

TRIAL AND ERROR: A COMPARATIVE PERSPECTIVE ON THE LAY PARTICIPATION IN CRIMINAL TRIALS AND APPELLATE REVIEW OF ERRORS IN TAIWAN

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ABSTRACT

Taiwan follows its East Asian counterparts to establish a system of lay participation in criminal trials, which is called citizen judges and took effect in January 2023. But Taiwan will soon face similar conundrums, like Japan and South Korea have encountered, about whether to allow professional judges to review and even reverse decisions made by citizen judges. In a mock case, the Taiwan High Court and Taiwan's Supreme Court both attempted to address the conflict from a perspective of American law, but more controversies have emerged than been solved. This Article follows the route of the two courts and deals with those unsettled controversies in four aspects: legal errors, factual errors, sentencing errors, and the mixed questions of law and fact. This Article advises appellate courts to: (1) employ principles like preservation of claims, plain errors, and harmless errors when reviewing legal errors *de novo*, (2) incorporate the substantial evidence review with the existing law into a two-step test, through which the appellate review of factual errors may work better, (3) interpret the standard of exceeding unreasonableness in an abuse-of-discretion way when investigating errors in sentencing, and (4) replace the *de novo* standard with a spectrum approach when reviewing the errors of impropriety, namely the mixed question of law and fact in Taiwan's context. Through these adjustments in the appellate review process, the new system of citizen judges will better serve to enhance the public knowledge of and confidence in criminal trials as the new system has been entailed.

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INTRODUCTION

There has been a surge of incorporating lay participation into the traditional judicial systems across the East Asian region since the 21st century. Japan established its mixed jury system by passing the Act of *Saiban-in* (lay judge) in May 2004, through which professional judges and lay judges try certain criminal cases and decide on the sentencing jointly. After a preparatory period of five years, the Act took effect in May 2009.¹ South Korea approved its Act for Citizen Participation in Criminal Trials in April 2007.² The new Act introduced the mechanism of jury into South Korea's criminal trials and was put into effect in January 2008.³ Under this Act, a jury acts in an advisory capacity; its verdict is not binding on professional judges.⁴ It is a choice out of compromise because the Constitution grants only the right to trial by judge.⁵ A jury of full decision-making power may cast doubt on its constitutionality.⁶ Following the implementation of *Saiban-in* and advisory juries in criminal trials by Japan and South Korea, Taiwan eventually set up its own system of lay participation in criminal trials by ratifying the Citizen Judges Act in July 2020.⁷ After two and half years' preparation, the new system has been put in operation since January

1. Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 322 (2007).

2. Jaihyun Park, *The Korean Jury System: The First Decade*, in JURIES, LAY JUDGES, AND MIXED COURTS: A GLOBAL PERSPECTIVE 88, 90 (Sanja Kutnjak Ivković et al. eds., 2021).

3. *Id.*

4. Yong Chul Park, *Advance Toward "People's Court" in South Korea*, 27 WASH. INT'L L.J. 177, 192 (2017).

5. DAEHANMINKUK HUNBEOB [HUNBEOB] [CONSTITUTION] art. 27 (S. Kor.).

6. Park, *supra* note 2, at 187-88.

7. Cent. News Agency, *Taiwan Legislature Passes Citizen Judge Bill*, TAIWAN NEWS (July 22, 2020), <https://www.taiwannews.com.tw/en/news/3971489> [<https://perma.cc/A3GT-7MG8>].

2023.⁸ Under the new system, professional judges and selected citizens will form a mixed panel to deliberate on a defendant's responsibility and determine the corresponding sanction if guilty.⁹

These East Asian countries brought in the apparatus of lay participation for addressing some deep-rooted problems in their bench trial systems,¹⁰ but the unintended consequences that counteract the effects of the input from lay persons also create some new problems, one of which is the appellate review of decisions of trial courts with lay judges or juries. Japan, for example, has faced the challenge of whether an appellate court consisting exclusively of professional judges could be justified in reviewing and replacing the findings of facts from *Saiban-in* trials with its own findings, and if yes, whether it will undermine the goals of introducing the system of *Saiban-in* into criminal trials.¹¹ On one side, some may argue that appellate courts in Japan have long held the power of finding truth and it is to the same extent even in *Saiban-in* cases. On the other side, some may urge appellate courts to show deference to the findings of fact from *Saiban-in* trials and to restrain from the use of their reviewing power unless there is substantial mistake in the findings of fact by *Saiban-in*.¹² A decision from the Supreme Court of Japan released in 2012 theoretically settled the controversy. The decision requires appellate courts to be respectful of the findings of fact by *Saiban-in* unless the findings are unreasonable such as being contrary to the rules of logic or rules of thumb.¹³ The same issue emerged and was more complicated when appellate courts were reviewing sentencing decisions made by *Saiban-in* courts because there are few clear-cut principles or standards for deciding on or reviewing a sentence in Japan's criminal proceedings. A decision from the Supreme Court of Japan, released in 2014, laid down the requirements of objectivity and equal treatment for sentencing; the sentencing of *Saiban-in* may deviate from the general trends or precedents only if justified upon reasonable grounds.¹⁴

South Korea is confronted with similar problems to Japan with a few distinctions because in South Korea decisions from juries have only an advisory

8. *Id.*

9. H Henry Chang, Howard Shiu & Paula Hsu, *Implications of Taiwan's Pending Lay Judge System*, EUROVIEW (November 13, 2020), <https://euroview.ecct.com.tw/category-inside.php?id=400> [<https://perma.cc/AM4F-H9QW>].

10. See generally Hiroshi Fukurai, Kay-Wah Chan & Setsuo Miyazawa, *The Resurgence of Lay Adjudicatory Systems in East Asia*, 12 ASIAN PAC. L. & POL'Y J. i (2010).

11. Caleb Jon F. Vandenbos, *Patching Old Wineskins: Heightened Deference Towards Saiban-In Findings of Fact on Koso Appeals Is Not Enough*, 24 WASH. INT'L L.J. 391, 410 (2015).

12. Masahito Inouye, *Citizen Participation in Criminal Trials and Reformation of Criminal Justice in Japan*, in ANNUAL REPORT FOR 2017 AND RESOURCE MATERIAL SERIES No. 105: ENHANCING THE RULE OF LAW IN THE FIELD OF CRIME PREVENTION AND CRIMINAL JUSTICE 74, 90-91 (2018), https://unafei.or.jp/publications/pdf/RS_No105/No105_11_VE_Inouye.pdf [<https://perma.cc/W4EW-94B5>].

13. Vandenbos, *supra* note 11, at 413-14.

14. Inouye, *supra* note 12, at 94-96.

effect. The agreement and disagreement between the jury's advisory verdict and the final decision made by judges may touch on some different issues about the appellate review of trial court decisions. The Supreme Court of South Korea, the final step of the appellate procedure, emphasized that the decisions from trial courts based on the verdicts of juries shall be respected unless clear errors are found in the decisions.¹⁵ The legislature, however, has different thoughts on the reviewing power of appellate courts so it did not adopt the bill proposed in early 2017 to revise the appealing process.¹⁶ Therefore, the controversies over the role of appellate courts in reviewing trial court decisions based on jury verdicts remain unsettled after more than a decade since the enactment of the Korean jury system in 2008. In addition, juries may offer their opinions and recommend a sentence to judges if the defendant is found guilty.¹⁷ However, there is little research on the standards for appellate courts to review sentencing decisions based on the recommendation from juries.

The controversies in Japan and South Korea have drawn the attention of legal professionals and scholars in Taiwan after Congress passed the Citizen Judges Act in July 2020. They noticed that similar disputes over the appellate review of citizen judges' decisions may arise soon after the new lay system launches in January 2023. Nonetheless, there are merely two articles in the Citizen Judges Act, Articles 91 and 92, telling appellate courts how to review lay participatory cases.¹⁸ It is obviously not enough. After consulting the Japan experience, one scholar has suggested that the high courts (the courts at the intermediate appellate level in Taiwan) shall take up the role of post-fact review when reviewing decisions from citizen judges.¹⁹ Another scholar has proposed otherwise to employ the standards of appellate review borrowed from the United States, such as substantial evidence, *de novo* review, or abuse of discretion.²⁰ Therefore, Taiwan has foreseen the potential legal issues on the appellate review of citizen participatory cases. The debate on whether Taiwan should

15. Park, *supra* note 2, at 103.

16. *Id.*

17. *Id.* at 96.

18. See FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, arts. 91-92 (2023) (Taiwan).

19. Zhu Shiyan (朱石炎), Guomin Canshen Anjian Shangsushen Zhi Gouzao (國民參審案件上訴審之構造) [The Structure of the Appellate Procedure in Citizen Participation Cases], Sifa Zhoukan (司法周刊) [JUD. WKLY.], no. 2022, 2020, at 2-3, <https://www.judicial.gov.tw/tw/cp-1429-291933-d5eba-1.html> [<https://perma.cc/6DW7-PKDQ>].

20. Wen Jiaqian (文家倩), Guomin Faguangzhi Zhi Shangsushenchen: Yi Meiguo Shangsushenchen Biaoqun Weili (國民法官制之上訴審查—以美國上訴審查標準為例) [Appellate Review of the Citizen Judges System: Example of the Standards of Appellate Review in the United States], Yuedan Caipan Shibao (月旦裁判時報) [CT. CASE TIMES], no. 101, 2020, at 95-103.

follow the American²¹ or Japanese line²² existed for a long time until the Taiwan High Court and the Supreme Court of Taiwan handed down their first decisions on a mock lay participatory case recently.

Both the decisions from the Taiwan High Court and the Supreme Court of Taiwan interpreted the Articles 91 and 92 of the Citizen Judges Act from the perspective of American law. The Taiwan High Court, for example, applied the abuse of discretion standard to the review of sentencing²³ and the plain error rule to the review of legal issues in the mock trial decision.²⁴ Also, the Supreme Court in its mock trial decision advises intermediate appellate courts to employ the harmless error doctrine when reviewing errors in law.²⁵ The two decisions thus have shed light on the possible choice the appellate courts will make for their reviewing standards after the system of citizen judges took effect in January 2023. Additionally, the Taiwan High Court and the Supreme Court both take a stance that appellate courts shall be respectful towards and demonstrate their deference to the citizen participatory judgments.

Accordingly, we can summarize from the decisions of the Taiwan High Court and the Supreme Court and lay out three arrays of unsettled issues on the

21. *See, e.g.*, Chen Ruiren (陳瑞仁), Meiguo Faguan Ruhe Shenchu Peishentuan Zhi Youzui Caijue (美國法官如何審查陪審團之有罪判決) [How American Judges Review Guilty Verdicts from Juries], Yuedan Caipan Shibao (月旦裁判時報) [CT. CASE TIMES], no. 116, 2022, at 64; Su Kaiping (蘇凱平), Lun Mingxian Cuowu Biaozhun Yu Guomin Faguan Fa Zhi Shangsu Shenchu: Taiwan Gaodeng Fayuan 110 Niandu Guomo Shangsu Zidi 1 Hao Xingshi Panjue (論「明顯錯誤」標準與國民法官法之上訴審查—臺灣高等法院110年度國模上訴字第1號刑事判決) [The Clearly Erroneous Standard and the Appellate Review in the Citizen Judges Act: The Taiwan High Court's 110 Guo-Mo-Shang-Su No. 1 Criminal Judgement], Yuedan Shiwu Xuanpin (月旦實務選評) [J. NEW PERSP. ON L.], no. 2, 2022, at 117.

22. *See, e.g.*, Yan Jung (顏榕), Riben Ershen Fayuan Duiyu Yishen Susong Chengxu Zhi Shenchu Ji Ershen Diaocha Zhengju Zhi Jizhun: Jianping Woguo Taiwan Gaodeng Fayuan 110 Niandu Guomo Shangsu Zidi 1 Hao Panjue (日本二審法院對於一審訴訟程序之審查及二審調查證據之基準—兼評我國台灣高等法院110年度國模上訴字第1號判決) [The Review of Japanese Court of Second Instance on the Procedure of the First Instance and the Standard of Investigating Evidence in the Second Instance: Comments on the Taiwan High Court's 110 Guo-Mo-Shang-Su No. 1 Judgement], Wanguo Falv Zazhi (萬國法律雜誌) [FORMOSA TRANSNAT'L L. REV.], no. 242, 2022, at 17.

23. Taiwan Gaodeng Fayuan 110 Niandu Guomo Shangsu Zidi 1 Hao Xingshi Panjue (臺灣高等法院110年度國模上訴字第1號刑事判決) [Year 110 Mock Appeal No. 1 Criminal Judgement of the Taiwan High Court].

24. *Id.*; *see also* Jung (顏榕), *supra* note 22, at 19.

25. Zuigao Fayuan 111 Niandu Guomo Taishang Zidi 1 Hao Xingshi Panjue (最高法院111年度國模台上字第1號刑事判決) [Year 111 Mock Appeal No. 1 Criminal Judgement of the Supreme Court]; *see* Zuigao Fayuan Shouban Guomin Faguan Disanshen Shangsu Moni (最高法院首辦國民法官第三審上訴模擬) [The Supreme Court Held a Mock Appeal to the Third Instance from Citizen Judge Cases for the First Time], Sifa Zhoukan (司法周刊) [JUD. WKLY.], no. 2113, 2022, at 1, <https://www.judicial.gov.tw/tw/cp-1429-673379-d1400-1.html> [https://perma.cc/68AQ-GS6X].

standards of appellate review of citizen participatory cases, in which there is still ambiguity and vagueness in need of further explanation and analysis. In addition, there are four arrays of research questions that are pivotal yet ignored by the two courts:

- (1) When reviewing errors in law, the Taiwan High Court applied the plain error rule. But what the rule is and how to use it in Taiwan's criminal appellate review needs more detailed elaboration. Additionally, the Supreme Court advises intermediate appellate courts to apply the harmless error doctrine when reviewing legal errors, the Citizen Judges Act states that intermediate appellate courts must reverse the relevant portion of the judgment where any legal error is found.²⁶ Here thus comes the dilemma of whether the reversal is mandatory or permissive when a harmless error in law is found.
- (2) When reviewing errors in facts, intermediate appellate courts are obliged to strictly obey the Citizen Judges Act by reversing the trial court's judgment only if it is in contravention of the rules of thumb or reasoning and the factual error obviously contributes to the verdict.²⁷ But neither the Taiwan High Court nor the Supreme Court expound on what these rules really mean in their decisions and hence appellate courts are left confused while dealing with such issues. Therefore, the substantial evidence standard utilized by U.S. courts for appellate review of jury's findings may be a useful reference here.
- (3) When reviewing errors in sentencing, the Taiwan High Court applied the abuse of discretion standard, but such a standard never appears in the Citizen Judges Act or the Code of Criminal Procedure, so what the standard is and how to use it in Taiwan's criminal appellate review need further clarification. In addition, the Supreme Court suggests that intermediate appellate courts sustain citizen judges' decision about sentencing unless the decision is exceedingly unreasonable. Therefore, how to coordinate the abuse of discretion standard and the standard of exceeding unreasonableness will also be covered.
- (4) The distinction between law and fact is not always that clear. There are many issues not easily classified as questions of law or of fact. Sometimes law and fact are mixed. If appellate courts are confronted with those mixed questions of law and fact, is there any standard of review for such kinds of questions? What is the standard?

This Article is going to grapple with the above four research questions from a comparative stance. The remainder of this Article will proceed as follows: Part I provides the basic introduction to the structure of criminal appeals process and the development of lay participation in Taiwan over the last four decades from

26. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1 (Taiwan); *see* discussion *infra* Part II.B.

27. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1 (Taiwan); *see* discussion *infra* Part III.A.2.

the end of the martial law period in 1987 to the approval of the Citizen Judges Act in 2020. Part II explains the standards of appellate review of legal errors in the United States, including the *de novo* review, plain errors, and the harmless error doctrine, and discusses how the standards can fit in the settings of Taiwan's criminal appellate courts. Part III turns to the standards of appellate review of errors in facts, sentencing, and the mixed question of law and fact and addresses how the standards adapt to the statutory requirements in the Citizen Judges Act²⁸ or court's interpretations. By pointing out the potential legal controversies and providing solutions to them from a comparative perspective, this article expects to help build a better framework of appellate review for the upcoming system of citizen judges in Taiwan's criminal trials.

I. CRIMINAL APPEALS PROCESS AND LAY PARTICIPATION IN TAIWAN

Over the past three decades, Taiwan's court system has been haunted by the perennial dispute over whether to introduce lay participation into criminal trials, but the efforts have come under heavy scrutiny and overcame a rocky road. This Part briefly introduces the structure of the criminal appeals process in Taiwan, in particular the role of the intermediate appellate court, for it holds the power to conduct a comprehensive review of facts and law regardless of the decision of the court of first instance (Part I.A). It next outlines the development of lay participation in Taiwan and provides the grounds for the long struggle before it was ultimately established in 2020 (Part I.B).

A. The Structure of Taiwan's Criminal Appeals Process

Like many other countries, the hierarchy of Taiwan's criminal court system is divided into three levels: district courts, the portal of judiciary for cases to be brought in, high courts, namely the intermediate appellate courts where most cases on appeal are first heard and the Supreme Court, known as the court of last resort, where only a limited scope of cases can be heard.²⁹ There are twenty-two criminal courts at the district level, at least one in every county or city, and six criminal courts at the high court level, one of which is the Taiwan High Court.³⁰ Every case is tried by professional judges.³¹ At the levels of district

28. *See id.* (examining the rules of thumb and reasoning).

29. Charles Hou, *An Overview of the Criminal Justice System in Taiwan*, in HANDBOOK OF ASIAN CRIMINOLOGY 297, 303 (Jianhong Liu, Bill Heberton & Susyan Jou eds., 2013); Margaret K. Lewis, *Taiwan's New Adversarial System and the Overlooked Challenge of Efficiency-Driven Reforms*, 49 VA. J. INT'L L. 651, 658 n.15 (2009).

30. *Organization Chart*, JUDICIAL YUAN, <https://www.judicial.gov.tw/en/cp-1668-84500-f8dba-2.html> [<https://perma.cc/A6UZ-QVQ4>] (July 9, 2021).

31. FAWUBU FAGUI ZILIAOKU, Court Organization Act, art. 3. (Taiwan). When the Citizen Judges Act started taking effect in January 2023, some cases will be tried by a mix of professional judges and lay persons. *See discussion infra* Part I.B.2.

court³² and intermediate appellate court,³³ each case is presided over by a panel of three judges unless stipulated otherwise.³⁴ If a case is successfully appealed to the Supreme Court, it will be reviewed by a panel of five judges.³⁵

A regular criminal trial is usually time-consuming and becomes a protracted legal battle when the case is complex or the offense charged is serious. Therefore, some simplified procedures are needed for those cases which are plain and undisputed. One popular option is summary procedures.³⁶ If the defendant confesses or the evidence presented is sufficient to determine the defendant's guilt,³⁷ summary procedures may be used in lieu of trial proceedings, either by the request of the prosecutor or the discretion of the judge.³⁸ Summary procedures are designed for minor offenses because the scope of punishment via summary procedures is limited to probation, a fixed-term imprisonment that is convertible to community service, short-term detention, or a fine.³⁹ Summary procedures are presided over by one judge in the summary division of courts;⁴⁰ the presiding judge may make decisions solely based on paper files,⁴¹ so there are usually no hearings unless necessary.⁴² Moreover, when using summary procedures, judgments may be written in a brief manner or quoted from the indictment.⁴³

Another critical distinction between regular and summary procedures is the tracks designed for parties to appeal their cases. In general, like the Japanese counterpart,⁴⁴ both the prosecution and defense in Taiwan enjoy the right to

32. Before the reform in 2003, criminal trials in the district courts were conducted before one single judge. *See* Lewis, *supra* note 29, at 704.

33. FAWUBU FAGUI ZILIAOKU, Court Organization Act, art. 3, § 2. (Taiwan) ("Trials in a High Court are conducted by a collegial panel of three judges.").

34. The difference in "summary procedures" will be discussed in subsequent paragraphs.

35. FAWUBU FAGUI ZILIAOKU, Court Organization Act, art. 3, § 3 (Taiwan) ("Trials in the Supreme Court, unless otherwise prescribed by law, are conducted by a collegial panel of five judges.").

36. Lewis, *supra* note 29, at 670.

37. In practice, summary procedures are generally used only when the defendant confesses, and the evidence presented is sufficient to prove one's guilt. *See id.* n.85.

38. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 449, §§ 1-2 (Taiwan); *see also* Kai-Ping Su, *Criminal Court Reform in Taiwan: A Case of Fragmented Reform in a Not-Fragmented Court System*, 27 WASH. INT'L L.J. 203, 209 (2017).

39. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 449, § 3 (Taiwan).

40. *Id.* art. 449-1 ("Cases under summary proceeding may be tried in the summary division of courts."); *see also* Lewis, *supra* note 29, at 670.

41. Brian L. Kennedy & Chun-Ling Shen, *The Best of Times and the Worst of Times; Criminal Law Reform in Taiwan*, 12 AM. J. CHINESE STUD. 107, 122 (2005).

42. Lewis, *supra* note 29, at 670.

43. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 454 (Taiwan).

44. Joseph J. Kodner, *Re-Introducing Lay Participation to Japanese Criminal Cases: An Awkward Yet Necessary Step*, 2 WASH. U. GLOBAL STUD. L. REV. 231, 237 (2003); Matthew J. Wilson, *Assessing the Direct and Indirect Impact of Citizen Participation in Serious Criminal Trials in Japan*, 27 WASH. INT'L L.J. 75, 99 (2017).

appeal their case to higher courts.⁴⁵ The Prohibition against double jeopardy doesn't prevent the prosecution from appealing acquitted decisions. In other words, the high courts may take separate appeals from both the prosecution and defense in the same case.⁴⁶ The courts of second instance have comprehensive power to review district court decisions in both the aspects of law and facts⁴⁷ and even to find new facts by investigating evidence,⁴⁸ just like district courts do.⁴⁹ For regular procedures, either party may appeal the district court's decision to one of the high courts if unsatisfied with it;⁵⁰ the appealing party shall establish concrete grounds in the instrument of appeal.⁵¹ On the contrary, cases handled through summary procedures are appealed to a three-judge panel within the same district court;⁵² In the instrument of appeal, specific grounds are not necessary.⁵³ Further, the Supreme Court reviews only those cases appealed from the high courts,⁵⁴ so when in summary procedures, decisions of second instance from a three-judge panel in district courts are not permitted to be appealed to the Supreme Court.

Working in the capacity as the court of last resort in Taiwan, the Supreme Court takes up a small scope of cases if they meet the threshold. First, as said in the previous paragraph, only decisions coming from the high courts are allowed to reach the gate of the Supreme Court.⁵⁵ Second, some types of offenses are excluded from the scope, such as the petty ones with a maximum imprisonment of no more than three years or just a fine, or property crimes like larceny, embezzlement, fraud, breach of trust, extortion, and receiving stolen goods.⁵⁶ Like in many other countries, Taiwan's Supreme Court reviews only legal errors

45. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 344, § 1 (Taiwan) ("A party who disagrees with the judgment of a lower court may appeal to the appellate court."); *see also* Lewis, *supra* note 27, at 668.

46. Su, *supra* note 38, at 218. For example, if a defendant is charged with four counts of offenses, two of which are convicted and the other two are acquitted by trial court, the defendant may appeal the convicted two and the prosecution may appeal the acquitted two.

47. Lewis, *supra* note 29, at 668.

48. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 366 (Taiwan) ("The court of second instance shall investigate the parts of original judgment which have been appealed.").

49. *Id.* art. 364 ("Unless otherwise provided in this Chapter, the trial of second instance shall apply *mutatis mutandis* the procedure of first instance.").

50. *Id.* art. 361, § 1 ("A person who disagrees with a judgment of first instance made by a district court shall file an appeal to the court of appeal with jurisdiction of the second instance.").

51. *Id.* § 2 ("A written petition of appeal shall set forth specific ground of reasons.").

52. *Id.* art. 455-1, § 1 ("Those who disagree with a summary judgment may appeal to the collegiate bench of the competent district court of second instance."); *see also* Lewis, *supra* note 29, at 672.

53. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 455-1, § 3 ("An appeal pursuant to Section 1 shall apply *mutatis mutandis* Articles in Chapters 1 and 2 of Part III, except Article 361.").

54. *Id.* art. 375, § 1 ("A person who disagrees with a judgment of first instance or second instance made by a High Court shall file an appeal to the Supreme Court.").

55. *Id.*

56. *Id.* art. 376, § 1.

in the decisions of lower courts.⁵⁷ Legal error here means, in general, failing to apply laws or regulations or applying them in improper ways.⁵⁸ There are some circumstances under which a judgment is, on its face, in contravention of laws or regulations, such as when the court is not organized in conformity with the laws, a trial proceeds in the absence of the defendant, to conduct a trial in camera not pursuant to laws, or a judge who should be recused has participated in the decision.⁵⁹ However, not every error in law can be a qualified basis for appealing to the Supreme Court. If the legal error found in a lower court's decision is a harmless one, it may not be used to challenge the decision.⁶⁰

B. Development of Lay Participation in Criminal Trials

Taiwan has gone through a series of reforms of the criminal justice system since the end of the period of martial law in the late 1980s. The call for reform was brought by the dissatisfaction with judicial corruption and incompetence in the time of martial law. The reforms were expected to create public confidence in the criminal justice system and were part of a broader trend looking for democracy and rule of law.⁶¹ The most tremendous one was the introduction of a modified adversarial system into the traditional inquisitorial mode of criminal trials in the early 2000s.⁶² This transition has substantially changed the role of prosecutors and defense attorneys, who were only supplemental in the traditional system of inquisitorial criminal trials because the burden of proof, either of the defendant's guilt or innocence, was chiefly borne by judges.⁶³ After this reform, the burden of proof has been shifted to the parties while judges retain the power to investigate evidence under certain circumstances.⁶⁴ This is why it is a "modified" adversarial system rather than a typical one.⁶⁵

Another pivotal reform of the criminal justice system in Taiwan, as the subject of this Article suggests, is the incorporation of lay persons into the conventional system of bench trials. Even though this unprecedented change happened in 2020, the relevant debates, discussions, preparation works, and attempts as well as failures can be traced back to as early as the end of martial

57. *Id.* art. 377 ("Appeals to the court of third instance may only be filed where the judgment is in contravention of the laws and regulations.").

58. *Id.* art. 378 ("A judgment which fails to apply rules or applies rules improperly is in contravention of the laws and regulations.").

59. For the complete list of the circumstances, see *id.* arts. 379, 449 .

60. *Id.* art. 380.

61. Kennedy & Shen, *supra* note 41, at 111.

62. Jaw-Peng Wang, *The Evolution and Revolution of Taiwan's Criminal Justice*, 3 TAIWAN IN COMP. PERSP. 8, 9 (2011).

63. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 163, § 1 (Taiwan) ("The court shall, for the purpose of discovering the truth, *ex officio* investigate evidence.").

64. *Id.* art. 163, § 2 ("The court may, for the purpose of discovering the truth, *sua sponte* investigate evidence. For maintaining justice or discovering facts that are critical to the interest of the accused, the court shall *sua sponte* investigate evidence.").

65. Su, *supra* note 38, at 206.

law in 1987.⁶⁶ Therefore, readers will see in Part I.B the unremitting efforts to introduce lay participation into Taiwan's criminal trials across the past four decades.

1. The Efforts to Bring Lay Persons in: A Brief History

In 1987, the same year martial law was lifted, the top officials of the Judicial Yuan, the highest office of Taiwan's judiciary,⁶⁷ made a resolution that a typical jury system was not a good fit for Taiwan's criminal trials; they decided it would be better to collect information about citizen participation systems from other countries for reference.⁶⁸ The next year, the judiciary decided to transplant in part the system of lay participation from the continental European countries.⁶⁹ Therefore, the Judicial Yuan spent the next five years on the preparation work and finally proposed a draft bill of lay participation in criminal trials in 1994.⁷⁰ This bill borrowed the idea and the framework of Germany's lay participation system because of its better adaptability to Taiwan's continental European style of criminal procedure.⁷¹

There were four major features of the proposal of 1994. First, three professional judges and two lay persons would form a panel to preside at criminal trials and cases would be decided by a simple majority of five votes.⁷² Second, only a limited range of serious crimes and cases which involve special knowledge could be tried by a mixed panel of professional judges and lay persons.⁷³ Third, both professional judges and lay persons could access case files before trial so that they could work together smoothly.⁷⁴ Fourth, a trial by

66. Margaret K. Lewis, *Who Shall Judge? Taiwan's Exploration of Lay Participation in Criminal Trials*, in *TAIWAN AND INTERNATIONAL HUMAN RIGHTS: A STORY OF TRANSFORMATION* 437, 439 (Jerome A. Cohen, William P. Alford & Chang-fa Lo eds., 2019).

67. Kuo-Chang Huang & Chang-Ching Lin, *Rescuing Confidence in the Judicial System: Introducing Lay Participation in Taiwan*, 10 *J. EMPIRICAL LEGAL STUD.* 542, 546 (2013).

68. Si Fa Yuan (司法院), *Sifayuan Renmin Guanshen Zhidu Yanyi Ziliao Huibian Shang (司法院人民觀審制度研議資料彙編 (上))* [The Compilation of Research and Negotiation Materials on Lay Observer System by the Judicial Yuan (I)] 3 (2012); see also Su Su-er (蘇素娥), *Woguo Xingshi Shenpan Shifou Chaixing Guomin Canshen zhi Yanjiu (我國刑事審判是否採行國民參審之研究)* [Research on Whether Our Country Shall Incorporate Lay Participation in Criminal Trials], *YUEDAN FAXUE ZAZHI (月旦法學雜誌)* [THE TAIWAN LAW REVIEW], no. 177, 2010, at 192, 193.

69. Si Fa Yuan, *supra* note 68, at 3-4.

70. *Id.* at 4; see also Mong-Hwa Chin, *Lay Participation in Taiwan: Observations from Mock Trials*, 6 *ASIAN J.L. & SOC'Y* 181, 181 (2019).

71. Si Fa Yuan, *supra* note 68, at 4; Huang & Lin, *supra* note 66, at 544.

72. Chin, *supra* note 70, at 181.

73. Si Fa Yuan, *supra* note 68, at 4.

74. *Id.*

such a mixed panel is not a legal right of the defendant.⁷⁵ On the contrary, whether to launch a lay participatory trial would be decided upon the court's discretion if the defendant petitioned for it.⁷⁶ This proposal did not become a statutory law, for it lacked the endorsement from the executive branch.⁷⁷ Additionally, the members of the judiciary itself could not reach a consensus on this proposal. Taiwan's criminal trials at that time were still conducted by judges in an inquisitorial fashion, but the incorporation of lay judges would transfer the power and the duties from judges to parties. Therefore, there would be an intrinsic conflict between the inquisitorial trial and lay judges. In addition, trial by lay persons would also mean more time spent in the courtroom, so it was likely that professional judges would be reluctant to support the proposal.⁷⁸

Learning from the failure of the proposal of 1994, the Judicial Yuan proposed another two draft bills in the mid-2000s. One was "expert participation" in 2006, and the other was a revised lay participation in 2007, after the transition of Taiwan's criminal trial from an inquisitorial style to a modified adversarial style in 2002. The proposal for expert participation was to incorporate two experts into a panel with three professional judges if special knowledge of the field was needed for the case.⁷⁹ This proposal was not designed only for criminal cases; civil and administrative cases could also take advantage of this proposal if knowledge of a special field was in need.⁸⁰ But the proposal of expert participation again did not secure the endorsement from the executive branch. The proposal, therefore, merely acted as a stepping stone for further proposals.⁸¹

Despite the failure of the expert participation proposal the previous year, the Judicial Yuan immediately put forward the proposal of revised lay participation in 2007.⁸² It was a revised version of lay participation because there are some critical features in common as well as some that differed from the original version from 1994. First, the tribunal was to be composed of four lay persons and three professional judges, and cases were still to be decided by a simple majority vote.⁸³ Second, only a small scope of serious crimes would be tried by a mixed panel.⁸⁴ Third, only professional judges would access case files before trial.⁸⁵ Fourth, whether to launch a participatory trial would remain subject to the court's discretion; the defendant could petition for one such trial but had no

75. *Cf.* the constitutional right to jury in the Sixth Amendment to the United States Constitution. U.S. CONST. amend. VI.

76. Si Fa Yuan, *supra* note 68, at 4.

77. Lewis, *supra* note 66, at 439; Su Su-er, *supra* note 68, at 194.

78. Chin, *supra* note 70, at 182.

79. Si Fa Yuan, *supra* note 68, at 6.

80. *Id.*

81. Lewis, *supra* note 66, at 440; Su Su-er, *supra* note 68, at 194.

82. Si Fa Yuan, *supra* note 68, at 7.

83. *Id.*

84. *Id.*

85. *Id.*

legal right to have one.⁸⁶ The proposal of 2007 remained at the stage of discussion within the Judicial Yuan for several years, waiting for the support from other branches to push it forward. But two impactful incidents happened in 2010, causing a severe crisis of public confidence in the court system and urging the government to implement different measures to fix the problem. Therefore, the proposal of 2007 was put on the shelf and eventually replaced by the proposal of the trial observation system in 2011.⁸⁷

The first incident in 2010 was corruption, where three senior judges in Taiwan High Court and a prosecutor were accused of taking bribes from a congressman to manipulate the outcome of a criminal appeal in which the congressman was involved. This scandalous event led to the resignation of the presidents of the Judicial Yuan and the Taiwan High Court.⁸⁸ The other incident in 2010 was a social movement caused by a series of contentious court decisions, some of which concerned sexual assault against children.⁸⁹ This social movement used white roses as its symbol to represent the innocence and pureness of children. Thus, this movement was called the “White Rose Movement.”⁹⁰ These two events demanded the removal of “dinosaur judges,” a term referring to professional judges who don’t seem to live in the real world,⁹¹ and hence pushed the government to accelerate the introduction of real, lay persons into criminal trials. But some unsolved long-term controversies remained still, such as the constitutional concern about lay judges and the incompetence of lay judges in dealing with criminal cases.⁹² Therefore, the Judicial Yuan found a middle ground by proposing the innovative idea of the “trial observation system” in 2011 and announced a draft bill in 2012.⁹³

Under the trial observation system, a tribunal would be composed of five lay persons and three professional judges who would hear cases together throughout the entire process.⁹⁴ The most distinctive feature of this system, which differed from the previous ones, was that lay persons in the system acted as “observers” rather than judges, so they didn’t have the power of decision-making.⁹⁵ In other words, lay observers would provide their opinions to

86. *Id.*

87. Su, *supra* note 38, at 224.

88. Su, *supra* note 38, at 221.

89. *Id.* at 222.

90. Chen Shun-xie (陳舜協), *Wudong Bai Meigui Yu Taihuan Bu Shiren Faguan* (舞動白玫瑰籲汰換不適任法官) [*Wield White Roses and Call for the Removal of Unqualified Judges*], YAHOO! XINWEN (Yahoo! 新聞) [YAHOO! NEWS] (Oct. 16, 2010), <https://tw.news.yahoo.com/%E8%88%9E%E5%8B%95%E7%99%BD%E7%8E%AB%E7%91%B0-%E7%B1%B2%E6%B1%B0%E6%8F%9B%E4%B8%8D%E9%81%A9%E4%BB%BB%E6%B3%95%E5%AE%98-20101015.html> [<https://perma.cc/XR39-4DX3>].

91. Huang & Lin, *supra* note 67, at 546.

92. Lewis, *supra* note 66, at 440.

93. Su, *supra* note 38, at 224.

94. Huang & Lin, *supra* note 67, at 547.

95. Chin, *supra* note 70, at 189.

professional judges, but their opinions would have no binding effects on the final decisions of judges.⁹⁶ Therefore, the trial observation system appeared more similar to the advisory jury in South Korea than the system of *Saiban-in* in Japan.

The proposal of the trial observation system was more of a compromise than a breakthrough, as the Judicial Yuan was trapped in a dilemma between the pressure from the government to solve the crisis of public confidence and the misgivings about the constitutionality of lay participation.⁹⁷ Some extolled this proposal as a necessary trade-off for both sides,⁹⁸ but others strongly criticized it for three reasons. First, the deprivation of lay person decision-making power revealed the judiciary's distrust of the people, while the introduction of lay persons in criminal trials was to fix the public distrust of the court system.⁹⁹ Second, the Judicial Yuan wrongly expected that the public would regain their confidence in the court system simply by entering courtrooms and observing trials.¹⁰⁰ Third, lay observers acted as nothing more than an advertisement for court reform without any meaningful function.¹⁰¹ Again, the proposal of trial observation system didn't garner support from other branches, so it was put on hold and eventually discontinued when the regime changed in 2016.¹⁰² Under the new leadership, the Judicial Yuan put forward a new proposal in 2018,¹⁰³ which was successfully passed into law as the Citizen Judges Act in 2020.

2. Citizen Judges as the Final Choice

Just like the ebb and flow of the tides, similar policies come and go, waiting for the perfect timing to be implemented. The Citizen Judges Act is not an all-new idea either. It shares some features with the earlier proposals, of which the most essential one is that lay persons regain their decision-making power.¹⁰⁴ This core feature separates the Citizen Judges Act from the trial observation system, reconnecting the Citizen Judges Act with the proposals of 1994 and 2007. However, the Act also has another four seminal components which differentiate the Act from the two predecessors to make itself more distinctive.

First, under the system of citizen judges, the number of lay persons in a panel increased to six.¹⁰⁵ With three professional judges and six lay persons, the

96. Su, *supra* note 38, at 225.

97. Lewis, *supra* note 66, at 440.

98. *Id.*

99. Chin, *supra* note 70, at 189.

100. *Id.*

101. Lewis, *supra* note 66, at 440.

102. Su, *supra* note 38, at 225.

103. Chin, *supra* note 70, at 190.

104. *Id.* at 190.

105. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 3, § 1 (Taiwan) (“A case with the participation of citizen judges shall be heard by a Tribunal with citizen judges which shall be composed of three judges and six citizen judges.”).

number of panel members in total comes to nine.¹⁰⁶ The proposal of 1994 has a five-member panel with three professional judges and two lay persons,¹⁰⁷ and the proposal of 2007 has a seven-member panel with three professional judges and four lay persons.¹⁰⁸ Japan's *Saiban-in* panel is also made up of three professional judges and six lay persons,¹⁰⁹ but the systems diverge when it comes to voting rules. Dissimilar to the bifurcated design for different matters in the Citizen Judges Act,¹¹⁰ the *Saiban-in* panel is required to uniformly reach a simple majority, with at least one professional judge and one lay person included in the vote, for rendering a guilty verdict and the sentencing in *Saiban-in* panels.¹¹¹ This divergence marks the second seminal component of the citizen judge system.

Unlike the proposals of 1994 and 2007, both of which utilize a simple majority vote when making decisions and have no requirements on the number of professional judges or lay persons to be included in the vote,¹¹² the Citizen Judges Act sets up different thresholds of voting requirements for different matters.¹¹³ For extending a guilty verdict or a death sentence, a super majority of two-third votes that includes at least one professional judge and one citizen judge is necessary.¹¹⁴ For determining other matters, such as procedural issues or non-capital sentencing decisions, a simple majority which includes at least one professional judge and one citizen judge is sufficient.¹¹⁵ Obviously, this requirement of minimum number of professional judges or citizen judges included in the vote is borrowed from Japan's *Saiban-in*, yet the Act heightens the threshold of votes from simple majority to super majority for guilty verdict and death sentencing. However, this is not the only component similar to *Saiban-in*.

Third, the designs of access to case files are all different in the three proposals of 1994, 2007 and 2020. The proposal of 1994 required lay persons to read through case files before trials, just as professional judges do, so that they could grasp the details of cases and work with professional judges smoothly. On the contrary, the proposal of 2007 prohibited lay persons from reaching case files before trial lest lay persons have any preconception about the case, but it allowed judges to do so because their professional training would

106. See Chin, *supra* note 70, at 190.

107. Si Fa Yuan, *supra* note 68, at 4; Chin, *supra* note 70, at 181.

108. Si Fa Yuan, *supra* note 68, at 7.

109. Vandenbos, *supra* note 11, at 393.

110. See discussion *infra* next paragraph.

111. Vandenbos, *supra* note 11, at 393.

112. Si Fa Yuan, *supra* note 68, at 4 and 7.

113. For details of the voting rules, see Chin, *supra* note 70, at 190.

114. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 83, §§ 1-3 (Taiwan).

115. *Id.* art. 83, §§ 2-3.

prevent them from having any prejudgment.¹¹⁶ Not following the steps of 1994 or 2007 proposals, the Citizen Judges Act adopts a third way. It forbids both professional judges and lay persons access to case files. The only thing they can read before trial is the indictment.¹¹⁷ The Act also ushers in the mechanism of discovery,¹¹⁸ through which the Judicial Yuan expects to prevent unnecessary evidence presented in the court for enhancing trial efficiency.¹¹⁹ The use of discovery mechanism is also borrowed from *Saiban-in*;¹²⁰ Japan improved its outmoded discovery process when *Saiban-in* started working.¹²¹

Fourth, as stated before, in the proposals of 1994 and 2007, whether to launch a lay participatory trial was not a right of the defendant, but upon the discretion of the court when the defendant petitioned for it.¹²² The Citizen Judges Act makes a crucial alteration by making it the court's duty to embark on a lay participatory trial when the requirements are met. In other words, it is still not a general right of the defendant to have a case tried by citizen judges. But according to Section 1 of Article 5 of the Citizen Judges Act, if the defendant is charged of crimes with a minimum sentence of ten-year imprisonment (Subsection 1) or a death resulted from the defendant's intentional criminal behavior (Subsection 2), and the case is under the jurisdiction of district courts, the court shall conduct a citizen participatory trial,¹²³ unless stipulated otherwise.¹²⁴ The idea to make citizen participatory trials mandatory when the requirements are met rather than upon court's discretion is also similar to the settings of *Saiban-in* in Japan.¹²⁵

116. Si Fa Yuan (司法院), SIFAYUAN RENMIN GUANSHEN SHIXING TIAOLI CAOAN YANJIU ZHIDING ZILIAO HUIBIAN XIA (司法院人民觀審試行條例草案研究制定資料彙編 (下)) [THE COMPILATION OF RESEARCH AND DRAFTING MATERIALS ON THE BILL OF THE PILOT PROGRAM OF LAY OBSERVER SYSTEM BY THE JUDICIAL YUAN (II)] 46 (2012).

117. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 43, § 1 (Taiwan).

118. *See id.* arts. 53, 54 and 55 (Taiwan).

119. Chin, *supra* note 70, at 190.

120. *Id.*

121. Fukurai, *supra* note 1, at 323; Vandenbos, *supra* note 11, at 402; Wilson, *supra* note 44, at 92.

122. *See supra* notes 76 and 86 as well as their accompanying text.

123. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 5, § 1 (2023) (Taiwan).

124. *See id.* art. 6. Juvenile cases and drug crimes are also not permitted to be tried by citizen judges. *See id.* art. 5, § 1.

125. Saibaninhō [The Saiban-in Act], Law No. 63 of 2004, art. 2, § 1. For an annotated translation of the Saiban-in Act in English, see Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN PAC. L. & POL'Y J. 233 (2005).

	Panel Composition	Voting Rule	Reach Case Files	Discretion or Duty
1994	3 judges and 2 lay persons	Simple majority	Both	Upon court's discretion
2007	3 judges and 4 lay persons	Simple majority	Judges only	Upon court's discretion
2020	3 judges and 6 lay persons	<ol style="list-style-type: none"> 1. Two thirds for guilty verdict and death sentencing 2. Simple majority for other matters 3. At least one judge and one lay person included in the votes 	Neither	Court's duty

Table 1: The Three Versions of Lay Judges Proposed by the Judicial Yuan Since the 1990s.

Source: Compiled by the author

II. ERRORS IN LAW

As we can see in Part I., Taiwan's conventional criminal procedure, including the appeals process, is more of a continental European style, but the Citizen Judges Act has some fundamental features similar to Japan's *Saiban-in*. Therefore, conflicts are expected between the citizen judges' function of fact-finding and the appellate court's power of reviewing errors after the new system started working in January 2023. Moreover, as specified in the Introduction, both the Taiwan High Court and the Supreme Court of Taiwan tackled the relevant controversies from an American law stance in their decisions on a mock citizen participatory case. However, there are still some unsettled issues, which can be categorized into three groups: errors in law, facts, and sentencing. This Part will deal with the issues in the first category by expounding on the review standards of errors in law in the legal system of the United States (Part II.A) and illustrating how the United States' standards of review may be accommodated to the appellate review under the system of citizen judges in Taiwan (Part II.B).

A. The American Approach

The two chief functions of appellate courts in the United States are law

clarification and error correction.¹²⁶ The nature of the question and which court holds the authority in solving the question will determine what standard of review will be implemented.¹²⁷ When reviewing legal errors, appellate courts exert a plenary and independent review without deference to trial courts.¹²⁸ Part II.A explicates three important legal concepts when the U.S. appellate courts are reviewing errors in law: the *de novo* review, the rule of plain error, and the harmless error doctrine.

I. De Novo Review

The standard of *de novo* is the standard of review applied by courts on appeal to examine whether there is any error in law in trial court decisions.¹²⁹ This standard is “the long-recognized appellate review standard for issues of law in the trial proceeding, regardless of whether the case was tried to a judge or a jury.”¹³⁰ *De novo* is a Latin phrase meaning “anew.”¹³¹ Therefore, a *de novo* review denotes a do-over by which appellate courts don’t defer to trial courts and exercise their own independent judgment on the subject issue¹³² as if the trial court’s decision had not been extended before.¹³³ In theory, there is little presumption of correctness in trial court decisions when appellate courts conduct reviews of legal matters on this basis,¹³⁴ In practice, however, trial court decisions still have an indirect effect upon their persuasiveness.¹³⁵ Therefore, under *de novo* review, district courts will be encouraged to develop their legal analysis with accuracy.¹³⁶

Why are appellate courts permitted to apply such an authoritative standard of review when inspecting the legal soundness of trial court decisions? That is because they have the institutional advantages to serve the dual goals of doctrinal coherence and economy of judicial administration.¹³⁷ Trials at district level are fast-paced and laborious. District court judges are occupied by many matters and must deal with them quickly, such as giving jury instructions,

126. Adam N. Steinman, *Rethinking Standards of Appellate Review*, 96 IND. L.J. 1, 9 (2020).

127. *Id.* at 15.

128. *Id.* at 8-9.

129. Martha S. Davis, *Standards of Review: Judicial Review of Discretionary Decisionmaking*, 2 J. APP. PRAC. & PROCESS 47, 48 (2000).

130. *Markman v. Westview Instruments, Inc.*, 52 F.3d 967, 984 n.13 (Fed. Cir. 1995) (en banc), *aff’d*, 517 U.S. 370 (1996).

131. *De novo*, BLACK’S LAW DICTIONARY (11th ed. 2019).

132. George A. Somerville, *Standards of Appellate Review*, 15 LITIG. 23, 24 (1989).

133. Kevin Casey, Jade Camara & Nancy Wright, *Standards of Appellate Review in the Federal Circuit Substance and Semantics*, 11 FED. CIRCUIT B.J. 279, 290 (2002).

134. Somerville, *supra* note 132, at 24.

135. Casey, Camara & Wright, *supra* note 133, at 290.

136. *Salve Regina Coll. v. Russell*, 499 U.S. 225, 233 (1991).

137. *Id.* at 231.

reviewing evidence, and ruling on several motions.¹³⁸ District court judges also have to preside over cases alone with little support from lawyers for they are busy with logistics, jury selection, and evidence preparation and presentation.¹³⁹ Consequently, district court judges must decide on complicated legal controversies without the advantage of “extended reflection or extensive information.”¹⁴⁰ Sometimes district court judges rely on appellate courts to rectify their legal errors made in such a hasty manner.¹⁴¹

On the contrary, the parties on appeal will pick out only the crucial issues of law to their benefit for further review so that appellate courts may devote their energy to and concentrate on those questions of law without being bothered by undisputed matters.¹⁴² In addition, briefs from parties usually come with comprehensive analysis on the pinpointed legal issues, so they are advantageous in their ability to broaden the scope of legal arguments not tackled and even envisaged by district courts.¹⁴³ Moreover, the design of appellate courts is to be an institutionally collaborative mechanism with multiple judges on a single panel.¹⁴⁴ This scheme substantially lowers the risk of errors for it is usually not possible that all judges make mistakes on the same occasions.¹⁴⁵ Instead, judges on appeal may cooperate with each other to refine their legal opinions and to reach decisional correctness with the help of full access to trial records.¹⁴⁶

In general, appellate courts are required to address legal questions in four aspects under *de novo* review: application of settled law to the facts, interpretation of existing rules, selection or creation of a legal rule,¹⁴⁷ and explanation of legal analysis.¹⁴⁸ First, most cases simply need application of settled law to the facts, where trial courts go wrong less often, than in interpretation, selection or creation of legal rules.¹⁴⁹ Thus, the application of laws by trial court decisions are presumed to be correct and deserve more deference than in other circumstances unless a clear showing otherwise.¹⁵⁰ Second, interpretation of statutory provisions and sometimes of the Constitution plays a dominant role in cases at the appellate level.¹⁵¹ Some appellants may need courts to “expound on the law, particularly by amplifying or elaborating

138. Dan T. Coenen, *To Defer or Not to Defer: A Study of Federal Circuit Court Deference to District Court Rulings on State Law*, 73 MINN. L. REV. 899, 922 (1989).

139. *Id.* at 923.

140. *Salve Regina Coll.*, 499 U.S. at 232.

141. Coenen, *supra* note 138, at 922.

142. *Id.* at 923.

143. *Id.*

144. *Id.* at 924.

145. *Id.*

146. *Id.*

147. Somerville, *supra* note 132, at 24.

148. Casey, Camara & Wright, *supra* note 133, at 292.

149. Somerville, *supra* note 132, at 24.

150. Casey, Camara & Wright, *supra* note 133, at 292.

151. *Id.* at 293.

on a broad legal standard.”¹⁵² On some occasions, however, it is hard to draw the line between interpretation and other issues. When the question involves two conflicting rules, for example, choice between laws and their interpretation overlap.¹⁵³ If the issue presented before appellate court is nothing more than statutory interpretation, the court reviews *de novo*, and no deference is needed.¹⁵⁴

On the other hand, sometimes the question presented before appellate courts is the selection of law or even to coin a new legal rule. Cases in such a category don't appear quite as often but consume much of appellate judges' time and energy because, in addition to addressing the present legal matters, this function of appellate courts also involves establishing a new precedent or developing ancillary legal principles of use in future cases.¹⁵⁵ This can be seen as the core value of the appellate court's function.¹⁵⁶ Consequently, cases in this category receive minimum deference from appellate courts.¹⁵⁷ Lastly, sometimes trial courts may fail in their decisions to provide a full explanation of legal conclusions or ignore an important legal issue raised by parties and leave it unanswered.¹⁵⁸ These scenarios do arise and are addressed by courts on appeal regularly.¹⁵⁹ The appropriate way for appellate courts to tackle such situations is to remand the cases to allow lower courts to amend them.¹⁶⁰

2. Plain Errors

A *de novo* review doesn't mean judges on appeal will examine every legal question throughout the entire trial court's decision. It is inefficient to conduct an appellate review in this fashion. Rather, appellate courts review *de novo* the legal issues brought to their attention by the parties. Therefore, only the portions of the trial record related to the legal controversies will be examined on appeal.¹⁶¹ But, if a legal error is shockingly obvious and impactful to the outcome of the decision while none of the parties has disputed it, do appellate courts set aside such a legal error? The answer may be yes if we follow the standard of *de novo* strictly, but Rule 52(b) of the Federal Rules of Criminal Procedure states otherwise.

Rule 52(b) of the Federal Rules of Criminal Procedure is the basis of the plain error rule. It states that “a plain error that affects substantial rights may be

152. U.S. Bank Nat'l Ass'n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

153. Somerville, *supra* note 132, at 24.

154. Casey, Camara & Wright, *supra* note 133, at 293.

155. U.S. Bank, 138 S. Ct. at 967.

156. Somerville, *supra* note 132, at 24.

157. Casey, Camara & Wright, *supra* note 133, at 295.

158. *Id.*

159. *Id.* at 296.

160. *Id.*

161. Martha S. Davis, *A Basic Guide to Standards of Judicial Review*, 33 S.D. L. REV. 469, 476 (1988).

considered even though it was not brought to the court's attention."¹⁶² Rule 52(b) is an exception to Rule 51(b) of the Federal Rules of Criminal Procedure, which allows a party to preserve a claim of error by objecting "when the court ruling or order is made or sought."¹⁶³ Over the past two decades, the Supreme Court of the United States has reformulated Rule 52(b) through three crucial decisions into a four-step test and addressed the dispute over the timing necessary for an error to be plain.

The U.S. Supreme Court in the decision of *United States v. Olano* elaborated on the individual component of Rule 52(b) and added an additional factor, creating a four-step test for determining whether a plain error exists under Rule 52(b).¹⁶⁴ First, there is an error, i.e., deviation from a legal rule, and the error has not been waived by the appellant.¹⁶⁵ Second, the error has to be plain, which is synonymous with clear or obvious,¹⁶⁶ rather than being reasonably disputed.¹⁶⁷ Third, the error must be detrimental to the appellant's substantial rights, which in most cases means the error has to be prejudicial so that the outcome of the trial court's proceedings was affected.¹⁶⁸ Fourth, added by the U.S. Supreme Court, appellate courts may exercise discretion to correct the error only if it "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."¹⁶⁹

As for the dispute about the timing necessary for an error to be plain, there are two possible scenarios. First, if a trial court's decision is obviously correct at the time it was made, can there be a plain error if a change in the law has rendered the trial court's decision clearly incorrect by the time of appeal? Second, if a trial court's decision is neither obviously correct nor obviously incorrect at the time it was made because of split circuit courts, can there be a plain error if, same as the first scenario, a change in the law has made the trial court's decision clearly incorrect at the time of appeal? The U.S. Supreme Court addressed the first controversy in the decision of *Johnson v. United States*¹⁷⁰ and resolved the second issue in its decision of *Henderson v. United States*.¹⁷¹ The U.S. Supreme Court gave affirmative answers to both questions.

The dispute about the timing of error to be plain was not a new issue for the U.S. Supreme Court when engaging in the case of *Johnson*. As early as in *Olano*, the U.S. Supreme Court had noticed it but refrained from dealing with it while giving a guiding principle that "at a minimum, a court of appeals cannot correct

162. FED. R. CRIM. P. 52(b).

163. *Id.* 51(b).

164. *United States v. Olano*, 507 U.S. 725 (1993).

165. *Id.* at 733.

166. *Id.* at 734.

167. *See Puckett v. United States*, 556 U.S. 129, 135 (2009).

168. *Olano*, 507 U.S. at 734.

169. *Id.* at 736.

170. *See Johnson v. United States*, 520 U.S. 461, 468 (1997).

171. *See Henderson v. United States*, 568 U.S. 266, 278 (2013).

an error pursuant to Rule 52(b) unless the error is clear under current law.”¹⁷² The U.S. Supreme Court in *Johnson* held that if a trial court’s decision was legally sound at the time it was made but clearly contrary to the law at the time of appeal, it is sufficient for an error to be plain “at the time of appellate consideration.”¹⁷³ Later in *Henderson*, the U.S. Supreme Court moved a step forward by holding that as long as the error is plain at the time of appellate review, it is a plain error within the meaning of Rule 52(b)—it doesn’t matter whether a legal dispute was settled or unsettled at the time of trial.¹⁷⁴

3. When Errors Are Harmless

Not every legal error found in a lower court’s decision will lead to a reversal of the verdict. Section 269 of the Judicial Code, enacted in 1919, provided that:

On the hearing of any appeal, certiorari, writ of error, or motion for a new trial, in any case, civil or criminal, the court shall give judgment after an examination of the entire record before the court, without regard to technical errors, defects, or exceptions which do not affect the substantial rights of the parties.¹⁷⁵

This is the first federal provision of harmless error doctrine in the United States. It was expected to improve the efficiency of criminal trials and thus to restore public confidence in the criminal process.¹⁷⁶ According to this provision, technical errors, defects, or exceptions can be regarded as harmless if they do not bear on the substantial rights of the parties, and hence courts don’t have to reverse decisions for harmless errors.¹⁷⁷ This provision was repealed in 1948,¹⁷⁸ and Rule 52(a) of the Rules of Criminal Procedure¹⁷⁹ and 28 U.S.C. § 2111¹⁸⁰ stepped into its role instead. Both legal rules are the restatement of Section 269 of the Judicial Code but Rule 52(a) applies to the district courts while § 2111 governs the courts on appeal.¹⁸¹

172. *United States v. Olano*, 507 U.S. 725, 734 (1993).

173. *Johnson*, 520 U.S. at 468.

174. *Henderson*, 568 U.S. at 279.

175. FED. R. CRIM. P. 52 advisory committee’s note to 1944 amendment.

176. Roger A. Fairfax Jr., *A Fair Trial, Not a Perfect One: The Early Twentieth-Century Campaign for the Harmless Error Rule*, 93 MARQ. L. REV. 433, 436-37 (2009).

177. Daniel Epps, *Harmless Errors and Substantial Rights*, 131 HARV. L. REV. 2117, 2128-29 (2018) (quoting *Berger v. United States*, 295 U.S. 78 (1935) to explain the purpose of the provision).

178. *Id.* at 2144 n.194.

179. FED. R. CRIM. P. 52(a) (“Any error, defect, irregularity, or variance that does not affect substantial rights must be disregarded.”).

180. 28 U.S.C. § 2111 (“On the hearing of any appeal or writ of certiorari in any case, the court shall give judgment after an examination of the record without regard to errors or defects which do not affect the substantial rights of the parties.”).

181. Epps, *supra* note 177, at 2144-45 n.195.

The U.S. Supreme Court later extended the scope of use of harmless error to constitutional error in the decision of *Chapman v. California*.¹⁸² It was unimaginable that any constitutional error would be deemed as harmless for it is not “technical” at all. In *Chapman*, the U.S. Supreme Court reaffirmed that the utility of harmless error doctrine is to avoid “setting aside convictions for small errors or defects that have little, if any, likelihood of having changed the result of the trial.”¹⁸³ While admitting there are some constitutional rights which are fundamental to a fair trial such that their violation is by no means to be viewed as harmless,¹⁸⁴ such as coerced confession,¹⁸⁵ right to counsel,¹⁸⁶ or impartial judge,¹⁸⁷ the U.S. Supreme Court held that there are also some constitutional errors, in the context of a particular case, that “are so unimportant and insignificant that they may, consistent with the Federal Constitution, be deemed harmless.”¹⁸⁸ Further, the U.S. Supreme Court added in *Chapman* that before such a constitutional error to be held harmless, the government bears the burden to prove the constitutional error was harmless beyond a reasonable doubt, namely the constitutional error didn’t contribute to the verdict.¹⁸⁹

Following the theory of *Chapman*, the U.S. Supreme Court came up with a framework in the decision of *Arizona v. Fulminante* for determining what kind of constitutional errors is subject to the review of harmless error doctrine.¹⁹⁰ In *Fulminante*, the U.S. Supreme Court made a distinction between “structural errors” and “trial errors.” Structural errors are infractions of the fundamental values of the trial mechanism; they render the mechanism unreliable and criminal trials unfair. Therefore, structural errors can never be treated as harmless and lead to automatic reversal.¹⁹¹ On the contrary, trial errors are simply the errors that happened during the trial process, and thus this kind of constitutional defect is still subject to harmless error analysis.¹⁹² Interestingly, the admission of involuntary confession was considered as a structural error in *Chapman*¹⁹³ but was later moved to the group of trial errors in *Fulminante*.¹⁹⁴

B. Taiwan’s Accommodation in the Reviewing Process

Part II.A has introduced three vital concepts in the U.S. law about the

182. *See Chapman v. California*, 386 U.S. 18 (1967).

183. *Id.* at 22.

184. *Id.* at 23.

185. *Payne v. Arkansas*, 356 U. S. 560 (1958).

186. *Gideon v. Wainwright*, 372 U. S. 335 (1963).

187. *Tumey v. Ohio*, 273 U.S. 510 (1927).

188. *Chapman v. California*, 386 U.S. 18,22 (1967).

189. *Id.* at 24.

190. *Arizona v. Fulminante*, 499 U.S. 279 (1991).

191. *Id.* at 309-10.

192. *Id.* at 307-08.

193. *Chapman*, 386 U.S. at 23 n.8.

194. *Fulminante*, 499 U.S. at 308-12.

appellate review of legal errors in trial court decisions: the *de novo* review, the rule of plain error, and the harmless error doctrine. Part II.B is going to analyze how Taiwan's criminal courts on appeal, as the two mock decisions from the Taiwan High Court and the Supreme Court have suggested, accommodate those U.S. legal concepts into its reviewing process when the system of the Citizen Judges Act starts working. Through the analysis in Part II.B, the first research question of this Article could be thus answered.

The first sentence of Section 1 of Article 92 of the Citizen Judges Act stipulates that: "The court of second instance shall reverse the relevant portion of the original judgment upon finding the appeal meritorious or upon finding an appeal meritless but the original judgment is improper or illegal."¹⁹⁵ According to this provision, the courts of second instance in Taiwan, namely the high courts, may conduct a *de novo* review of the legal errors in the decisions of citizen judges. It is not surprising to have such a legal design because Taiwan's conventional criminal appeals process also grants the courts of second instance a comprehensive power to review district court decisions. The purpose of this provision also indicates this design is nothing different from the conventional criminal appeals process.¹⁹⁶ There are, however, two requirements of the provision to which we must be attentive as discussed in the subsequent paragraphs.

First, in addition to the legal issues included in appellant's brief "...upon finding the appeal meritorious,"¹⁹⁷ the provision asks the high courts to also review the legal issues not included in the brief "...or upon finding an appeal meritless but the original judgment is improper or illegal."¹⁹⁸ In other words, it demands a full review. This requirement is not only completely different from Rule 51(b) of the Federal Rules of Criminal Procedure, it also compromises the call for the plain error rule by the Taiwan High Court in its mock trial decision.¹⁹⁹ Per Rule 51(b), a party preserves his claim of error by objecting at the time "when the court ruling or order is made or sought."²⁰⁰ And Rule 52(b) of the Federal Rules of Criminal Procedure, namely the plain error rule, is an exception to Rule 51(b)'s rule of claim's forfeiture.²⁰¹ It is illogical to introduce only 52(b), an exception to a rule, into Taiwan, but not to introduce Rule 51(b), the rule itself. Moreover, 52(b) will contradict the present legal requirement to review the thorough judgment. Therefore, if the high courts in Taiwan decide to borrow the idea of plain error and apply it into their review of future citizen participatory cases, it would be better for them also to borrow and apply the idea

195. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1 (Taiwan).

196. The Provisions and Purpose of Citizen Judges Act (July 22, 2020) [https://lis.ly.gov.tw/lglawc/lawsingle?00267B630028000000000000001400000004000000^04598109072200^000000000000](https://lis.ly.gov.tw/lglawc/lawsingle?00267B630028000000000000001400000004000000^04598109072200^00000000000) [<https://perma.cc/8DLK-FKK7>].

197. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1 (Taiwan).

198. *Id.*

199. See discussion *supra* Introduction.

200. FED. R. CRIM. P. 51(b).

201. *Henderson v. United States*, 568 U.S. 266, 281 (2013) (Scalia, J., dissenting).

of forfeiture of claims together to replace the inefficient requirement of full review.

Second, the provision demands an automatic reversal if any legal error is found in the judgment "...shall reverse the relevant portion of the original judgment upon...".²⁰² However, if the high courts strictly follow this requirement and reverse every decision in which any tiny legal error is found, they will probably be blamed for exhausting the energy and resources of the judiciary to no avail and causing damage to the public trust in the criminal trials. That is the reason why Taiwan's Supreme Court in its mock trial decision advises the high courts to apply the harmless error principle to their review of legal errors.

Taiwan has its own version of harmless error doctrine. Article 380 of the Code of Criminal Procedure states that: "Except situations specified in the preceding article, litigation process in contravention of the laws or regulations but obviously has no effects on the judgment may not be a reason for appeal."²⁰³ But there are three problems that need to be addressed if this provision is to be applied to the level of the high courts. First, Article 380 is considered as only applicable to review by the Supreme Court.²⁰⁴ So, if the high courts expect to have the same effects as Article 380 in their review of citizen participatory decisions, an amendment to incorporate the harmless error analysis into Section 1 of Article 92 of the Citizen Judges Act is necessary. Next, unlike the U.S. Supreme Court in *Chapman*, which held that the government bears the burden to prove the error was harmless beyond a reasonable doubt,²⁰⁵ Article 380 doesn't specify anything about the burden of proof and the standard of proof. Therefore, it is vital to require the beneficiary of an error to prove beyond a reasonable doubt that the error doesn't contribute to the verdict²⁰⁶ if integrating Article 380 into the system of citizen judges. Finally, based on the language of Article 380, every legal error can be viewed as harmless if proved to have no effects on the judgment, even errors at the constitutional level. However, just as the U.S. Supreme Court said in *Chapman*, there are some rights which are so integral to a fair trial that their infractions render the mechanism of criminal trials so unreliable that they can never be considered as harmless errors.²⁰⁷ Consequently, it is advisable for appellate courts in Taiwan to follow the

202. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1 (Taiwan).

203. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art 380.

204. Su Kaiping (蘇凱平), *Lun Guomin Canyu Xingshi Shenpan De Shangsu Shencha Biaozhun: Taiwan Gaodeng Fayuan Moni Panjue Yu Meiguo Fazhi Guandian* (論國民參與刑事審判的上訴審查標準—臺灣高等法院模擬判決與美國法制觀點) [*Standards of Review in Taiwan's Lay Participation System: Taiwan High Court's Mock Trial Decision and the Perspective from the American Law*], 242 WANGUO FALV ZAZHI (萬國法律雜誌) [FORMOSA TRANSNAT'L L. REV.] 2, 5 (2022).

205. *Chapman v. California*, 386 U.S. 18, 24 (1967); see discussion *supra* Part II.A.3.

206. *Id.*

207. *Chapman*, 386 U.S. at 23.

framework in *Fulminante* to categorize some errors as “structural error,” which is not subject to harmless error analysis and will result in an automatic reversal.²⁰⁸

Additionally, the U.S. Supreme Court recategorized the admission of involuntary confession from structural error to trial error in *Fulminante*.²⁰⁹ From this shift it may be inferred that an error about admission or exclusion of certain evidence cannot be deemed as a structural error but rather a trial error subject to harmless error analysis. If so, Subsection 10 of Article 379 of the Criminal Procedure in Taiwan, which requires an automatic reversal upon finding a legal error that evidence to be investigated at the trial but not investigated,²¹⁰ shall be displaced from Article 379 and reoriented as a trial error and thus subject to harmless error review under Article 380.

III. ERRORS IN FACTS, SENTENCING, AND THE MIXED QUESTION OF LAW AND FACT

In addition to the analysis of review of legal errors in Part II, this Part deals with review of errors in facts and sentencing. First, this Part introduces how the review of factual errors works in the context of U.S. law and examines how this can be accommodated into Taiwan’s legal framework (Part III.A). It next engages in the review of errors in sentencing, explaining how appellate courts in the United States review the sentencing decisions from lower courts and trying to incorporate this into Taiwan’s reviewing process (Part III.B). This Part in its final section turns to the mixed question of law and fact, which is reviewed through a spectrum approach in the United States, expecting the approach may bring new inspirations into Taiwan’s appellate review (Part III.C).

A. Reviewing Errors in Facts

This section first elucidates the standard for reviewing a jury’s verdict in the United States, namely the substantial evidence standard. In the United States, a jury enjoys great deference on its finding of facts. Next, this section spells out how to consolidate Taiwan’s rules of thumb and reasoning with the substantial evidence standard from the United States. Through the analysis in this section, the second research question of this Article could be therefore answered.

208. See discussion *supra* Part II.A.3.

209. *Arizona v. Fulminante*, 499 U.S. 279, 308-12 (1991).

210. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 379, § 10. (“A judgment shall be automatically in contravention of the laws and regulations on its face under the following circumstances: . . . Where evidence to be investigated at the trial date is not investigated.” There are fourteen circumstances (legal errors) under Article 379 demanding automatic reversal; subsection 10 is one of them. *Id.* art. 379.

1. Substantial Evidence Standard in the United States

When reviewing errors in finding of facts, there are two standards of review utilized by U.S. appellate courts: the standard of clearly erroneous review and the standard of substantial evidence review. The former was derived from Rule 52(a)(6) of the Federal Rules of Civil Procedure²¹¹ and was further interpreted by the U.S. Supreme Court in the decisions of *United States v. United States Gypsum Co.*²¹² and *United States v. Yellow Cab Co.*²¹³ The standard of clearly erroneous is employed in the review of finding of facts by judges.²¹⁴ On the contrary, the standard of substantial evidence review applies to the review of finding of facts by juries.²¹⁵ For focusing on the thesis of the article, namely the standards of appellate review of lay participatory decisions in criminal trials, the following paragraphs will concentrate on the standard of substantial evidence review.

Unlike the *de novo* review and clearly erroneous review, the substantial evidence standard is a more deferential review of a jury's verdict.²¹⁶ The Seventh Amendment to the Constitution of the United States states that "...no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law."²¹⁷ It lays the foundation of a highly deferential standard for courts when they are in review of a jury's finding of facts.²¹⁸ A jury's finding of facts and other decisions are thus given great deference by reviewing courts; challenges to a jury's findings on appeal hardly succeed.²¹⁹

Appellate courts in the United States conduct the review of the substantial evidence standard by asking this question: upon the reexamination of the entire evidence in a way most favorable to the verdict, can a reasonable person reach the same conclusion as the jury did in the verdict?²²⁰ The verdict shall be sustained if "any rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt."²²¹ On the contrary, only if no reasonable person could find substantial evidence to bolster the jury's verdict may the verdict be discarded.²²² In other words, a jury's verdict shall be sustained unless

211. FED. R. CIV. P. 52(a)(6) ("Findings of fact, whether based on oral or other evidence, must not be set aside unless clearly erroneous, and the reviewing court must give due regard to the trial court's opportunity to judge the witnesses' credibility.").

212. *See* *United States v. U.S. Gypsum Co.*, 333 U.S. 364 (1948).

213. *See* *United States v. Yellow Cab Co.*, 338 U.S. 338 (1949).

214. Davis, *supra* note 161, at 476.

215. *Id.*

216. *Id.* at 478.

217. U.S. CONST. amend. VII.

218. Davis, *supra* note 161, at 477.

219. Somerville, *supra* note 132, at 53.

220. Davis, *supra* note 161, at 477.

221. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979).

222. Davis, *supra* note 161, at 477.

it lacks rational basis in the evidence.²²³ Therefore, it is also known as the standard of reasonableness review with the emphasis on a reasonable mind's perspective.²²⁴ In addition, it is sometimes rephrased as the sufficiency of the evidence test in criminal cases on appeal²²⁵ because the major inquiry from appellate courts is whether the evidence can "fairly be deemed sufficient to have established guilt beyond a reasonable doubt."²²⁶

2. Rules of Thumb and Reasoning in Taiwan

The second sentence of Section 1 of Article 92 of the Citizen Judges Act states that: "The court of second instance shall not reverse the judgment unless its finding of facts is contrary to the rules of thumb or reasoning and the factual error obviously has effects on the judgment."²²⁷ Accordingly, there are two requirements that can determine whether the finding of facts from citizen judges shall be reversed: (1) the fact finding shall not violate the rules of thumb and reasoning, and (2) the error in facts shall obviously have effects on the judgment.

The rules of thumb and reasoning is not a brand-new term in Taiwan's legal system. Section 1 of Article 155 of the Code of Criminal Procedure states that "[t]he probative value of evidence shall be determined at the discretion and based on the firm confidence of the court, provided that it cannot be contrary to the rules of thumb and reasoning."²²⁸ Section 3 of Article 222 of the Code of Civil Procedure also provides that "[t]he court shall not violate the rules of reasoning and thumb in finding the facts by free evaluation."²²⁹ Taiwan's Supreme Court interprets the term in this way: "The rule of thumb means the rules of life based on our daily experience, rather than personal and subjective speculation; the rule of reasoning indicates the rules based on the logic, which is an objective law and can't be called into question simply by personal opinion."²³⁰ Therefore, the rules of thumb and reasoning can be rearticulated, in plain English, as the rules of life experience and logic.

The most crucial element behind the rules of life experience and logic, while not specified in the provision or answered by Taiwan's Supreme Court, is whose life experience and logic suffices to be the "life experience and logic" here. For solving this conundrum, we may look to the substantial evidence standard from the U.S. law for a better definition of the legal concept. As explained in the prior section, the substantial evidence standard is also stated as a reasonableness

223. Somerville, *supra* note 132, at 53.

224. Davis, *supra* note 161, at 477.

225. *Id.* at 477-78.

226. *Jackson*, 443 U.S. at 322.

227. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1(Taiwan).

228. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 155, § 1.

229. FAWUBU FAGUI ZILIAOKU, Code of Civil Procedure, art. 222, § 3 (Taiwan).

230. Zuigao Fayuan 107 Niandu Taishang Zidi 1626 Hao Xingshi Panjue (最高法院107年度台上字第1626號刑事判決) [107 Taishang No. 1626 Criminal Judgement of the Supreme Court].

standard because its core inquiry is “[whether] a reasonable person reach the same conclusion as the jury did in the verdict.”²³¹ Therefore, borrowing from the U.S. legal standard, it shall be the rules of life experience and logic based on “a reasonable person.”

As for the second requirement, we ask who is laden with the burden to prove the factual error obviously had effects on the judgment and to what extent. In other words, this is a requirement asking about the burden of proof. In the United States, it is the defendant’s burden to persuade the appellate court that the jury’s guilty verdict can’t pass the substantial evidence test.²³² But in Taiwan, both the defense and the prosecution can appeal a trial court’s decision to the high courts,²³³ so it should be rearticulated that the beneficiary of the factual error is given the burden of proof. The substantial evidence test is also a sufficiency of the evidence test; it asks whether the evidence can fairly be deemed sufficient to have established guilt beyond a reasonable doubt.²³⁴ Thus, back to Taiwan, the beneficiary of the factual error shall prove to the extent that the factual error can be fairly deemed sufficient to obviously have effects on the judgement.

Combining the above reformulation of the two requirements from the substantial evidence standard, the standard of review raised from the second sentence of Section 1 of Article 92 of the Citizen Judges Act to examine the finding of facts by citizen judges can be remodeled into a two-step test: (1) whether the finding of facts by citizen judges is contrary to the rules of life experience and logic based on a reasonable person, and (2) the beneficiary of the factual error shall prove to the extent that the factual error can be fairly deemed sufficient to obviously have effects on the judgement. The finding of facts by citizen judges can be reversed only by passing this two-step test.

B. Reviewing Errors in Sentencing

As stated in the Introduction, the Taiwan High Court applied the abuse of discretion standard, a legal concept borrowed from the American law when reviewing sentencing errors in a mock citizen-judge case.²³⁵ Taiwan’s Supreme Court otherwise suggests that the high courts review citizen judges’ sentencing decisions with the exceedingly unreasonable test.²³⁶ Therefore, how to combine the two standards is the subject of this section. Accordingly, this section first

231. *See* discussion *supra* Part III.A.1.

232. *Id.*

233. *See* discussion *supra* Part I.A.

234. *See* discussion *supra* Part III.A.1.

235. *See* Taiwan Gaodeng Fayuan 110 Niandu Guomo Shangsu Zidi 1 Hao Xingshi Panjue, (臺灣高等法院110年度國模上訴字第1號刑事判決) [Year 110 Mock Appeal No. 1 Criminal Judgement of the Taiwan High Court].

236. Zuigao Fayuan 111 Niandu Guomo Taishang Zidi 1 Hao Xingshi Panjue (最高法院111年度國模台上字第1號刑事判決) [Year 111 Mock Appeal No. 1 Criminal Judgement of the Supreme Court].

articulates the abuse of discretion standard and subsequently investigates the possible solutions for the combination of the abuse of discretion standard and the exceedingly unreasonable test. Through the analysis in this section, the third research question of this Article is answered.

1. Abuse of Discretion Standard in the United States

During the entire process of litigation, a trial judge will be confronted with a lot of decisions which must be made with discretion, such as admission or exclusion of evidence, discovery, or other issues about trial management.²³⁷ When exercising discretion properly, judges have to take many factors into consideration before making the final decision. It is very difficult to review discretionary decisions because it is not clear what weight every factor should be given when reaching a decision. Therefore, what a reviewing court can do is to make sure the exercise of discretion does not go beyond the Constitutional, statutory, or guideline limitations.²³⁸ That is the abuse of discretion standard, applied to the review of discretionary decisions.

The standard of abuse of discretion review is the most deferential standard—only no review is more deferential.²³⁹ This standard has such a high level of deference to the discretionary decision made by trial courts because it is believed that a judge who presides at the trial has superior knowledge of the controversies, the record, the process, and the parties as well as other persons involved in the case, placing the trial judge in a better position than appellate courts to evaluate the relevant factors and then to make decisions.²⁴⁰

Sentencing is also a decision that needs the exercise of discretion. Before the U.S. Supreme Court's decision of *United States v. Booker*,²⁴¹ the Sentencing Guidelines were mandatory and 18 U.S.C. §3742(e)²⁴² required appellate courts to review lower court's departures from the Guidelines with a *de novo* standard. But *Booker* made the Sentencing Guidelines advisory, and thus appellate courts now review the sentencing decisions of lower courts with a reasonableness standard.²⁴³ The reasonableness standard was first proposed in *Booker* and later clarified in *Gall v. United States* that this standard is equivalent to the abuse of discretion standard.²⁴⁴ Consequently, when reviewing sentencing decisions of trial courts, appellate courts shall respect them unless finding discretionary errors like "failing to calculate (or improperly calculating) the Guidelines range, treating the Guidelines as mandatory, failing to consider the [18 U.S.C.] §

237. Casey, Camara & Wright, *supra* note 133, at 310.

238. Davis, *supra* note 161, at 481.

239. *Id.* at 480.

240. Casey, Camara & Wright., *supra* note 133, at 310.

241. *See generally United States v. Booker*, 543 U.S. 220 (2005).

242. 18 U.S.C. § 3742(e).

243. *Booker*, 543 U.S. at 260-62.

244. *Id.* at 46; *see also* Carissa Byrne Hessick & F. Andrew Hessick, *Appellate Review of Sentencing Decisions*, 60 ALA. L. REV. 1, 12 (2008).

3553(a) factors, selecting a sentence based on clearly erroneous facts, or failing to adequately explain the chosen sentence—including an explanation for any deviation from the Guidelines range.”²⁴⁵

2. *The Standard of Exceeding Unreasonableness in Taiwan*

There is not any provision in either the Citizen Judges Act or the Code of Criminal Procedure telling appellate courts how to review sentencing decisions from lower courts. There are also no such guidelines.²⁴⁶ Therefore, what reviewing courts do when examining sentencing decisions is to make sure the decisions are staying within the range permitted by statutory laws as well as legal principles, such as justice, proportionality, and fairness.²⁴⁷ Here, the statutory limitations are called “outer boundaries” and the legal principles are called “inner boundaries.”²⁴⁸ Any infringement of either side of boundaries may cause a reversal of the sentencing decision.²⁴⁹

Owing to the absence of formal laws or guidelines and the vagueness of legal principles, the Taiwan High Court and the Supreme Court proposed their own standards of review for examining errors in sentencing in their mock citizen participatory decisions. The Taiwan High Court utilized the abuse of discretion standard,²⁵⁰ yet the Supreme Court instead advised appellate courts to apply a standard of exceeding unreasonableness, that is, only exceedingly unreasonable sentencing decisions may be reversed.²⁵¹ The Supreme Court provides some exceedingly unreasonable circumstances as examples: in contravention of

245. *Gall v. United States*, 552 U.S. 38, 51 (2007).

246. But there are laws and advisory guidelines for courts to “make” decisions in sentencing. *See* FAWUBU FAGUI ZILIAOKU, Criminal Code of the Republic of China, arts. 57-73 (Taiwan); *see also* Xingshi Anjian Liangxing ji Ding Zhixingxing Cankao Yaodian (刑事案件量刑及定執行刑參考要點) [the Guidelines for Sentencing and Determining the Punishment to Be Executed in Criminal Cases].

247. *See, e.g.*, Zuigao Fayuan 108 Niandu Taikang Zidi 436 Hao Xingshi Caiding (最高法院108年度台抗字第436號刑事裁定) [108 Taikang No. 436 Criminal Ruling of the Supreme Court].

248. Su Kaiping (蘇凱平), *Yi Sifayuan Liangxing Zixun Xitong Zuwei Liangxing zhi Neibuxing Jiexian Ping Zuigao Fayuan 108 Niandu Taishang Zidi 3728 Hao Xingshi Panjue* (以司法院量刑資訊系統作為量刑之內部性界限？—評最高法院108年度台上字第3728號刑事判決) [*Sentencing Information System of Judicial Yuan as the Inner Boundary for Sentencing? Review of 108 Taishang No. 3728 Criminal Judgement of the Supreme Court*] 98 YUEDAN CAIPAN SHIBAO (月旦裁判時報) [COURT CASE TIMES] 85, 87-88 (2020).

249. *Id.*

250. Taiwan Gaodeng Fayuan 110 Niandu Guomo ShangsuziPanjue di 1 Hao Xingshi (臺灣高等法院110年度國模上訴字第1號刑事判決) [110 Guomo Shangsuzi No. 1 Criminal Judgement of the Taiwan High Court].

251. Zuigao Fayuan 111 Niandu Guomo Taishang Zidi 1 Hao Xingshi Panjue (最高法院111年度國模台上字第1號刑事判決) [111 Guomo Taishang No. 1 Criminal Judgement of the Supreme Court].

constitutional principles, misunderstanding of important sentencing factors, or ignorance of these factors.²⁵²

We can find that the standard of exceeding unreasonableness shares some important features with the abuse of discretion standard. First, unlike conventional standards such as the outer and inner boundaries, the standard of exceeding unreasonableness reduces the scope of errors which will lead to a reversal of sentencing decision. Thus, this standard demonstrates a more deferential attitude towards sentencing decisions from trial courts than prior ones. Second, from the proposition of the standard of exceeding unreasonableness and the examples, we have seen that the Supreme Court has moved away from the use of abstract or even vague legal buzzwords. Instead, it requires trial courts to go through concrete appraisal of sentencing factors rather than the misuse of sentencing discretion before making decisions.

Accordingly, there is little difference in their content between the use of the abuse of discretion standard by the Taiwan High Court and the use of the standard of exceeding unreasonableness. Further, the abuse of discretion standard from the American law would be a perfect reference for the future development of the standard of exceeding unreasonableness, such as the miscalculation of weight of sentencing factors, making decisions according to facts without reasonable basis, or failing to give adequate explanation for the chosen sentence, just as the U.S. Supreme Court illustrated in *Gall*.²⁵³

C. Reviewing Errors in the Mixed Question of Law and Fact

As stated in the previous sections, appellate courts will review legal errors in a *de novo*, strict, non-deferential way; on the contrary, factual errors in lay participatory decisions will undergo a more deferential review with the standard of substantial evidence. This section addresses the question in between. It first introduces the spectrum approach used by U.S. courts when conducting appellate review of mixed questions of law and fact. Next, this section turns to the counterpart in Taiwan, to analyze if the idea of improper judgment could be substantiated by the U.S. approach. Through the analysis in this section, the fourth research question of this article is answered.

1. The Spectrum Approach in the United States

A mixed question of law and fact arises, as the U.S. Supreme Court has defined in *Pullman-Standard v. Swint*, when “the historical facts are admitted or established, the rule of law is undisputed, and the issue is whether the facts satisfy the statutory standard” or, “whether the rule of law as applied to the

²⁵². *Id.*

²⁵³. *Gall v. United States*, 552 U.S. 38, 51 (2007).

established facts is or is not violated.”²⁵⁴ Accordingly, the mixed question of law and fact usually involves the disputes about the application of law to facts²⁵⁵. The U.S. Supreme Court also admits that it is difficult to label an issue as a question of law, fact, or mixed of law and fact with a clear rule or principle.²⁵⁶ Guilty or not guilty, for example, is a typical question of the application of law to factual determinations,²⁵⁷ but it is treated as more of a question of fact and receives a substantial evidence or clear erroneous review, depending on whether the decision is made by a jury or through a bench trial.²⁵⁸ Therefore, it is widely believed that law and fact is more of a continuum than a simple duality.²⁵⁹

Following the idea of continuum, the U.S. Supreme Court has offered a general principle for the review of mixed questions: It depends “on whether answering it entails primarily legal or factual work.”²⁶⁰ This principle is called the spectrum approach, by which it denotes there are pure factual disputes on one side, pure legal controversies on the other, and mixed questions of law and fact in between.²⁶¹ Mixed questions are not all the same and not easy to clearly categorize. Therefore, if the question is more about the use or interpretation of legal principles, “appellate courts should typically review a decision *de novo*.”²⁶² But if the question involves case-specific disputes over facts, “appellate courts should usually review a decision with deference.”²⁶³

Nevertheless, when the mixed question of law and fact falls in the gray area and is not easy to determine which side the mixed question is closer to, appellate courts are encouraged to bring those most debatable questions under the side of law of the spectrum, because this way allows for more intensive appellate review under a *de novo* standard.²⁶⁴

2. Errors of Impropriety in Taiwan

The first sentence of Section 1 of Article 92 of the Citizen Judges Act states that: “The court of second instance shall reverse the relevant portion of the original judgment upon finding the appeal meritorious or upon finding an appeal meritless but the original judgment is improper or illegal.”²⁶⁵ As we may notice, this provision applies not only to examining whether the lower court’s judgment

254. Pullman-Standard v. Swint, 456 U.S. 273, 289 n.19 (1982); *see also* Ornelas v. United States, 517 U.S. 690, 696-97 (1996).

255. Casey, Camara & Wright, *supra* note 133, at 318-19.

256. Miller v. Fenton, 474 U.S. 104, 113 (1985).

257. Davis, *supra* note 161, at 473.

258. *See* discussion *supra* Part III.A.1.

259. Casey, Camara & Wright, *supra* note 133, at 318.

260. U.S. Bank Nat’l Ass’n v. Vill. at Lakeridge, LLC, 138 S. Ct. 960, 967 (2018).

261. Davis, *supra* note 161, at 474.

262. *U.S. Bank*, 138 S. Ct. at 967.

263. *Id.*

264. Davis, *supra* note 161, at 474.

265. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1(Taiwan).

is illegal,²⁶⁶ but also to investigating whether the lower court's judgment is improper. Therefore, per this provision, an improper judgment is also subject to reversal. But here comes the question: What is the standard of review for the errors of impropriety?

The idea of improper judgment also appears in the Code of Criminal Procedure.²⁶⁷ Research has pointed out that the errors of impropriety include the wrongful application of legal rules to facts.²⁶⁸ Therefore, just like the review of errors in law, the Act also adopts a *de novo* standard for reviewing mixed questions of law and fact in the judgment made by citizen judges. This legal design follows Taiwan's conventional criminal appeals process to grant the courts of second instance a comprehensive power to the review of mixed questions in district court decisions.²⁶⁹

This unified approach, however, may undermine the core purpose of introducing lay persons into criminal trials: to enhance the public knowledge of and confidence in the judicial system.²⁷⁰ To make it clear, when the high courts are granted the comprehensive power to review the applications of law to facts by citizen judges with a *de novo* standard, the high courts can easily hollow out almost the entire judgment and replace it with the reviewing court's own findings. If so, the importance of citizen judges in criminal trials will be down to nearly zero and the public will distrust the government's resolution to revamp the system of criminal trials.

Consequently, it would be advisable for the high courts to borrow and utilize the spectrum approach from the U.S. law when reviewing questions about errors of impropriety. In other words, the high courts must realize that law and fact is more of a continuum than a simple duality. Hence, a reviewing court may apply a *de novo* standard when the question is closer to the side of law and utilize the substantial evidence standard when the question is closer to the side of fact. The spectrum approach allows appellate courts to have a more flexible range of options to make both ends meet, namely, deference to the fact finding by citizen judges and clarification of legal issues.

266. See discussion *supra* Part II.B.

267. FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 369, § 1 ("The court of second instance shall reverse the relevant portion of the original judgment and adjudicate the case upon finding the appeal meritorious or upon finding an appeal meritless but the original judgment is improper or illegal.").

268. Kaiping, *supra* note 204, at 11-12.

269. See FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 92, § 1 (Taiwan); FAWUBU FAGUI ZILIAOKU, Code of Criminal Procedure, art. 369, § 1.

270. FAWUBU FAGUI ZILIAOKU, Citizen Judges Act, art. 1 (Taiwan) ("For allowing citizens and judges to preside at criminal trials together, increasing the transparency of judicature, mirroring citizen's proper feelings of the law, enhancing their knowledge of and confidence in the judicial system, and manifesting the idea of popular sovereignty, this Act is therefore enacted.").

CONCLUSION

After preparing and waiting for more than thirty-five years, Taiwan is welcoming its first system of lay participation in criminal trials, which just took effect in January 2023. Compared with the counterparts in East Asia, who have already owned their similar systems in the 2000s, Taiwan has fallen behind for more than a decade. Despite a long way to go, Taiwan may benefit from the latecomer's advantage by imitating what the forerunners have achieved and learning a lesson from their mistakes. Research has shown that when transplanting lay participation into their conventional criminal trials, both Japan and South Korea have been confronted with the issue about whether to allow professional judges to review and even reverse decisions made by lay persons.²⁷¹ It is doubtless that similar conflicts between the new system and the old institutions will appear in Taiwan soon after the mechanism of citizen judges starts working. In a mock case tried by citizen judges, the Taiwan High Court and the Supreme Court both attempted to address such conflicts from a perspective of American law, but more controversies have emerged than been solved.

This Article follows the route of the two courts and deals with those controversies over appellate review of errors in four aspects: legal errors, factual errors, sentencing errors, and the mixed questions of law and fact. After a thorough discussion of the relevant American laws and a deep analysis of their integration into Taiwan's legal system, this Article advises that when reviewing decisions made by citizen judges, appellate courts may: (1) employ principles like preservation of claims, plain errors, and harmless errors when reviewing legal errors *de novo*, (2) incorporate the substantial evidence review with the second sentence of Section 1 of Article 92 of the Citizen Judges Act into a two-step test, through which the appellate review of factual errors may work better, (3) interpret the standard of exceeding unreasonableness in an abuse-of-discretion way when investigating errors in sentencing, and (4) replace the *de novo* standard with a spectrum approach when reviewing the errors of impropriety, namely the mixed question of law and fact in Taiwan's context. Through these adjustments in the process of appellate review, the new system of citizen judges in Taiwan will better serve to enhance the public knowledge of and confidence in criminal trials as the system has been entailed.

271. See discussion *supra* Introduction.