3.2.1. Part 101

The background of the Advisory Circular 101-1[86], which provides advice on best practices to be followed when operating small unmanned aircraft weighing 25 kilograms or less, operating in accordance with Part 101 rules, mentions that the civil use of unmanned aircraft has increased significantly in recent years and that these aircraft can now perform tasks that were previously difficult or risky for humans.[87] Part 101, which this advisory circular describes, contains model regulations for the civilian use of unmanned aircraft.[88] The most prominent feature of Part 101 is its focus on lower risk operations and its aim to ease the regulatory and administrative duties on operators.[89]

Part 101 regulates relatively low-risk activities, for instance daylight operations and it has a weight limit for unmanned aircraft.[90] This model regulation will apply to unmanned aircraft weighing between 15 kg and 25 kg.[91] Higher risk unmanned aircraft such as night operations or unmanned aircraft weighing more than 25 kg are regulated under Part 102, which will be discussed in the next section of this article.[92]

In this part of this article, various features of Part 101 that are prominent and should be considered by States that may want to implement the model will be examined. These features are registration, operating conditions, and operator obligations.

85) Morrison and others (2022), 290.
86) Advisory Circular (AC) 101-1, available from https://www.icao.int/safety/UA/UAID/Documents/AC%20101-1.pdf, accessed 22.08.2023.
87) Henderson (2022), 194.
88) AC 101-1, Description.
89) Morrison and others (2022), 291.
90) Chatzara (2023), 55.
91) Part 101, 101.3 Applicability and Open Category (a) (2), 8.
92) Part 101, 101. 29 Weather and Day Limitations, 14.

3.2.1.1. Registration

Registration of unmanned aircraft and certificate of registration are regulated in Part 101, under the Subpart B named 'operating rules'. It is stated that anyone who is legally permitted to possess an unmanned aircraft and who intends to operate one in [country] must register that unmanned aircraft and have an active certificate of registration for the particular aircraft.[93] The following statements were included on the Advisory Circular after emphasizing the significance of registration:

> *"It allows identification of the aircraft and owner and provides the [CAA] with data regarding the industry. Registration is also a way to record experience with a particular model of UA should the operator elect to expand operations into [Part 102]."*

It is appropriate to emphasise registration under Part 101. Because registration of unmanned aircraft with a national registration system will provide significant advantages for their operations.[94] These advantages are important not only for the unmanned aircraft operators but also for the general safety and order of the airspace.[95]

The first advantage is ease of identification. By registering unmanned aircraft, they and their owners in the airspace can be more easily identified.[96] This allows for faster identification of those responsible for any breach of rules, involvement in an accident or inappropriate behaviour in the airspace, and easier identification of those responsible for the sanctions to be imposed for violations.[97] This will contribute to the safety and orderliness of the airspace.

The second advantage will arise in airspace monitoring and management. Registered unmanned aircraft help to monitor and manage airspace more effectively. All aircraft in the airspace are better integrated with reg-

93) Part 101, 101.5 Unmanned Aircraft Registration and Certificate of Registration, 8.
94) Although States largely require registration for unmanned aircraft operations (e.g., United States, United Kingdom, European Union, Singapore), there are States where registration is not required, such as New Zealand, or where registration is only required for commercial use, such as Australia. See, Henderson (2022), 195.
95) Chatzara (2023), 46.
96) Morrison and others (2022), 292.
97) Chatzara (2023), 46.

istered unmanned aircraft, making air traffic more organised and safer.[98] This reduces the risk of accidents and greatly prevents conflicts in the airspace.

The third advantage is safety and public awareness. Registered unmanned aircraft encourage users to act in accordance with laws and regulations. This encourages more responsible behaviour by the operators of the vehicles and creates a safer environment in the airspace. It can also serve to create a positive perception of unmanned aircraft in society, as unmanned aircraft can be recognised as more reliable and safer if they are registered.[99]

The fourth advantage is industry data and analysis. The registration system provides valuable data to the Civil Aviation Authorities of nations. This data can be used to understand industry growth and trends and to improve policy and regulation. It also helps in the development of unmanned aircraft technology and strategic decisions for the industry.

Finally, the registration of unmanned aircraft through a national registration system encourages their safe and responsible use. This contributes to the orderly and safe operation of the airspace, while providing greater assurance to the operators of the vehicles.[100] It also increases public confidence in unmanned aircraft technology, enabling a more sustainable and successful development of this industry.

3.2.1.2. Standard UA Operating Conditions

Unmanned aircraft is an important technology that has rapidly become popular for various purposes. However, it is of great importance to comply with certain operating conditions to use this technology smoothly and safely. These rules are regulated to ensure the safety of both users and the public.[101] The Model Regulations establish basic unmanned aircraft operating conditions which may vary depending on the circumstances, enabling unmanned aircraft to be performed in accordance with Part 101 operational and regulatory requirements.[102]

In accordance with Part 101, the following basic criteria must be met in order for an unmanned aircraft to be operated under standard operating

98) Some authors in the legal doctrine have expressed their concern that, given that even the private use of unmanned aircraft causes significant disruptions in air traffic circulation, the use of these vehicles for the transport of larger cargo and passengers may also raise safety concerns regarding air traffic. The incident at London Heathrow airport in 2019, where an unmanned aircraft was sighted close to the airport, causing all take-offs to be stopped for approximately one hour, was cited as an example. See, Chatzara (2023), 45.

99) Chatzara (2023), 46; Kopardekar and others (2016), 4.

100) Morrison and others (2022), 292.

101) Kopardekar and others (2016), 4.

102) Part 101, 101.7 Meaning of Standard Unmanned Aircraft Operating Conditions, 9.

conditions:
- Visual Monitoring: The unmanned aircraft must be kept in visual line by the operator or an observer in direct communication with the operator.[103] In other words, the person controlling the vehicle or an observer who fulfils the conditions must be at a distance where they can see it visually.[104] This reduces potential hazards by enabling the operator to monitor the status of the unmanned aircraft and the surrounding conditions.[105] It should be noted, however, that no specific distance limit has been set for the fulfilment of this requirement. The distance will be determined by considering the surrounding conditions and weather conditions.
- Daytime Operation: Unmanned aircraft should be operated during daylight hours. At night or in low light conditions, it may be more difficult to control the vehicle and detect hazards, therefore daytime operation is preferred.[106] This limitation is imposed since Part 101 covers low risk operations.
- Maximum Height Limit: Unmanned aircraft must fly at or below 120 m (400 ft) above the ground.[107] This restriction ensures a safe flight by reducing the risk of collision with other aircraft in the airspace and reduces the risk of flight.[108] Approval under Part 102 is required for unmanned aircraft to be operated at a higher altitude.[109]
- Safe Distance: Unmanned aircraft should not fly closer than 30 m horizontally to a person not directly involved in its operation.[110] This is important to ensure that the vehicle does not get out of control and jeopardise the safety of others and will reduce the risk of the operation.[111]

In addition, the operation of unmanned aircraft is prohibited in certain areas. These vehicles should not be operated in the following areas:
- Prohibited Areas: Unmanned aircraft should not be flown in designated

103) Part 101, 101.7 (a) (1), 9.
104) Regarding visual monitoring, it should be clarified that the line of sight in question is to be understood as a normal sight with the naked eye. More precisely, the use of binoculars or electronic sighting devices is not appropriate in the context of visual line of sight.
105) Morrison and others (2022), 293.
106) Part 101, 101.31 Night Operations, 14.
107) Part 101, 101.7 (a) (2), 9.
108) On the other hand, flying at low altitudes also raises a variety of security concerns. To address these concerns, some authors have argued that it is critical to ensure national and regional security in unmanned aircraft operations in low-altitude airspace, and that important assets such as the White House, airport operations, and various valuable assets, such as monuments, should be protected. See, Kopardekar and others (2016), 4.
109) Morrison and others (2022), 293.
110) Part 101, 101.7 (a) (3), 9.
111) Chatzara (2023), 56.

restricted areas.[112] These areas include areas closed to unmanned aircraft traffic for security, privacy or other special reasons.[113]

- Restricted Areas: The use of unmanned aircraft in restricted areas is limited.[114] These areas usually include security zones around airports or sensitive infrastructure.

- Overpopulated Areas: Unmanned aircraft should not fly over densely populated areas.[115] This is important for the safety of people and the protection of privacy.[116]

- Controlled Aerodromes: Unmanned aircraft should not fly in movement areas located within [4 km] of controlled aerodromes.[117] This can be considered as a precautionary measure to avoid interference with flight traffic and to ensure aviation safety.[118]

In addition, the use of unmanned aircraft in areas where fire, police or other public safety or emergency operations are being conducted should not be undertaken without the approval of the relevant authorities.[119] Such operations should be planned and organised in advance.

Finally, the person operating the unmanned aircraft should control only that vehicle and multiple vehicles should not be operated by the same person at the same time. This is important to ensure the coordination and safety of the unmanned aircraft.

All these standard operating conditions are important to ensure the safe and effective use of unmanned aircraft and to protect the safety of society.[120] By complying with these rules, owners and operators of unmanned aircraft can guarantee safe flights.

3.2.1.3. Obligations of Operators

As explained in the previous sections of our study, today, the use of unmanned aerial vehicles is increasing and gaining an important place in the aviation sector. With this developing technology, unmanned aircraft opera-

112) Part 101, 101.7 (b) (1), 9.
113) Morrison and others (2022), 293.
114) Part 101, 101.7 (b) (2), 9.
115) Part 101, 101.7 (b) (3), 9.
116) For detailed information see, Oh, S. and Yoon, Y., (2022). Data-driven risk analysis of unmanned aircraft system operations considering spatiotemporal characteristics of population distribution. *Transportation Research Interdisciplinary Perspectives*, 16, 100732.
117) Part 101, 101.7 (b) (4), 9; Chatzara (2023), 57.
118) Since the Model Regulations are not mandatory for States and serve as an example, it should be noted that various States regulate these rules in different ways. For example, for aerodromes, the ICAO limit of 4 km is regulated as 5 km by Singapore and 5.5 km by Australia. See, Henderson (2022), 195.
119) Part 101, 101.7 (c), 9.
120) Kopardekar and others (2016), 4.

tors have a great responsibility for aviation safety and human life safety.[121] Especially in flights carried out near aerodromes, certain legal obligations must be fulfilled. Since it is directly related to aviation safety, under this title, important obligations of unmanned aircraft operators regulated in Part 101 will be explained:

- Remote Pilot Licence Requirement: Although a pilot licence is not required for unmanned aircraft operations generally in terms of Part 101, knowledge of aeronautical charts and airspace usage is very important for flights to be performed over or within approximately 4 km of aerodromes.[122] If performed in light of this information, flights can be carried out safely and smoothly and the risk of collision with other aircraft can be minimised.

- Minimisation of Hazard and Risk: Operators are obliged to minimise hazards to persons, property, and other aircraft as far as possible.[123] When planning flights, all hazards must be considered, and precautions must be taken to ensure a safe flight. These hazards include flying away from areas where people congregate, flying over structures and buildings, and unsuitable weather or visibility conditions.[124] Minimising hazards and risks is vital for a safe and smooth aviation operation and ensures the safety of people.[125]

- Prohibited Operations: No one should operate unmanned aircraft in a careless or reckless manner that jeopardises aviation safety or the safety of life or property of others. It is also prohibited to operate an unmanned aircraft at the same time as operating a vehicle or aircraft.[126] This rule is intended to protect aviation safety by ensuring that operators conduct their flights in a responsible and safe manner.

- Alcohol or Drugs: Flight crew members or remote pilots may not operate within 8 hours of alcohol ingestion[127] and may not operate an unmanned aircraft while using substances that have a mental effect that may endanger or potentially endanger aircraft safety.[128] Because the use of alcohol or drugs may adversely affect the mental and physical abilities of the persons performing the tasks, which may jeopardise the safe operation of the aircraft and increase the risk of possible accidents.

121) Morrison and others (2022), 294.
122) Part 101, 101.41 Requirement for a Remote Pilot Licence, 15.
123) Part 101, 101.17 Hazard and Risk Minimization, 11.
124) AC 101-1, 101.17 Hazard and Risk Minimization, 9.
125) Morrison and others (2022), 294.
126) Part 101, 101.43 Prohibited UAS Operations, 15.
127) AC 101-1, 13.
128) Part 101, 101.45 Alcohol or Drugs, 16.

The duty of the operators is to carry out flights safely, without causing inconvenience to the public and without creating unnecessary hazards. Flights that do not comply with legal regulations are always considered dangerous and may be subject to criminal sanctions.[129] Operators must take all efforts and measures to minimise hazards in their operations, like health and safety regulations in the working environment. Furthermore, by fulfilling the obligations imposed by the regulations, they will play a safer and more responsible role in the aviation industry. If these obligations are not meticulously and at the highest level, operators may find it difficult to defend themselves in the event of post-flight incidents. Therefore, ensuring compliance with legal regulations and safety standards should be the primary responsibility of unmanned aircraft operators.

The Model Regulations prohibit the careless or irresponsible use of unmanned aircraft and the operation of an unmanned aircraft while driving another vehicle.[130] It is also strictly prohibited to operate unmanned aircraft while under the influence of alcohol or drugs. Such violations will be subject to criminal sanctions, as with other mechanisms, and behaviour that could jeopardise aircraft safety will not be permitted.

3.2.2. Part 102

Part 102 covers operations involving unmanned aircraft that do not comply with the aviation standard conditions of Part 101 and pose a higher risk. Such operations entail higher risks, either because the unmanned aircraft weighs more than 25 kg or because of the nature of the environment in which the operation is to be performed (e.g., night flights, flights beyond visual line, etc.).

The most important objective of Part 102 is to provide a detailed assessment and risk mitigation process that is authorised by the national aviation authorities.[131] These comprehensive assessment and risk mitigation measures aim to ensure that high-risk operations can be carried out safely.[132]

129) One example is the risk of hacking of unmanned aircraft and their support systems, which could lead to privacy breaches or threats to public safety. Another example is the risk that unmanned aircraft capable of carrying large payloads could be used to transport hazardous materials close to security-sensitive locations and/or infrastructure targeted for terrorist acts. See, Chatzara (2023), 45.

130) Morrison and others (2022), 294.

131) Morrison and others (2022), 296.

132) *"[Part 102] provides a framework for UA that is flexible providing the [CAA] with the discretion to tailor operational requirements to each proposed operation. Given the rapid advancements underway with UA technology, this approach ensures the regulatory regime can accommodate these aircraft while addressing the risks related to their activity."* AC 102-1 Background, 7.

Within this framework, the focus of Part 102 is on safety, which naturally represents the most critical point that attracts the attention of national authorities and operators.

As inspiring as innovative technology and aviation practices may be, safety is always paramount. ICAO's Part 102 provides States with a model framework for the regulation, monitoring and supervision of high-risk unmanned aircraft operations. These regulations aim to both ensure airspace safety and minimise risk, even while pushing the boundaries of aviation innovation.[133] In this section, we will focus on the highlights of Part 102, which has several important model legal frameworks for unmanned aircraft.

3.2.2.1. Unmanned Aircraft Remote Pilot Certification

As the scope of Part 102 includes higher risk unmanned aircraft operations, a remote pilot licence is required to ensure the safety of the activity. Accordingly, an operator wishing to conduct unmanned aircraft activities outside the scope of Part 101 must hold a Remote Pilot Licence (RPL).[134] For applicants wishing to obtain an RPL, ICAO requires two different categories of qualification.

The applicant, who must be at least 16 years of age, must demonstrate both general aviation knowledge and unmanned aircraft operations knowledge if they wish to hold an RPL.[135] There is more than one way to demonstrate these competencies.[136] In accordance with the Model Regulation Recommendation, the applicant may demonstrate general aviation knowledge by passing an aeronautical knowledge test[137], an aeronautical licence theory test[138], the theory component of a remote pilot training course[139] or an acceptable foreign equivalent.[140] It is sufficient for the applicant to hold one of these qualifications.

In addition to general aviation knowledge, the applicant must demonstrate competence in unmanned operations.[141] This may be demonstrated by completing a remote pilot training course[142] or a manufacturer's train-

133) Morrison and others (2022), 296.
134) Part 102 Unmanned Aircraft Remote Pilot Certification, 14.
135) Morrison and others (2022), 296.
136) Morrison and others (2022), 296.
137) Part 102, 102.1 Eligibility for Remote Pilot Licence (a) (1), 16.
138) Part 102.1 (a) (2), 16.
139) Part 102.1 (a) (3), 16.
140) Part 102.1 (a) (4), 16.
141) Morrison and others (2022), 297.
142) Part 102.1 (b) (1), 16.

ing course[143], depending on the category of unmanned aircraft; by passing the regulatory flight test[144], or by demonstrating the competencies required for the safe operation of the relevant unmanned aircraft type and control station under standard operating conditions.[145] As with general technical aviation knowledge, it is sufficient for the applicant to hold one of these qualifications.

It should be stated that ICAO's requirement that an applicant for a remote pilot licence for unmanned aircraft must have both general aviation and unmanned aircraft operations knowledge is entirely appropriate. Firstly, general aviation knowledge enables the operator to understand air traffic regulations, aviation terminology and general safety protocols. This helps the operator to manage their interaction with air traffic, share safely with other aircraft and better assess potential risks.[146] Knowledge of unmanned aircraft operations demonstrates mastery of topics such as how to fly the vehicle, different flight modes and air traffic controllers, which in turn supports safer operations.

3.2.2.2. Risk Mitigation

In Part 102, which regulates relatively higher risk operations, it is instructive to note the various measures taken by ICAO in relation to these operations.

Firstly, Part 102 provides guidance to operators to ensure that night operations, which fall outside the scope of Part 101[147], are made safe. The provision requires operators to describe certain requirements to ensure that night flights are carried out safely and effectively.[148] This is because night flights require special attention due to low visibility conditions and increased risk factors.[149] In the application, the operator should describe: the availability of equipment to ensure that the vehicle is visible to other manned or unmanned aircraft; how visual contact with the vehicle will be maintained; planned flight zones; risks to persons or property taking off from the ground; and how flights will be notified to the emergency services.[150]

143) Part 102.1 (b) (2), 16.
144) Part 102.1 (b) (3), 16.
145) Part 102.1 (b) (4), 16.
146) Morrison and others (2022), 297.
147) Part 101, 101.29 Weather and Day Limitations, 14.
148) Chatzara (2023), 64.
149) Morrison and others (2022), 298.
150) AC 102-1, 10. The model regulation also recommends that States provide an explanation of what the term "day" refers to, depending on the specific characteristics of the region.

The proposals will allow applicants to assess potential risks and hazards in advance. The Regulation also serves to improve public safety by addressing how emergency services will be notified of night flights, thereby optimising response procedures.

One of the operations that are considered high risk and for which additional information is required from applicants is operations that will be carried out over crowds of people or in congested areas where people may be present.[151] To protect public safety, applicants wishing to conduct such operations should include in their application the potential hazards and risks; vehicle configuration; reliability of the vehicle and control system; mitigations in the event of potential system failure; system redundancy and, where applicable, operator's steps to obtain consent or notify affected people.[152]

Another type of high-risk operation concerns the altitude limit at which unmanned aircraft operate. It has been stated that a ceiling limit of 120 m (400 ft) is imposed in Part 101 for unmanned aircraft to ensure coordination with other aircraft operating in the airspace, such as conventional aircraft and helicopters, and to manage air traffic in a safe and secure manner.[153] If the operator of the unmanned aircraft wishes to operate beyond this limit, in accordance with Part 102, he/she must first determine the class of airspace he/she intends to fly in, as different rules will apply according to this categorisation.

These are not the only high-risk activities for which Part 102 places additional demands on operators on a case-by-case basis. The model regulation also includes various requirements for operations within 4 km of an aerodrome, for use in agricultural activities, out of visual range, and close to buildings and structures where people are present.[154]

3.2.2.3. Eligibility of Unmanned Aircraft

To carry out high-risk operations safely, there are several requirements that must be met not only by the operators, but also by the unmanned aircraft systems themselves. Moreover, these requirements impose various obligations not only on the operators but also on the manufacturers.[155] In our opinion, this approach is justified, as the imposition of obligations on manufacturers ensures that the vehicles produced meet certain quality standards and makes the products more reliable and safer. Lack of quality

151) Part 101, 101.35 Operation Over and Near People, 14-15.
152) Oh and Yoon (2022), 2.
153) Chatzara (2023), 45.
154) Morrison and others (2022), 298.
155) Morrison and others (2022), 299.

control may cause vehicles to operate in unexpected ways or malfunction. The responsibilities imposed on manufacturers will also make it easier for manufacturers to be held liable for accidents caused by defects in the design of devices or deficiencies in manufacturing. This is also important for the development of the industry. The imposition of liability on manufacturers will lead to the continuous development of unmanned aircraft technology, the obligation to comply with quality and safety standards and the development of more reliable and advanced technology products in the sector.

To operate in a specific category in accordance with the model regulations presented in Part 102, unmanned aircraft must fulfil the following conditions:

- The vehicle must be designed, manufactured, or modified so that it is free from safety defects identified by the authority.[156)]
- Bear a label (in English, legible and permanently affixed to the vehicle) indicating its suitability for operation.[157)]
- Have up-to-date remote pilot operating instructions applicable to the operation of the unmanned aircraft. The person who designed, manufactured, or modified the vehicle shall provide the instructions if the vehicle is sold, transferred, or used by a person other than the person who designed, manufactured, or modified it.[158)]
- An unmanned aircraft may be operated after the person who designed, manufactured, or modified the vehicle has received notification that the authority has accepted the Declaration of Conformity for that vehicle or has received approval from an Approved Aviation Organisation.[159)]
- The unmanned aircraft must have a current aircraft registration.[160)]

3.2.2.4. Authorization or Operator Certificate

ICAO has provided important and detailed guidance to States on the documentation to be submitted when applying for an unmanned aircraft operator certificate in Part 102[161)], where the documents listed in the Model

156) Part 102.19 Specific Category Operations (a) (1), 20.
157) Part 102.19 (a) (2), 20.
158) The information to be included in the instructions is also listed under the same heading. Accordingly, the instructions must include at least "a system description that includes the required UAS components, any system limitations, and the declared category or categories of operation; modifications that will not change the ability of the UAS to meet the requirements for the category or categories of operation the UAS is eligible to conduct; and instructions that explain how to verify and change the mode or configuration of the UA, if they are variable". See, Part 102, 102.19 (a) (3), 20-21.
159) Part 102.19 (a) (4), 21.
160) Part 102.19 (a) (5), 21.
161) Morrison and others (2022), 300.

Regulation for Applicants include the following[162]:
- **Person with primary responsibility for the operation:** This rule requires the applicant to identify all primary individuals.[163] These are the individual(s) with major control over any aspect of the unmanned aircraft activity, who may or might not be the same person who submitted the initial application.[164]
- **Location of operation:** This standard necessitates the identification of the valid locations where unmanned aircraft activities will take place.[165]
- **Operational Risk Assessment:** This provision necessitates an Operational Risk Assessment (ORA), which is a component of a safety management system.[166] While there are numerous ORA approaches available, the ORA ought to be customized to fit the operation's risk, including suitable mitigations specified.[167]
- **Reporting procedures:** The rule demands that processes be put in place for reporting accidents and incidents.[168]
- **Licensing and qualifications:** This rule govern employee licensing, qualifications, training, and competency standards.[169] The rule envisions the [CAA] being met in two main areas of knowledge and competence: general aviation competence and thorough understanding of the unmanned aircraft.[170]
- **Cargo-handling and dropping of items:** When an operator is interested in transporting cargo, especially hazardous commodities, drop items, or undertake farming activities, protocols must be devised to ensure the activity can be carried out without causing injury to people or property.[171]
- **Amendment and distribution of the application and documentation:** The applicant must have a method in place for modifying the application submittal in order to meet this criterion.[172]
- **Approvals:** This necessitates the operator identifying any permits that were issued in connection with the operation.[173]

It should be noted that this list is not exhaustive and that there are other

162) Part 102.23 Application for a UAS Authorization or UAS Operator Certificate, 21.
163) Part 102.23 (b) (1)-(2), 21.
164) AC 102-1, 15.
165) AC 102-1, 16; Part 102.23 (b) (3), 21.
166) Part 102.23 (b) (4), 22.
167) AC 102-1, 16.
168) AC 102-1, 16; Part 102.23 (b) (5), 22.
169) Part 102.23 (b) (6), 22.
170) AC 102-1, 17.
171) AC 102-1, 21; Part 102.23 (b) (11), 22.
172) AC 102-1, 24; Part 102.23 (b) (13), 23.
173) AC 102-1, 24; Part 102.23 (b) (14), 23.

documents that applicants should attach to their applications.[174]

3.2.3. Part 149

Part 149 of the ICAO Model Regulations deals with the rules for the certification and operation of Approved Aviation Organisations (AAOs).[175] As there is not yet an advisory circular accompanying Part 149, the definition of an AAO can be derived from the following provision in Part 101:

> *"...an approved organization (AAO) means an organization having appropriate expertise in the design, construction or operation of an unmanned aircraft, or appropriate knowledge of airspace designations and restrictions, and who has been approved by the [CAA] to perform various functions..."*[176]

Part 149 contains regulations on aviation organisations authorised and approved to fulfil various duties, and in a sense encourages the existence of such organisations.[177] It should be stated that it is quite appropriate for ICAO to include such a structure in a model regulation prepared for States. By means of AAOs, the workload on the Civil Aviation Authorities of the countries will be reduced to a great extent.

We believe that the reduction of this workload may also have a positive effect on the industry. The fact that AAOs will be able to carry out procedures such as remote pilot licensing, unmanned aircraft maintenance and inspections more quickly will ease the bureaucratic process and make the industry more independent.[178] This may contribute to the rapid and safe development of the unmanned aviation sector.[179]

4. Voyage of Unmanned Duel in the Legal Arenas: Seas or Skies?

As detailed in the previous sections of our study, both IMO and ICAO have undertaken various framework studies on the legal regulation of unmanned ships and unmanned aircraft. The work of both organisations is valuable, but the most notable difference is their approach to the subject.[180]

174) Details of aircraft to be used, control systems, aircraft maintenance, operational procedures, construction and design of unmanned aircraft; AC 102-1, 19-22.
175) Morrison and others (2022), 302.
176) Part 101, 101.21 Approved Person or Organization (AAO), 11.
177) Morrison and others (2022), 302.
178) Morrison and others (2022), 302.
179) Breunig and others (2018), 3.
180) Liu (2023), 490.

In its studies on unmanned ships, the IMO has distinguished between different levels of autonomy. ICAO, on the other hand, has taken an operations-centred approach[181], distinguishing between the risk levels of operations, and developing model regulations for States.[182]

Although both approaches to unmanned vehicles have various advantages and disadvantages, we believe that the operation-centred and risk-based approach will contribute more to the development of the sectors.[183] For this reason, the studies carried out by ICAO can serve as a good example for IMO.[184] The IMO approach, i.e. categorising vehicles according to their level of autonomy and setting the legal basis accordingly, could at first sight provide clear guidance on how governments and regulators should approach these technologies. On the other hand, levels of autonomy may change constantly as technology progresses, requiring constant updating of legislation.[185]

Technology we now consider commonplace was once beyond our imagination merely a decade ago. Such advancements may propel the features and capabilities of unmanned vessels to unprecedented heights.[186] In this case, it is very likely that a distinction made today according to the level of autonomy of the vehicles will be useless soon. Moreover, as explained in the previous sections of our study, the IMO has carried out its studies by taking the existence of fully autonomous ships to a rather 'utopian' point.[187] However, advancements in artificial intelligence and sensor technologies are showing us every day that it won't take centuries for fully autonomous ships to dominate the seas.

To better understand the importance of this issue, a scenario can be considered. Suppose a country decides to base its legislation on autonomous vehicles on levels of autonomy. Initially, the regulations limit autonomous transport vehicles to low levels of autonomy, allowing them to operate only on certain roads and under certain conditions.

However, in the not-too-distant future, autonomy technology is advancing rapidly, and higher levels of autonomy systems are being developed. These higher levels of autonomy will be able to operate safely on a wider road network and in more complex traffic conditions. As a result, legislation that was limited to lower levels of autonomy will no longer be appro-

181) Chatzara (2023), 57.
182) Liu (2023), 490.
183) Kopardekar and others (2016), 7.
184) Liu (2023), 490.
185) Zhu and Xing (2022), 458.
186) Kopardekar and others (2016), 6.
187) Liu (2023), 490.

priate for this new technology and may even become a barrier to progress.

In this situation, regulators need to constantly update legislation and adapt to new technologies. Rapid technological progress requires constant changes in legislation, which can affect the coherence and stability of regulation.[188] It can also create uncertainty for companies and make long-term planning difficult.

This scenario demonstrates that technological progress may necessitate updates to the legal framework, as autonomy levels change constantly. This could highlight some of the challenges of an autonomy-based regulatory framework.In addition, failure to anticipate the future strong presence of fully autonomous vehicles would exacerbate the uncertainties in this scenario.

IMO's distinction by level of autonomy also has deficiencies in maritime safety and risk assessment. The standards and protocols required to ensure safety and manage risks when unmanned ships are travelling at sea may be unclear for a given level of autonomy. There should be clear guidelines on under what circumstances and conditions ship operations should be halted or intervened.

Failure to prioritise risks can also lead to insurance and financial problems. The risk profile and safety of autonomous ship operations should be assessed by insurance companies and insurance premiums should be adjusted accordingly. While autonomous ship technology is developing rapidly, not adopting a risk-based approach may make it difficult to predict insurance models.

On the other hand, the operation-centred and risk-based approach adopted by ICAO in the model regulations prepared by it as an example for States, which provides a legal framework according to the risk levels of the operations, has many advantages.[189]

To start with, unlike the autonomy-based approach, the operation-centred approach provides flexible regulations that can be adapted more quickly to different levels of risk and technological developments.[190] This makes it easier to keep pace with rapidly changing technology and industry. This is because the operation-centred approach analyses risks in more detail and helps to determine the potential risk level of each operation.[191] In this way, higher-risk operations can be subject to stricter regulation, while lower-risk operations can be subject to less strict regulation. This approach ensures a

188) Liu (2023), 490.
189) Liu (2023), 490.
190) Kopardekar and others (2016), 7.
191) Liu (2023), 491.

more efficient use of resources by accurately assessing risks.[192] Less regulation of low-risk activities can help regulators and governments use their resources more effectively and efficiently. This can also optimise audit and compliance processes.

Another advantage of this approach is that it can incorporate continuous improvement. An operations-centric approach allows regulators to continuously collect and analyse data on operations and risks. This can be used to assess the effectiveness and appropriateness of existing regulations, and to update regulations where necessary.[193] This continuous improvement cycle can improve the safety and compliance of the industry.

Increasing the competitiveness of the industry is another benefit of a flexible and liberalised regulatory framework.[194] Fewer restrictions on low-risk activities allow companies to experiment and develop new solutions. More flexible regulation will therefore encourage the development of new and innovative activities.[195] Smarter and risk-based regulations can improve the competitiveness of a country or region in the drone and ship sectors. As companies and developers have more freedom and opportunities, they may be more likely to develop more innovative solutions.

In addition to the technological investment incentives and industry benefits, an operations-centred approach also has greater public benefits. This is particularly the case for low-risk operations. Less regulation of low-risk operations can facilitate faster and more effective emergency response and crisis management. This can be illustrated with an example scenario:

Suppose a natural disaster occurs in a country where the regulatory framework for unmanned aircraft operations is based on risk levels. Due to severe weather conditions and difficult terrain, land and air transport is almost impossible. Low risk unmanned aircraft operations can contribute to a fast and effective emergency response. First, because these types of operations are less regulated and can be controlled quickly, they can be activated quickly and deliver emergency supplies to areas where they are needed. In this way, unmanned aircraft routes can be quickly adjusted and updated as the emergency requires. Reduced regulation of low-risk operations can allow new routes to be created quickly. As a result, flexible regulations can make it more effective to adapt to rapidly changing situations and meet urgent needs.

Another advantage of an operation-centred approach is that it contributes

192) Kopardekar and others (2016), 7.
193) Liu (2023), 491.
194) Breunig and others (2018), 20.
195) Kopardekar and others (2016), 7.

to strengthening the development environment.[196] Because there are far fewer bureaucratic requirements for low-risk operations[197], it is easier to create a test environment in which new technologies and concepts can be tested and developed.[198] In this way, new ideas can be tested and even other uses for unmanned vehicles can emerge.

In addition to the flexibility and freedom offered by low-risk operations, there are several benefits of an operations risk-based approach for high-risk operations.[199] Firstly, more stringent regulation of high-risk operations leads to higher safety standards.[200] This, in turn, supports safer operations and minimises potential accidents or errors. In addition, stricter regulation of high-risk operations may encourage more research and development in these areas. Tailoring regulations to high-risk operations can support technological progress. In addition, the person or company conducting an operation categorised as high risk will be more aware of the potential risks. This helps businesses to be better prepared for the operation and to manage risks effectively.[201]

5. Conclusion

In today's rapidly advancing world of advanced technology, unmanned aircraft and unmanned ships offer extraordinary potential in the aviation and maritime sectors. In the light of these technological advances, the development of regulations should not only be limited to safety and operational standards, but also cover industrial development and other critical aspects. Against this dynamic backdrop, this article provided a detailed look at how two distinct approaches, namely classification by levels of autonomy and risk-based operation-centred regulation, can shape these important regulations.

The aim of this paper was to examine the advantages and disadvantages of these two different approaches to establishing the legal frameworks for unmanned ships and unmanned aircraft, and to present ICAO's classification system for unmanned aircraft operations as an example of IMO's regulations for unmanned ships.

The legal framework developed by ICAO for unmanned aircraft adopts

196) Kopardekar and others (2016), 7.
197) Breunig and others (2018), 3.
198) Liu (2023), 491.
199) Kopardekar and others (2016), 7.
200) Breunig and others (2018), 20.
201) Liu (2023), 492.

an operation-centred approach. This approach allows operations to be categorised according to their risk level and thus ensures that regulations are flexible and adaptable.[202] This approach of ICAO offers the ability to adapt to technological developments in the rapidly changing aviation sector.

At this point, when IMO's regulations for unmanned ships are analysed, it is seen that the classification is based on autonomy levels. Although this approach offers some advantages, it may impose some limitations in terms of keeping pace with technological progress and responding to rapidly changing operational needs.

ICAO's operation-centred approach for unmanned aircraft can serve as an example for IMO. This approach allows regulations to be more flexible, adaptable and risk based. It can also facilitate the rapid adoption of new technologies and the updating of operational standards. At this point, cooperation and information sharing between the aviation and maritime sectors are important for both safety and regulatory effectiveness.

In conclusion, while establishing legal frameworks for unmanned vehicles, different approaches of international regulatory organisations are effective in shaping these frameworks. ICAO's operation-centred and risk-graded approach for unmanned aircraft may inspire IMO's regulations for unmanned ships. Examining similar approaches in both sectors could contribute to the development of future regulations in a more effective and harmonised manner.

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202) Breunig and others (2018), 20.

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International Crimes in United Kingdom and Japanese Law and Practice

Paul Arnell and Toshinobu Kawai***

Introduction

The incorporation and application of international criminal law by states is critical if the gravest acts are to be deterred and punished. International law and institutions cannot alone meet the challenge of addressing these crimes. That the principle of complementarity is central to the operation of the International Criminal Court (ICC) supports this fact. As does customary international law, which permits states to assume universal jurisdiction over genocide, war crimes and crimes against humanity. The UK and Japan, as relatively powerful states, members of the G7, and parties of to the Rome Statute of the International Criminal Court (Rome Statute) can play a meaningful role in ensuring that international criminal law is applied and enforced. They can set an example to other states of the commitment to further global criminal justice. Whilst both countries have in general terms acted in accordance with the aim of pursuing global criminal justice more can, and should, be done. Indeed, as regards the UK Baroness Helena Kennedy in late 2023 has written "…despite its robust judicial system, top-tier law schools, and an abundance of highly skilled legal professionals, the UK has done little in the last decade to deliver meaningful accountability for international crimes in its own courts".[1)] This article describes the approaches taken by the UK and Japan to the core international crimes and considers why the law and practice in both countries is not as effective as it should be.

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1) Kennedy, H., Forward to Global Britain – Global Justice, Strengthening Accountability for International Crimes in England and Wales, Redress and the Clooney Foundation, 2023, cited at https://redress.org/wp-content/uploads/2023/10/Global-Britain-Global-Justice-report.pdf (accessed 11 December 2023) 2.

The Core International Crimes

Public international law criminalises certain acts.[2] Whilst perhaps taken for granted in modern times, this fact is exceptional. It is also relatively modern, becoming generally accepted only after the end of the Second World War (WWII).[3] The legal basis for this criminalisation is today both customary international law and treaty obligation. The customary international legal position was affected by treaties, including the four 1949 Geneva Conventions,[4] and state practice and *opinio juris*. In turn, customary international law formed the basis of the original acts included within the jurisdiction of the ICC. This is not to suggest that those crimes did not find a place in the domestic law prior to the creation of the ICC. They did. Perhaps the most famous relatively early example being found in Israeli law as applied against Adolf Eichmann.[5] The conclusion of the Rome Statute, however, gave new impetus to the movement to hold accountable those who commit the most serious crimes wherever they may take place.

Whilst the ICC has existed from 1 July 2002, the effectiveness of action against international core crimes relies upon the actions of states. This is in part evidenced by the principle of complementarity playing a prominent role in the Rome Statute creating and governing the ICC.[6] Article 1 of the Rome Statute *inter alia* provides that the ICC's jurisdiction "shall be complementary to national criminal jurisdictions". Notably generally and

2) There is a wealth of writing and authority on this point. See, for example, Schwarzenberger, G., The Problem of an International Criminal Law, (1950) 3(1) Current Legal Problems 263, Parsons, S., The Individual under International Criminal Law: Pt 1, (2023) 173 New Law Journal 13, Parsons, S., The Individual under International Criminal Law: Pt 2, (2023) 173 New Law Journal 17, and Cassese, A. and Gaeta, P., *Cassese's International Criminal Law*, Third Edition, Oxford University Press, Oxford, 2013.

3) Related to but distinct from this point is the emergence of universal jurisdiction. Crimes subject to universal jurisdiction pre-date those prescribed by international law itself by some measure. Piracy is perhaps the paradigmatic example. See Arnell, P., International Criminal Law and Universal Jurisdiction, (1999) 11 International Legal Perspectives 53.

4) Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field 1949, 75 UNTS 31; Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked Members of Armed Forces in the Field 1949, 75 UNTS 85; Geneva Convention Relative to the Treatment of Prisoners of War 1949, 75 UNTS 135, and Geneva Convention Relative to the Protection of Civilian Persons in Time of War 1949, 75 UNTS 287.

5) *Attorney- General of the Government of Israel v. Adolf Eichmann*, (1962) 36 ILR 5.

6) See Nsereko, D., The ICC and Complementarity in Principle, (2013) 26(2) Leiden Journal of International Law 427, Jackson, M., Regional Complementarity: the Rome Statute and Public International Law, (2016) 14(5) Journal of International Criminal Justice 1061, and Cowell, F., Inherent Imperialism: Understanding the Legal Roots of Anti-imperialist Criticism of the International Criminal Court, (2017) 15(4) Journal of International Criminal Justice 667.

as regards the discussion below, article 1 does not also provide, as might be expected, that there is a positive obligation on states to exercise that jurisdiction. This is indicative of a discordance of practice more generally between international and national law providing for the possibility of the prosecution of persons for international crimes within the territory of states and the actual fact of a prosecution. The questions presently addressed are whether the UK and Japan follow this general international pattern, and if so whether they do so in a similar manner.

The UK Legislative Position

Pre-Rome Statute

Prior to 2001, the year that the UK and Scottish Parliaments incorporated aspects of the Rome Statute, the law and practice within the UK as regards the core international crimes primarily took the form of the enactment of the Geneva Conventions Act 1957, the Genocide Act 1969 and the War Crimes Act 1991.[7] The Geneva Conventions Act 1957, by section 1, originally criminalised the commission of a grave breach of articles 50, 51, 130 and 147 of the four Geneva Conventions respectively.[8] The Geneva Convention (Amendment) Act 1995 added a grave breach of Protocol 1 to the list in the 1957 Act. The Geneva Conventions and United Nations Personnel (Protocols) Act 2009 added crimes covered by Protocol 3 to the 1957 Act. The grave breaches, in general, prohibit various forms of mistreatment of persons *hors de combat*, certain forms of damage and destruction of property and the perfidious use of the Red Cross and related emblems.[9] The 1957 Act applies to all persons whatever their nationality and regardless of the locus of the act.[10] The terms of the Conventions are such that they estab-

7) See as regards England and Wales Grady, K., International Crimes in the Courts of England and Wales, (2014) 10 Criminal Law Review 683. For a discussion of the UK's and Canada's practice up to 1996 see Arnell, P., War Crimes - A Comparative Opportunity, (1996) 13(3) International Relations 29.

8) Those Conventions are cited in footnote 4 above. The Geneva Conventions Act 1957 has been amended following the UK's ratification of the two 1977 Protocols, by the Geneva Conventions (Amendment) Act 1995. Those Protocols being Protocol Additional to the 1949 Conventions on the Protection of Victims of International Armed Conflicts 1977 (Protocol 1), 1125 UNTS 3, and Protocol Additional to the 1949 Conventions on the Protection of Victims of Non-International Armed Conflicts 1977 (Protocol 2), 1125 UNTS 609. See generally Rowe, P., and Meyers, M. A., The Geneva Conventions (Amendment) Act 1995: a Generally Minimalist Approach, (1996) 45(2) International and Comparative Law Quarterly 476.

9) Grady, *supra* note 7, 710.

10) See O'Keefe, R., The Grave Breaches Regime and Universal Jurisdiction, (2009) 7 Journal of International Criminal Justice 811.

lish a duty to exercise jurisdiction over persons alleged to have committed grave breaches of the relevant Convention.

The Genocide Act 1969 was enacted to give domestic force in the UK to the Convention on the Prevention and Punishment of the Crime of Genocide 1948.[11] It brought into UK domestic criminal law (the Act applied throughout the UK) the crime of genocide as defined in article 2 of the Genocide Convention. Article 2 is repeated verbatim in paragraph 1 of schedule 1 to the Act. Jurisdictionally, the crime was not limited by any temporal, territorial or relationship-based conditions. Section 1 merely provides that a person commits an offence of genocide if he commits any act falling within the definition found in article 2 of the Genocide Convention. The Genocide Act 1969 was repealed by the International Criminal Court Act 2001 as regards England and Northern Ireland and the International Criminal Court (Scotland) Act 2001 as regards Scotland. This was, of course, because the crime of genocide is amongst those coming within the jurisdiction of the ICC, mentioned below.

The War Crimes Act 1991 criminalised murder, manslaughter and culpable homicide which violated the laws and customs of war committed during WWII in German-held territory. The preamble to the Act *inter alia* provides that the statute confers jurisdiction on UK courts in respect of certain grave violations of the laws and customs of war. It does not, however, define or explain what those laws and customs are. Jurisdictionally, the operative section is s 1(1) which gives jurisdiction to UK courts for the above offences irrespective of the accused's nationality at the time of the offence if that offence was committed between 1 September 1939 and 5 June 1945 in a place which was at the time part of Germany or under German occupation and it constituted a violation of the laws and customs of war. Section 1(2) limits this provision to persons who were or became British citizens or residents on 8 March 1990. Clearly this Act has limited scope, substantively, temporally and geographically. This is in part a consequence of objections to its passage though the UK Parliament.[12]

11) (1948) UNTS 78.

12) Indeed, the Act is one of the few that was enacted without the consent of the House of Lords, with the Parliament Acts 1911-1939 being invoked to allow that to happen. See Richardson, A.T., War Crimes Act 1991, (1992) 55 Modern Law Review 72. Richardson identifies the main substantive objection of principle being the 'rule of law' argument, viz. that the Act was "retrospective, selective and that no appropriate purpose for mounting a prosecution existed, apart from a desire for revenge, 76.

Incorporation of Rome Statute

The Rome Statute creating the International Criminal Court was adopted on 17 July 1998. The UK signed the treaty on 4 October 2001. The vast majority of the English, Welsh and Northern Irish incorporating legislation, the International Criminal Court Act 2001 (the ICCA), entered into force one month previously, on 1 September 2001. It created 61 substantive offences in English criminal law.[13] Due to the particular constitutional design of the UK, with Scottish criminal law being a responsibility of the Scottish Parliament, a separate statute was enacted in Scotland, the International Criminal Court (Scotland) Act 2001.[14] The offences under the ICCA comprise genocide, and certain crimes against humanity and war crimes.[15] Also criminalised are a number of ancillary acts relating to the substantive crimes, including conspiracy, incitement and attempt. As alluded to above, the operation of the ICC is based "… on the premise that states will share the burden of the investigation, prosecution and adjudication of core international crimes by undertaking proceedings at the national level".[16] According to the complementarity principle, then, the ICC will only become seized of a specific case where the state with jurisdiction is unwilling or unable genuinely to carry out the investigation or prosecution, under article 17(1) of the Rome Statute.

Jurisdictionally, the crimes under the ICCA apply to UK nationals, residents and persons subject to service jurisdiction. This has been termed 'enhanced' nationality jurisdiction.[17] The definition of 'residence' under the ICCA was clarified by an amendment made by the Coroners and Justice Act 2009, to include a number of categories of individual including those with indefinite leave to remain in the country, those with leave to remain for the purposes of work or study and those who have made a human rights to asylum claim which has been granted, in s 67A. Apart from the listed categories, in considering whether an individual is a resident for the purposes of the ICCA, a court must have regard to the period and purpose the individual has been or intends to be in the UK, their family and other connections, and any residential property interests.

13) Grady, *supra* note 7, 694.
14) The ICCA contains iterations of the offences applicable to Northern Ireland, in ss 58-59.
15) As noted, the ICCA repealed the Genocide Act 1969, by para 1 of schedule 10.
16) Grady, K., *supra* note 7 at 695, citing Bekou, O., Crimes at Crossroads: Incorporating International Crimes at the National Level, (2012) 10 Journal of International Criminal Justice 677, 677.
17) Williams, S., Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, (2012) 75 Modern Law Review 368, 374-375.

The Japanese Legislative Position

Pre-Rome Statute

The pre-Rome Statute position in Japan is very different from the UK. In general terms, this follows from the result and consequences of WWII. Specifically, Japan adopted two contradictory policies following WWII. War as a national policy was renounced by the Constitution, and accordingly Japan has not had armed forces. It has not been involved in armed conflict. On the other hand, Japan has been allied with the United States and has maintained its Self-Defense Forces (SDF). For decades, the introduction of a domestic law relating to war crimes was unlikely to happen, it was almost taboo. It was not until the 21st century that relevant legislation was introduced.

More particularly, in August 1945 Japan accepted the Potsdam Declaration, and thus unconditionally surrendered to the Allied Powers. Under their military occupation, both the Japanese Houses of Representatives and Peers overwhelmingly voted for the Bill to revise the Imperial Constitution in August and October 1946 respectively. The Constitution of Japan was promulgated by the Emperor in November 1946 and enacted in May 1947. The Constitution introduced pacifism as one of the three basic principles.[18] Paragraph 1 of article 9 of the Constitution "renounces war as a sovereign right of the nation" and "[i]n order to accomplish the aim of the preceding paragraph", paragraph 2 provides, "land, sea and air forces, as well as other war potential, will never be maintained. The right of belligerency of the state will not be recognized".[19] In addition, paragraph 2 of article 76 provides that "[n]o extraordinary tribunal shall be established", which excludes the possibility of establishing a military tribunal. Article 96 provides a procedure to amend the Constitution, but it has not been amended since its enactment, and pacifism has become deeply rooted in Japan.

In spite of its pacifism, Japan was not immune from the effects of the Cold War. The Korean War broke out in June 1950, which accelerated the processes of ending the Allied occupation and the rearmament of Japan. Of importance is the formal end of the war, in September 1951, when the Peace Treaty Conference was held in San Francisco, and the Treaty of Peace with

18) The other two principles are the sovereignty of the people and respect for human rights.
19) The Constitution of Japan, Constitution November 3, 1946. The English translation of the Constitution is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/174 (accessed 7 December 2023)

Japan was signed.[20] According to article 1, peace was restored between Japan and the Allied Powers, and Japan regained its full sovereignty. Of note is that the Peace Treaty had a declaration in which the Japanese Government stated its intention to formally accede to international instruments, including the 1949 Geneva Conventions "within the shortest practical time, not to exceed one year from the first coming force of the Treaty of Peace". Accordingly, Japan acceded to the conventions in April 1953.[21] It did not, however, enact legislation giving effect to any of the terms in the Conventions, including the grave breach provisions.[22]

At the same time as the conclusion of the Peace Treaty, Japan and the United States signed the Security Treaty. According to its preamble the United States would maintain its armed forces in Japan "to deter armed attack upon Japan" which did not possess "the effective means to exercise its inherent right of self-defense because it has been disarmed".[23] Both the Peace and Security Treaties entered into force on 21 August 1952. Regarding the rearmament of Japan, soon after the outbreak of the Korean War, under the directive of General Douglas MacArthur, Japan created a National Police Reserve with 75,000 men in August 1950.[24] The Reserve was then transformed into National Safety Forces in October 1952, which later became SDF in July 1954.[25]

Incorporation of Rome Statute

The Rome Statute creating the ICC was adopted on 17 July 1998, as noted above. Japan did not sign the Statute at that point because it was not legally ready to deal with war crimes.[26] In 2004, however, Japan adopted legisla-

20) Treaty of Peace with Japan (with two declarations) (signed at San Francisco, on 8 September 1951, entered into force on 21 August 1952) 136 UNTS 45.

21) ICRC, States Party to the Following International Humanitarian Law and Other Related Treaties as of 25 September 2023, available at https://ihl-databases.icrc.org/public/refdocs/IHL_and_other_related_Treaties.pdf (accessed 7 December 2023).

22) See Kurosaki, M., Sakamoto, S., Nishimura, Y., Ishigaki, T., Mori, T., Mayama, A. and Sakai, H., *Law of Armed Conflict and International Security: A Practitioners' Manual*, (Koubundou, 2021), 1571.

23) Security Treaty Between the United States and Japan (signed at San Francisco, on 8 September 1951, entered into force on 21 August 1952) 136 UNTS 211.

24) Chapter 5 (d), Modern Japan in archives, National Diet Library, Japan, available at https://www.ndl.go.jp/modern/e/cha5/description13.html (accessed 8 December 2023).

25) A concise history of the Self-Defense Forces can be found in Japan Ministry of Defense, About Ministry, available at https://www.mod.go.jp/en/about/index.html (accessed 8 December 2023).

26) See Nakauchi, Y., Kokusai shakai ni okeru hou no kakuritsu ni mukete ~ Kokusai keiji saibansho roma kitei・kokusai keiji saibansho kyoryoku houan no kokkai giron [Towards establishing the rule of law in international community: Debates in the Diet about the Rome Statute of the International Criminal Court and a bill on Cooperation with the International Criminal Court], (2007) No. 207 Rippo to chosa (Legislation and Research) 3, 3-4.

tion to cope with emergency situations. That legislation was influenced by international relations at that time. Situations included growing concerns over terrorism, missile threats from North Korea and the Iraq War. The legislation included the Act on the Treatment of Prisoners of War and Other Detainees in Armed Attack Situations[27] and the Act on Penal Sanctions against Grave Breaches of the International Humanitarian Law.[28] In addition, Japan acceded to the 1977 Protocols additional to the 1949 Geneva Conventions on 31 August 2004.[29] At this point Japan finally introduced penal sanctions criminalising war crimes, but it should be pointed out that the Act on Penal Sanctions against Grave Breaches contained only four crimes; that of destroying important cultural heritage (article 3), delaying the returning of prisoners of war (article 4), transporting to occupied territories (article 5) and precluding civilians from leaving Japan (article 6).[30] This limited form of incorporation was founded on the view of the Japanese Government that the existing laws, including the Penal Code, could deal with most of the grave breaches of the Geneva Conventions. Only a limited number of new crimes were therefore introduced.[31] Yasushi Masaki, official of the Ministry of Foreign Affairs who was then involved in the enactment of the legislation, stated that the introduction of emergency legislation "promoted the general understanding of international humanitarian law in a broad sense" and that Japan would become a member of the ICC sooner or later.[32]

Japan did not accede to the Rome Statute for another three years. The Rome Statute was eventually submitted to the Diet for approval in February 2007. Four reasons were given at the Diet by the then Prime Foreign Minister, Taro Aso, for the delay. First, he noted that the Government had to consider the consistency between the crimes within the Rome Statute and the relevant crimes in Japanese law; second, new law to suppress crimes which hampered the activities of the ICC had to be introduced; third, the Government had undertook research into the implementation of the Rome Statute in foreign countries; and fourth, it had to prepare for paying its contribution

27) Act No. 117 of June 18, 2004. The English translation of the Act is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3801 (accessed 12 December 2023).
28) Act No. 115 of June 18, 2004. Only the English translation of the title of the Act is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/1590 (accessed 8 December 2023).
29) See ICRC, *supra* note 21.
30) The author's translation.
31) See Kurosaki *et al*, *supra* note 22, 1571.
32) Masaki, Y., Nippon to kokusai keiji saibanjo [Japan and International Criminal Court], Murase, S. and Ko, K. (eds), *International Criminal Court,* Second Edition, Tokyo, Toshindo, 2014, 355-384, 359.

to the ICC.[33] Regarding the first three legal points, the Government did not find it necessary to introduce new domestic law to suppress the crimes provided by the Rome Statute, because the crimes provided by the Penal Code, such as crimes of homicide and injury could deal with the crimes under the Statute.[34] Whilst countries, such as Canada, Germany, the Netherlands and, as seen, the UK, introduced new domestic measures to incorporate the Rome Statute, the Japanese Government considered that the treaty did not oblige state parties to criminalise the specific crimes under the Statute and so found it unnecessary to introduce new crimes.[35]

The Rome Statute was approved by the Diet on 27 April 2007[36], the instrument of accession was deposited to the UN Secretary-General on 17 July and the treaty came into force for Japan on 1 October. In spite of it being considered unnecessary to create substantive new crimes, the Japanese Government did feel it needed to introduce law concerning investigative, procedural and cooperative matters and crimes against the administration of the ICC.[37] The Act on Cooperation with the International Criminal Court was promulgated on 11 May 2007[38], and entered into force 1 October. Article 1 of the Act states:

> The purpose of this Act is to ensure the proper implementation of the Rome Statute of the International Criminal Court (hereinafter referred to as the "Statute") by prescribing procedures concerning the cooperation necessary for investigations, trials, execution of a sentence, etc. by the International Criminal Court (hereinafter referred to as the "ICC")

33) Nakauchi, *supra* note 26, 3. Regarding the original statement of the Foreign Minister, see The House of Representatives, Japan, 166th Session of the Diet, Committee on Foreign Affairs, Minute No. 5, 28 March 2007, available at https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/000516620070328005.htm#p_honbun (accessed 11 December 2023) (available in Japanese).

34) Nakauchi, *ibid*., at 4. Regarding the original statement of the Minister of Foreign Affairs, see The House of Representatives, Japan, 166th Session of the Diet, Plenary Sitting, Minute No. 15, 20 March 2007, available at https://www.shugiin.go.jp/internet/itdb_kaigirokua.nsf/html/kaigirokua/000116620070320015.htm (accessed 11 December 2023) (available in Japanese).

35) *Ibid*. Regarding the original statement of the Deputy Assistant Minister of Foreign Affairs, see House of Councillors, 166th Session of the Diet, Committee on Foreign Affairs and Defense, Minute No. 8, 26 April 2007, 11, available at https://kokkai.ndl.go.jp/simple/dispPDF?minId=116613950X00820070426#page=2 (accessed 11 December 2023) (available in Japanese).

36) Treaties are required to be approved by the Diet under article 73, paragraph 3 of the Constitution.

37) Nakauchi, *supra* note 26, 6.

38) Act No. 37 of May 11, 2007. The English translation of the Act is available at https://www.japaneselawtranslation.go.jp/ja/laws/view/3989#je_s1 (accessed 11 December 2023).

> with regard to the crime of genocide and other most serious crimes of concern to the international community as a whole that are specified in the Statute, and by providing penal provisions for acts that obstruct the administration of the ICC.[39)]

In order to facilitate cooperation with the ICC, the Act provides for the provision of evidence (articles 6 to 13), the surrender of an accused person (articles 19 to 33) and cooperation with enforcement (articles 38 to 48). In addition, the Act creates offences related to the administration of the ICC (articles 53 to 65), such as destruction of evidence (article 53), intimidation of a witness (article 54), bribery of a witness (article 55), destruction of evidence related to organized crime (article 56), perjury (article 57), acceptance of a bribe (article 58), and offering of a bribe (article 63).[40)]

Analysis – the Prosecution of International Crimes

There is no doubt that there is a considerable disconnect between incorporated core international crimes, instances of egregious criminal behaviour across the planet, and their prosecution in both the UK and Japan. In the UK, there have only been two persons convicted of crimes within the legislation outlined above. In 1999 Anthony Sawoniuk was convicted under the War Crimes Act 1991 of two counts of murder which occurred in Belorussia under Nazi occupation in 1942.[41)] In 2006 Donald Payne was convicted of a crime under the International Criminal Court Act 2001, namely the war crime of inhuman treatment in relation to individuals detained in Iraq.[42)] There have been no prosecutions under the relevant legislation in Japan. The reasons for these facts are, in general terms, similar in the UK and Japan. There are, however, differences between the countries that further

39) *Ibid*.

40) *Ibid*. Regarding the Japanese accession to the Rome Statute and the introduction of the Act on the Cooperation with the ICC, see Kurosaki *et al*, *supra* note 22, 1687.

41) Sawoniuk unsuccessfully challenged his conviction in R v Sawoniuk, [2000] 2 Cr App R 220. See generally Hirsh, D., The Trial of Andrei Sawoniuk: Holocaust Testimony under Cross-Examination, (2001) 10 Social and Legal Studies 529.

42) See First British Soldier to be Convicted of a War Crime is Jailed for Ill-treatment of Iraqi Civilians, 1 May 2007, The Guardian, cited at https://www.theguardian.com/uk/2007/may/01/military.iraq (accessed 12 December 2012). See also Rasiah, N., The Court-martial of Corporal Payne and Others and the Future Landscape of International Criminal Justice, (2009) 7 Journal of International Criminal Justice 177. One person has also been convicted of conspiracy to torture under s 134 of the Criminal Justice Act 1998. That is of Faryadi Zardad in 2005, his conduct relating to his conduct in Afghanistan in the 1990s. See Zardad unsuccessfully appealed against his conviction, reported as R v Zardad [2007] EWHC Crim 279. See also Metcalfe, E., Torture and the Boundaries of English Law, (2005) 2(2) Justice Journal 79.

explain the situation.

There are undoubted practical obstacles to prosecuting international core crimes domestically, including those under the Rome Statute.[43] Illustrating this fact is that, in the UK, the War Crimes Unit investigated 1863 people for genocide, war crimes and crimes against humanity between 2004-2008[44] and, as noted, there was only one prosecution leading to a conviction over that period. While this fact does not in itself support any particular reason or reasons for the dearth of prosecutions, it is not unreasonable to conclude that in certain of the cases at least evidential and procedural difficulties were germane. In England and Wales a prosecution can only proceed if there is sufficient evidence such that there would be a realistic prospect of conviction and that the public interest test is met.[45] As Grady notes, "The challenge of obtaining evidence in cases where the conduct occurred abroad, and therefore much (or perhaps all) of the documentary evidence and witnesses are overseas, is formidable and expensive".[46] Mutual legal assistance treaties may or may not exist between the UK, Japan and the country where the alleged acts have occurred. The use of technology such as video links, and the use of interpreters may cause further hurdles in the way of the institution of a prosecution.[47]

A further relevant consideration is that countries which have had international crimes committed in their territory may be unwilling to provide evidence to third countries where the crimes may have been "perpetrated by state officials with the acquiescence, tolerance or support of" those in

43) See as regards England and Wales, but applying to a degree in other jurisdictions Grady, *supra* note 7. See also See Cryer, R. and Bekou, O., International Crimes and ICC Cooperation in England and Wales, (2007) Journal of International Criminal Justice 441. And Williams, S., Arresting Developments? Restricting the Enforcement of the UK's Universal Jurisdiction Provisions, (2012) 75 Modern Law Review 368. And Cryer, R. and Mora, P.D., Legislative Comment: The Coroners and Justice Act 2009 and International Criminal Law: Backing into the Future (2010) 59 International and Comparative Law Quarterly 803.

44) Cryer, *ibid*, 813 footnote 73.

45) The *Code for Crown Prosecutors* sets out the general principles that should be followed when coming to a decision to prosecute, at https://www.cps.gov.uk/publication/code-crown-prosecutors, (accessed 11 December 2023). The public interest test provides that where there is sufficient evidence a prosecution will usually take place unless the prosecutor is satisfied that there are public interest factors tending against prosecution which outweigh those tending in favour, para 4.10.

46) Grady, *supra* note 7, 717.

47) Here the question of witness protection and intimidation comes to the fore. With international crimes normally emerging from conflict situations, there are almost certainly continuing political animosities within the countries where the alleged crimes occurred. See further Grady, *supra* note 7, 719. The context of such crimes also gives rise to significant amounts of evidence, *ibid*, 720.

positions of power.[48] This fact raises the need for a considerable degree of political will for prosecutions to take place, not only by those in power in the situs of the alleged crimes but also by those authorising and undertaking a prosecution. As Meron notes, reasons for the rarity of national prosecutions include a "lack of resources, evidence and, above all, political will".[49] Nserko adds to this list "… the undue homage that states have tended to accord to national sovereignty and to the principle of non-interference in each other's internal affairs".[50] Overall, there is no doubt that there are considerable hurdles in the way of prosecution of international core crimes in the UK and Japan, and indeed all countries. Additionally as regards Japan, the country's general military disengagement following WWII has meant that there have not been situations where Japanese nationals have been involved in hostilities where international crimes could be committed.[51] This fact, in itself, explains to a not-inconsiderable degree the lack of Japanese prosecutions.

Cooperation with the ICC

A question issue arising in light of the very small number UK prosecutions and the complete lack of proceedings in Japan as regards core international crimes is whether the two countries are, apart from enacting domestic legislation, cooperating in good faith in the fight against international crimes. The answer appears to be mixed. One avenue of cooperation is through putting forward judges for election to the ICC. In this respect both the UK and Japan have been active. Indeed, both countries have had a judge at the ICC for some time. As regards the UK, Sir Adrian Fulford sat as a judge from 2003 to 2012, Howard Morrison sat from 2012 to 2021, and Joanna Korner is sitting as a judge presently. Her term started in March 2021. As regards Japan, similarly, three judges have been elected to the ICC since it became a state party to the Rome Statute in 2007. There was a by-election of ICC judges in November 2007, and Fumiko Saiga was elected as an ICC judge,

48) Grady, *supra* note 7, 718, citing Cassese *et al*, *supra* note 2, 271.
49) Meron, T., International Criminalization of Internal Atrocities, (1995) 89 American Journal of International Law 554, 555.
50) Nserko, *supra* note 6 at p 428-429.
51) It should be noted that Japan has participated in peacekeeping activities since the 1990s, so Japanese nationals have been present in conflict zones outside its territory in that capacity. See Fujishige, H.N., Uesugi, Y., and Honda, T., *Japan's Peacekeeping at a Crossroads: Taking a Robust Stance or Remaining Hesitant*, Springer, Cham, 2022, at https://library.oapen.org/handle/20.500.12657/52836 (accessed 12 December 2023).

as she won 82 votes out of 105, "the largest number among all candidates".[52] According to Masaki, the Japanese Government was of the opinion that "Japan should send a judge to the ICC as soon as possible" rather than waiting for a normal election of 2009.[53] In November 2009, Kuniko Ozaki was elected as a judge[54], and later in March 2015 she was elected as the Second Vice President of the ICC.[55] In December 2017, Tomoko Akane, Ambassador for International Judicial Cooperation was elected as a judge.[56] In this respect both the UK and Japan have contributed to the goal of preventing and punishing the core international crimes.

In a different vein are the positions of the UK and Japan as regards amendments to the Rome Statute following the Kampala Review Conference in 2010. State Parties to the Statute adopted by consensus two resolutions amending the crimes under the jurisdiction of the ICC. Of the most general relevance is Resolution 6, which provided a definition and a procedure for the jurisdiction of the ICC over the crime of aggression.[57] Whilst both the UK and Japan took part in the conference, neither has ratified the amendments on the crime of aggression.[58] Nor have they amended their law to reflect the Resolution. It may be seen, however, that Japan's willingness to amend the Statute as regards aggression was notable since Japanese leaders were tried for such a crime by the International Military Tribunal for the

52) Ministry of Foreign Affairs of Japan, Election of Ms. Fumiko Saiga, Ambassador in Charge of Human Rights and Member of the Committee on the Elimination of All Forms of Discrimination against Women (CEDAW), as Judge of the International Criminal Court (ICC), December 1, 2007, available at https://www.mofa.go.jp/announce/announce/2007/12/1176491_840.html (accessed 12 December 2023).

53) Masaki, *supra* note 32, 369.

54) Ministry of Foreign Affairs of Japan, Statement by Mr. Katsuya Okada, Minister for Foreign Affairs, on the Election of Ms. Kuniko Ozaki, Professor at the National Graduate Institute for Policy Studies and Special Assistant to the Ministry of Foreign Affairs of Japan, to the International Criminal Court (ICC), November 19, 2009, available at https://www.mofa.go.jp/announce/announce/2009/11/1197505_1146.html (accessed 12 December 2023).

55) Ministry of Foreign Affairs of Japan, Statement by Foreign Press Secretary Yasuhisa Kawamura on the Election of Judge Kuniko Ozaki of the International Criminal Court (ICC), as the Second Vice President of the Court, March 12, 2015, available at https://www.mofa.go.jp/press/release/press4e_000672.html (accessed 12 December 2023).

56) Ministry of Foreign Affairs of Japan, The Election of Ms. Tomoko Akane, Ambassador for International Judicial Cooperation and Public Prosecutor of Supreme Public Prosecutors Office of Japan as Judge of the International Criminal Court (ICC) (Statement by Foreign Minister Taro Kono), December 5, 2017, available at https://www.mofa.go.jp/press/release/press4e_001824.html (accessed 12 December 2023).

57) See https://treaties.un.org/doc/Treaties/2010/06/20100611%2005-56%20PM/CN.651.2010.pdf (accessed 12 December 2023).

58) https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XVIII-10-b&chapter=18&clang=_en (accessed 11 December 2023). See also Kurosaki et al, *supra* note 22, Chapter 13, note 128.

Far East. The San Francisco Peace Treaty, noted above, provided that Japan accept the judgments of the Military Tribunal (article 11). This led to strong criticism in Japan that the judgments were the result of *ex post facto* law, and therefore Japan should not be actively involved in the debates about the crime of aggression.[59] However, Japan emphasized the importance of the ICC's jurisdiction over the crime of aggression since its leaders were judged at the Tribunal held in Tokyo.[60] Thus, at the Kampala Review Conference, Ambassador Ichiro Komatsu of Japan made a statement, part of which was as follows:

> Let me, instead, emphasize once again how much Japan considers it important for the ICC to become able to exercise its jurisdiction over the crime of aggression. There is a historical for this. Japanese nationals were convicted of crime against peace and of war crimes by the International Military Tribunal for the Far East. Japan solemnly accepted its judgments by virtue of the San Francisco Peace Treaty. As a country with an ingrained memory of the history and lessons learned therefrom, Japan firmly believes that ICC should be able to exercise its jurisdiction over the crime of aggression. And international criminal tribunals should not be operated on the basis of ex post facto law. Any criminal suspect should be prosecuted and punished based on the principle of legality including due process of law.[61]

There is, in both the UK and Japan, a recognition that international law and the ICC in particular are important in the fight against the most egregious crimes committed by mankind. There are, however, undoubted and significant hurdles in the national prosecution of them.

59) Okano, M., Shinryaku hanzai kitei saitaku he no koken [Contribution to the adoption of provisions relating to the crime of aggression], Yanai, S. and Murase, S. (eds), *Putting International Law into Practice: In Memory of Ambassador Ichiro Komatsu*, (Shinzansha, 2015), 249-268, at 255. Okano was Director of Policy Coordination Division, Ministry of Foreign Affairs of Japan, at the time of writing the article.

60) Ministry of Foreign Affairs of Japan, Kokusai keiji saibansho (ICC) roma kitei kento kaigi (kekka no gaiyo) [The summary of the result of the Review Conference of the ICC Rome Statute], 11 June 2010, available at https://www.mofa.go.jp/mofaj/gaiko/icc/rome_kitei1006.html (accessed 12 December 2023); Okano, *ibid*.

61) Ministry of Foreign Affairs of Japan, Statement by H.E. Mr. Ichiro Komatsu Special Envoy of the Government of Japan Ambassador Extraordinary and Plenipotentiary of Japan at the Review Conference of the Rome Statute of the International Criminal Court (ICC) 4 June 2010, Kampala, available at https://www.mofa.go.jp/policy/i_crime/icc/pdfs/statement_1006.pdf (accessed 12 December 2003). The statement was reprinted in Okano, *supra* note 59, 257-260.

Conclusion

The UK and Japan, with very different histories over the past 75 years, have both become party to many of the leading international criminal treaties including those which are designed to prevent and punish those who commit or participate in the core international crimes of genocide, crimes against humanity and war crimes. They have enacted domestic legislation in furtherance of their obligations under certain of those agreements. Domestic prosecutions, however, have been very rare or indeed non-existent. This is a function of history, politics, geography, evidence and procedure. It is clear that both the UK and Japan should seek to prosecute such crimes where the circumstances arise. Doing so would send important signals to the international community. Through the passage of domestic legislation and the participation of judges at the ICC both countries can be said to be acting to the minimum level required.[62] Ratifying the crime of aggression protocol would send a further positive signal. In the absence of the United States, India, Russia and China both the UK and Japan have the opportunity, some might say moral obligation, to play a leading role in the global effort to prevent and punish the world's most serious crimes.

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62) That noted, Japan was the largest contributor to the ICC's budget to the year ending 2020 (contributing 24,311,100 euros), with the UK fourth, after Germany and France, (contributing 12,143,931 euros), see Financial statements of the International Criminal Court for the year ended 31 December 2020, at https://asp.icc-cpi.int/sites/asp/files/asp_docs/ASP20/ICC-ASP-20-12-ENG.pdf (accessed 12 December 2023) 46.

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