

# Japan's Prosecutorial Review Commissions: Lay Oversight of the Government's Discretion of Prosecution

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I. INTRODUCTION.....	2
II. THE EVOLUTION OF THE PROSECUTORIAL REVIEW COMMISSION AND ITS OVERSIGHT OF GOVERNMENTAL PROSECUTION .....	5
A. The Original Conception and Creation.....	5
B. The 2004 PRC Act and the New Legally Binding Authority	8
C. The PRC Selection Procedure.....	12
III. THE POWER STRUGGLES BETWEEN THE PRC AND THE JAPANESE PROSECUTION .....	15
A. The Asahi Stampede Incident.....	15
B. The Fukuchisen Derailment Incident.....	18
IV. LAY PARTICIPATION IN THE PROSECUTORIAL REVIEW COMMISSION: EMPIRICAL QUESTIONS AND ANALYSIS .....	21
A. The 2005–2006 PRC Survey .....	21

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B. Deliberative Experiences .....	22
C. Perceptions about Lay Participation .....	23
D. Confidence in the Criminal Justice System and the News Media .....	25
E. Lessons from PRC Participation and Experience .....	25
V. DISCUSSION: FUTURE STRATEGY TO PROMOTE LAY OVERSIGHT OF GOVERNMENTAL DISCRETION OF PROSECUTION .....	29
A. Misfeasance Allegation Against Political Heavyweights...	31
B. Indictment of Military Personnel and Their Dependents....	33
C. Okinawa and Environmental Devastation .....	35
D. Potential Problems of the PRC's Power to Review Alleged Military Crimes.....	39
VI. CONCLUSION .....	41

## I. INTRODUCTION

On January 27, 2010, a former deputy chief of a police station became the first person in Japan's modern legal history to be formally indicted by a citizen's panel, called the Prosecutorial Review Commission (PRC).<sup>1</sup> Historically, until then, Japanese prosecutors had been the only party with the legal power and authority to issue an indictment in criminal cases. This criminal negligence case, known as the Akashi Stampede incident, left eleven people dead and 247 people injured. Despite significant public calls for the deputy chief's prosecution, the Prosecutors Office made the decision numerous times not to indict the deputy chief.<sup>2</sup>

Public dismay followed the decisions not to indict. The Kobe PRC of Hyogo Prefecture, which is just west of Japan's second largest city of Osaka, finally recommended the indictment of former Deputy Chief of the Akashi police station Kazuaki Sakaki for professional negligence resulting in deaths and injuries.<sup>3</sup> The PRC's recommendation was its second public demand for prosecution since the revision of the PRC Law took effect. The first PRC indictment against a police officer was returned by the same Kobe PRC in July 2009.<sup>4</sup>

According to the new PRC Law, the second PRC recommendation for prosecution is legally binding, thereby prompting the

<sup>1</sup> *Ex-police Officer to be Charged over Stampede in Line with New System*, JAPAN ECON. NEWSWIRE, Jan. 27, 2010 [hereinafter *Ex-police Officer*] (discussing the use of the PRC to indict Kazuaki Sakaki and two police officers for the death of eleven people).

<sup>2</sup> *Id.*

<sup>3</sup> *'Forced Indictment' a Heavy Responsibility*, DAILY YOMIURI, Jan. 29, 2010, at 2 (agreeing with the indictment so that the facts of the tragedy may be revealed and determine who was at fault).

<sup>4</sup> *Ex-police Officer*, *supra* note 1.

formal criminal prosecution of a suspect, whom the Japanese prosecutor previously decided not to indict.<sup>5</sup> In other words, the PRC has emerged as a popular legal institution with the power both to challenge critically the propriety of a prosecutor's indictment decision and to reverse the government's decision on certain criminal matters.

Throughout Japan's modern history, the government office of public prosecution has long held the exclusive legal power to indict. After World War II, in 1948, the Allied forces led by the U.S. government tried to weaken the prosecutor's dominant role in the criminal investigative and adjudicatory process by introducing a citizen's panel to review the government's decisions on prosecutorial matters.<sup>6</sup> If the prosecutor decided not to indict a suspect in a criminal case, the victim of the crime or the victim's proxy may demand a hearing regarding the prosecutorial decision. The PRC, which is composed of eleven citizens chosen at random from local voter registration, conducts this hearing.<sup>7</sup> If the PRC decides that the indictment is the proper criminal disposition in the given case, it delivers a written recommendation to the Prosecutors Office. Since prosecutors held the exclusive authority to indict, the PRC recommendations were regarded as merely advisory rather than legally binding, and Japanese prosecutions often disregarded the recommendations.<sup>8</sup>

In the Akashi Stampede incident, two separate review commissions recommended prosecution of the former police officer. Those decisions were made prior to the enactment of the new PRC Law in 2009. After brief investigations in both instances, the prosecutors dismissed the PRC recommendations and announced their non-indictment decisions.<sup>9</sup> After the new PRC Law took effect in May 2009, the families of victims resubmitted a complaint to the local PRC which once again deliberated on the case. In January 2010, its second deliberation reversed the previous decision not to prosecute and finally forced the prosecutors to begin their prosecutorial proceeding against the former police officer.<sup>10</sup>

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<sup>5</sup> See discussion *infra* Part II.B.

<sup>6</sup> See *infra* note 20 and accompanying text.

<sup>7</sup> Kensatsu Shinsakai Hō [Prosecutorial Review Commission Law], Law No. 147 of 1948, art. 4 [hereinafter PRC law].

<sup>8</sup> Setsuko Kamiya, *Inquest Committee: Inquest Bodies Give Public a Voice*, JAPAN TIMES, Sept. 21, 2010, <http://search.japantimes.co.jp/cgi-bin/nn20100921il.html>.

html ("Previously, their [PRC] rulings were only recommendations to prosecutors."); Editorial, *Keeping an Eye on Prosecution*, JAPAN TIMES, May 19, 2009, <http://search.japantimes.co.jp/cgi-bin/ed20090519a1.html> ("Before the law revision . . . public prosecutors often decided not to indict suspects after a second investigation.")

<sup>9</sup> *Ex-police Officer*, *supra* note 1.

<sup>10</sup> *Ex-police Official Indicted over Stampede Under New Inquest System*, JAPAN TODAY, Apr. 26, 2010, <http://www.japantoday.com/category/crime/view/ex-police-official-indicted-over-stampede-under-new-inquest-system>.

The refusal of the government to facilitate the prosecution of a select group of the privileged elites, despite their egregious conduct, has been well documented throughout Japan's modern history. Even today, both unethical conduct and outright illegal activities by high-ranking government officers are not subjected to prosecutorial scrutiny, indictment, or trial. Similarly, police officers and prosecutors have not been properly punished for the lengthy detention of innocent civilians and the use of physical and psychological torture during interrogation.<sup>11</sup>

This paper argues that the new binding power bestowed upon the PRC can exert a significant authority over, and insert public sentiments and equitable judgments into, prosecutorial decisions on politically sensitive cases or controversial issues that may affect the broader public interest. In addition, the PRC can help expose the fortified terrain of special protection and immunity given by the Japanese government to influential political heavyweights, high-ranking bureaucrats, and business elites. A single civic complaint by victims or their proxies in the PRC can initiate a public hearing to review incidents or alleged crimes committed by individuals whom the Japanese government did not indict.

Part II of this article examines the history of the PRC, reviews its power to examine the propriety of the prosecutor's non-indictment decision, and reveals the important civic function it performs in incorporating public voices into the deliberation of criminal cases. Part III provides analysis of two recent PRC decisions and the patterns in their deliberation and decision that may influence the conduct of public officers and governmental bureaucrats, forcing decision-making to be more transparent and accountable. These two PRC cases involved: (1) the Akashi Stampede incident; and (2) the Fukuchiyama-Line derailment accident, both of which took place in Hyogo Prefecture in southern Japan.

Part IV presents the results of recent surveys and interviews of former PRC members. The preliminary results of these studies were first published in an earlier paper of mine, which conducted a cross-national comparison of the legal experiences of Japanese and American jurors. Here, to provide some empirical insight into the PRC, I summarize the key findings of these studies, which examined PRC former members' experiences in serving on the commission, their attitudes and opinions towards civic legal participation, their perceptions on civic responsibilities,

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<sup>11</sup> See, e.g., Hiroko Tabuchi, *Retrial Clears Japanese Wrongly Convicted of Child Killing: Defendant Jailed 17 Years was Bullied to Confess, Judge Says in Acquittal*, INT'L HERALD TRIB., Mar. 27, 2010, at 3 (discovering human rights violations in forced confessions in the criminal justice system); *Tapes Show Route to 'Confession': Recordings of Sugaya Interrogation Reveal Prosecutor's Tactics*, DAILY YOMIURI, Oct. 10, 2009, at 2 (having been placed under tremendous psychological stress and torture, the innocent suspect claimed, "I can't forgive that prosecutor. I want him to apologize.").

and the weight of people's trust and confidence in judicial institutions and law enforcement agencies. My analysis of the interview and survey results show that the deliberative engagement and people's direct participation in the decision-making process enhanced their sense of civic engagement and social responsibility, elevated the feeling of civic empowerment over governmental functions and decision-making, and fostered long-lasting commitment to civic engagement and future deliberative opportunities.

Part V examines and proposes future strategies to promote public interests in criminal matters. It provides overall summaries of the missions, functions, and consequences of PRC's deliberative powers and explores the potential boundaries of future utilization of the PRC and its deliberative processes in furthering the effort to democratize the judiciary and to hold the government accountable and responsible to the demands of the public in governmental affairs.

## II. THE EVOLUTION OF THE PROSECUTORIAL REVIEW COMMISSION AND ITS OVERSIGHT OF GOVERNMENTAL PROSECUTION

### A. *The Original Conception and Creation*

Through the joint collaborative work of the Japanese government and the Allied forces, represented by the U.S. government, the civilian review commission was established by the passage of the Prosecutorial Review Commission Law on July 12, 1948.<sup>12</sup> The PRC is the Japanese version of an American-style grand jury system. As the leader of the office of the Supreme Commander for the Allied Forces (SCAP) occupying Japan after World War II, General Douglas MacArthur saw the grand jury as an important democratic institution for engaging the public.

The first suggestion to establish the grand jury system in Japan was included in the Proposed Revision of Code of Criminal Procedure, authored by Captain Maniscalco of the Legal Section, Public Safety Division of the SCAP.<sup>13</sup> Article 227 of the proposed revised code of criminal procedure specifically stated that "no accused shall be made to answer (stand public action) for any crime the penalty for which may be

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<sup>12</sup> PRC law, *supra* note 7, art. 4.

<sup>13</sup> Anna Dobrovolskaia, Japan's Past Experiences with the Institution of Jury Service, 49 n.233 (Feb. 5, 2010) (unpublished manuscript) (on file with East Asia Law Review) (discussing the history of revisions of implementing both the grand and petit jury system in Japan). The paper was presented at the Inaugural East Asia Law and Society Conference in Hong Kong in February 2010.

confinement for one year or more, or for life, or an indefinite period, or death, unless an indictment or presentment made by a grand jury.”<sup>14</sup> Article 228 also specified, “[n]o indictment shall be found, nor shall presentment be made, without the concurrence of at least ten jurors (of a panel of 12).”<sup>15</sup> However, Captain Maniscalco’s proposal was submitted to the Japanese government as a private draft and his provision regarding the jury system were not formally included as part of the final draft of the official SCAP recommendation.<sup>16</sup> Thomas L. Blackmore, who became the first non-Japanese to pass the Japanese bar examination conducted in Japanese and worked as Chief of Civil Affairs and Civil Liberties Branch, Legislation, and Justice Division, Legal Section under the SCAP, proposed a substantially different version of the U.S. grand jury system to the Japanese government.<sup>17</sup> His deep understanding of Japanese legal ethos and culture was crucial to a successful negotiation with Japanese officials. After Blackmore graduated from the University of Oklahoma, he received a grant to study in Japan and came to Tokyo in 1939 as a student of international law and language at Tokyo Imperial University.<sup>18</sup> After he passed the Japanese bar exam, he was also admitted to practice law with full courtroom status in Japan.<sup>19</sup> As Blackmore was highly critical of Maniscalco’s original proposal and Maniscalco’s seemingly unilateral imposition of the American lay participatory system onto Japanese legal culture, his own proposal laid the foundation for the creation of the PRC to check the prosecution’s discretion when it decides not to prosecute.<sup>20</sup>

With a strong American influence, the PRC became a hybrid institution, adapting the American civil and criminal grand jury systems to Japanese culture and legal milieu. This legal system mirrored America’s civil grand jury because it examined and inspected local public offices, including the Prosecutors Office, the police department, and local jails, to ensure they function properly.<sup>21</sup> Similar to the U.S. criminal grand jury, the PRC has influence on decisions to indict, with over 150 such committees throughout Japan.<sup>22</sup>

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

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

<sup>16</sup> *Id.* at 50 n.240.

<sup>17</sup> JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 126 n.12 (1991).

<sup>18</sup> Mary F. Pols, *Thomas Blakemore Spent His Life Connecting America and Japan*, *SEATTLE TIMES*, Mar. 1, 1994, at B4 (recounting Blackmore’s life and influence on Japan).

<sup>19</sup> HALEY, *supra* note 17.

<sup>20</sup> SHIGEMITSU DANDŌ, *WAGA KOKORO NO TABIJI [JOURNEYS OF MY OWN HEART]* 196-31 (1986) (recounting his memories of the Japanese committee to revise the Japanese legal institutions).

<sup>21</sup> *See generally* Hiroshi Fukurai, *The Proposal to Establish the System of the Federal Civil Grand Jury in America* (May 29, 2008) (unpublished manuscript) (on file with author).

<sup>22</sup> *Keeping an Eye on Prosecution*, *supra* note 8.

The principal function of the commission is to empanel a group of randomly chosen Japanese citizens to examine and review a prosecutor's discretion in decisions not to indict. Given the fact that nearly 100% of all indictments lead to conviction in Japan,<sup>23</sup> the PRC's *ex post facto* review of whether the decision not to prosecute was proper is quite important in checking any potential prosecutorial abuse of power.

Since its creation in 1948, the PRC has examined many controversial political cases and investigated activities related to personal injuries, torts, and other civil matters. Not only has the PRC deliberated on criminal cases, but they also have examined prominent white-collar crimes and allegations of egregious governmental misconduct.<sup>24</sup> Their examinations have included controversial matters such as: the Minamata mercury poisoning incidents,<sup>25</sup> an organ transplant from a brain dead donor,<sup>26</sup> thalidomide scandals,<sup>27</sup> incidents where hemophiliacs contracted HIV from contaminated blood products,<sup>28</sup> drug-induced sufferings of millions of Japanese who contracted the Hepatitis C virus from unheated

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<sup>23</sup> See J. Mark Ramseyer & Eric B. Rasmusen, *Why the Japanese Conviction Rate so High?*, 30 J. LEGAL STUD. 53, 53 (2001) ("Conviction rates in Japan exceed 99 percent.").

<sup>24</sup> See 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, 349-353 (2007) (discussing how Japan's HIV contamination incident is historically rooted in the germ and biological warfare experiments conducted by Unit 731 military doctors during WWII, who later played prominent roles in the development of Japan's pharmaceutical industries and the formulation of health-related government policies).

<sup>25</sup> See generally T. TSUBAKI & K. IRUKAYAMA, *MINAMATA DISEASE: METHYLMERCURY POISONING IN MINAMATA AND NIIGATA, JAPAN* (1977) (explaining that Minamata disease was originally caused by the release of methylmercury in the industrial wastewater from the Chisso Corporation's chemical factory from 1932 to 1968 and that local prefectural and central governments did little to prevent the pollution, further exacerbating the problem); Ass'n of Minamata Disease Victims "Shiranui" & Minamata Disease Victims' Mutual Aid Soc'y, *Statement by Minamata Victims and Supporter Groups Addressing the Government of Japan's Proposal to Call the Mercury Treaty the "Minamata Convention"* (Jan. 23, 2011), available at [http://www.ne.jp/asahi/kagaku/pico/mercury/INC2\\_NGO/Minamata\\_Statement\\_110123\\_en.pdf](http://www.ne.jp/asahi/kagaku/pico/mercury/INC2_NGO/Minamata_Statement_110123_en.pdf) ("The Supreme Court verdict of October 2004 established the legal responsibility of the Government of Japan and Kumamoto prefecture for spreading Minamata disease."); *Kensatsu shinsakai no gaiyō* [Overview of the Prosecutorial Review Commission], SAIBANSHO [COURTS IN JAPAN] (2005), <http://www.courts.go.jp/kensin/seido/sinsakai.html>.

<sup>26</sup> *Fuin sareta misshitsu no giwaku: Wada kyōju no shinjō ishoku jiken* [Questions Behind Closed Doors: The Heart Transplant by Professor Wada], KI NI NARU SHIRYŌ-SHITSU (2005), <http://www.nazoo.org/misteries/wada.htm>.

<sup>27</sup> Katsuhiko Komatsu, *Toriatsukai shinsa jikensū to yūmei jiken* [Numbers of PRC Deliberations and Famous Cases], <http://www.macnet.or.jp/co/ok21/kensatsu5.html> (last visited Apr. 24, 2011).

<sup>28</sup> *Summaries of the Prosecutorial Review Commission*, *supra* note 25.

pharmaceutical products previously approved by the government,<sup>29</sup> and illegal campaign donations and political bribery.<sup>30</sup>

The PRC investigates these cases from behind closed doors. They have the power to summon petitioners, their proxies, and witnesses for examination, question prosecutors, ask them for additional information when necessary, and seek special expert advice on a given case.<sup>31</sup> The investigative function only begins after a public complaint filed against a decision by the prosecution not to indict. Individuals and civic organizations are empowered to file these complaints to launch a first strike against the prosecution in its assessment of criminal matters.

After assessing and deliberating on the case, the PRC then submits one of three recommendations: (1) the non-indictment is proper; (2) the non-indictment is improper; or (3) the indictment is proper. A simple majority is needed for either of the first two resolutions, while a supermajority of at least eight of the eleven votes is needed to pass the third resolution. The PRC then delivers a written recommendation to the Prosecutors Office. In the past, because the Prosecutors Office was the only institution with the power to indict, the PRC's recommendations were regarded as advisory. This limited legal authority was finally expanded by the 2004 PRC Act, which made PRC decisions legally binding.<sup>32</sup>

Nonetheless, the importance of civic participation in the legal system and PRC has not been widely communicated to Japanese communities, suggesting that PRC duties remain virtually unknown in Japan. For example, in a 1990 national poll by the Japanese Cabinet Office, 68.8% of respondents had no knowledge of the PRC system or its duties.<sup>33</sup> Even among those with knowledge of the system, 73.8% of them did not know who could actually be selected to sit on the commission.<sup>34</sup> In addition to its obscurity, strict confidentiality requirements and severe penalties imposed on PRC participants may further discourage, and even scare away, many people from fulfilling their PRC duties.

#### *B. The 2004 PRC Act and the New Legally Binding Authority*

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<sup>29</sup> Fukurai, *supra* note 24, at 349-53.

<sup>30</sup> *Id.* at 347-49.

<sup>31</sup> Keiji soshōhōtō no ichibu o kaiseisuru hōritsu [Act to Revise the Code of Criminal Procedure], Law No. 62 of 2004, art. 38, *available at* <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html> [hereinafter PRC Act].

<sup>32</sup> *Id.* art. 41(6)(1).

<sup>33</sup> Naikakufu seifu kōhōshitsu [Cabinet Office, Public Relations], *Kensatsu shinsakai seido ni kansuru yoron chōsa* [Public Opinion Poll on the PRC System], Oct. 1990, *available at* <http://www8.cao.go.jp/survey/h02/H02-10-02-15.html>.

<sup>34</sup> *Id.*



For many decades, the Japanese Federation of Bar Associations (JFBA) insisted that the PRC decision be given legally binding status, instead of being treated as a mere advisement to the Japanese prosecutor. In 1973, the JFBA created the internal investigative commission to examine whether or not the PRC resolution should receive legally binding authority.<sup>35</sup> After two years of analysis and examination, the investigative committee submitted the recommendation to the headquarters of the JFBA, which then released its final report in 1975.<sup>36</sup> The final report recommended that the second PRC decision to indict must be legally binding. Specifically, the report recommended that first, after the PRC decides that “the indictment was proper” or “the non-indictment was improper,” the prosecutor is required to decide whether to maintain their decision not to prosecute and respond to the PRC recommendation within the three months. If the decision not to prosecute stands, the prosecutor has to provide an explanation of their non-indictment decision to the PRC.<sup>37</sup> If the PRC is not convinced by the prosecutor’s explanation and believes that the indictment was proper for the given case, its second decision to indict is then binding.<sup>38</sup> Prosecutors are then required to respect the PRC decision and initiate a public action against the accused.

The JFBA report also recommended that a two-thirds majority approve the second resolution. The report suggested a new structure for the PRC and the replacement of the quota system with a quorum rule. Under the existing PRC law, the deliberative forum had to consist of eleven members. Often times, however, the forum did not meet its required quota for attendance because PRC members had work-related hardships, economic excuses, or other personal reasons. The JFBA report, thus, recommended that the number of PRC members be expanded from eleven to fifteen and that the PRC adopt a quorum rule so that the attendance of any eleven members would constitute a quorum for full deliberative discussions.<sup>39</sup>

The JFBA report recommended that two PRC decisions—“the indictment is proper” and “the non-indictment is improper”—share essentially the same legal status, and the passage of this first PRC indictment decision requires a two-thirds vote (i.e., at least eight of eleven votes). A second decision of “the indictment is proper,” requires a two-thirds majority of the entire fifteen members, which means that at least ten

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<sup>35</sup> JAPANESE FEDERATION OF BAR ASSOCIATIONS, KENSATSU SHINSAKAI SEIDO NO KAISEIAN: SONO JŪJITSU KYŌKA WO MEZASHITE [THE PROPOSED AMENDMENT TO THE PROSECUTORIAL REVIEW COMMISSION: TO ENRICH AND STRENGTHEN] (1975).

<sup>36</sup> *Id.* at 1.

<sup>37</sup> *Id.* at 28-29.

<sup>38</sup> *Id.* at 29.

<sup>39</sup> *Id.* at 16-17.

votes are necessary for a legally binding indictment.<sup>40</sup> The JFBA's proposals, however, were not made into law and its recommendations to strengthen the PRC had to wait another twenty years for serious discussion. The opportunity to revisit and possibly incorporate the JFBA recommendations finally came in the late 1990s, when the Justice System Reform Council (JSRC) discussed the introduction of another lay justice institution, the lay assessor system.

The revision of the PRC law, however, was not a primary objective of the JSRC's discussions and was only first mentioned in JSRC's seventh meeting in November 1999.<sup>41</sup> It took until April 10, 2001 for discussion on the revision of the PRC law to emerge. The JSRC, the JFBA, the Supreme Court, and the Ministry of Justice expressed differing strategies and opinions. JSRC members discussed making the two resolutions—"non-indictment is improper" and "indictment is proper"—legally binding.<sup>42</sup> At the same time, the Ministry of Justice recommended that only the third resolution of "indictment is proper" should be legally binding, while the Supreme Court suggested the second resolution, "non-indictment is improper," be binding when the decision is unanimous. Finally, the JFBA's view was that the third resolution should be legally binding and subject to a two-thirds voting requirement and that PRC members should be supported in their deliberations by a practicing attorney.<sup>43</sup>

Although the final JSRC proposal lacked specificity regarding revision of the PRC law, a close reading of the proposal reveals a commitment to introducing a legal system that "reflect[s] popular will more directly,"<sup>44</sup> that "grants legally binding effect to certain resolutions,"<sup>45</sup> and that would "enable the voices of people to be heard and

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<sup>40</sup> *Id.* at 18-19.

<sup>41</sup> *Shihōseido kaikaku shingikai: Dai 7 kai giji gaiyō* [JSRC: No. 7 Proceeding Outline] (Nov. 24 1999), available at <http://www.kantei.go.jp/jp/sihouseido/991126dai7.html>.

<sup>42</sup> *Shihōseido kaikaku shingikai: Dai 55 kai giji gaiyō* [JSRC: No. 55 Proceeding Outline] (Apr. 10, 2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html>.

<sup>43</sup> *Kensatsu shinsakai no itteino giketsu ni taishi hōteki kōsokuryoku o fuyōsuru tameno hōsaku: Hōsō sansha no iken no hikaku* [The Strategy to Provide a Legally Mandatory Status to a Particular Resolution by the PRC: Comparisons of Three Legal Professional Groups] (Apr. 10, 2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai55/55bessi2.html> [hereinafter *Strategy*].

<sup>44</sup> *Recommendations of the Justice System Reform Council—For a Justice System to Support Japan in the 21st Century*, available at [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html) (translating portions of *Kokumin no kitai ni kotaeru shihō seido* [The Judicial System in Response to Expectation of Citizens] (June 12, 2001), available at <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/iken-2.html>).

<sup>45</sup> *Id.*

reflected in the management of the public prosecutors offices.”<sup>46</sup> The Lay Assessor/Penal Matter Investigation Committee was authorized to undertake the establishment of the lay assessor system and the revision of the PRC law. The Chairman of the Committee presented an outline, suggesting that the PRC’s decision be legally binding and that a practicing attorney be included as a legal advisor.<sup>47</sup> Public opinion and feedback on the Committee’s proposals and guidelines were solicited in April and May 2003.<sup>48</sup> Many grassroots activists from the Research Group on Jury Trial (RGJT) were encouraged to send their opinions and suggestions to the committee website.<sup>49</sup> As a result of greater calls for participation and involvement, there was substantial public response. Individual citizens complained about the failure to recruit a sufficient number of lay participants for the commission to convene<sup>50</sup> and the PRC’s automatic disqualification of vision or hearing impaired candidates.<sup>51</sup> The institutional response was strong as well. The JFBA and the Citizens Committee for the Creation of a Lay Assessor System, an influential civic group, opposed and criticized the imposition of a penalty on PRC members for divulging case-specific information, but both strongly supported the PRC resolution to be legally binding.<sup>52</sup> A final proposal was submitted and the PRC Law was revised on May 28, 2004.<sup>53</sup>

The back-and-forth maneuvers finally resulted in revision to the PRC law, giving a PRC resolution the legally binding authority to demand explanations for non-prosecution decisions and making explanations mandatory if the commission recommended prosecution two times. Specifically, the revised law created a two-step process to make a PRC

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<sup>46</sup> *Id.* (suggesting the need to reinforce the PRC system by expanding the volunteer officer system).

<sup>47</sup> Chairman Inouye submitted his outline for reform on November 11, 2003.

*Kangaerareru Kensatsu Shinsakai Seido Kaisei no Gaiyo ni Tsuite* [The Outline on the PRC’s Reform to Consider] (Nov. 11, 2003), available at <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai29/29siryou1.pdf>.

<sup>48</sup> OFFICE FOR THE PROMOTION OF JUSTICE SYS. REFORM, *Saiban-in Seido oyobi Kensatsu Shinsakai Seido ni Tsuiteno Ikenboshu no Kekka ni tsuite* [Results of Public Opinions on the Lay Assessor and PRC Systems] (July 2003),

<http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/siryou/0307kekka.html>.

<sup>49</sup> The RGJT has a long history of advocating for the establishment of the jury system in Japan. See Fukurai, *supra* note 24, at 317-20 (“The RGJT became the national center for providing resources and jury information and organized many public forums to discuss the introduction of the jury trial in Japan.”).

<sup>50</sup> *Id.* at 327 (citing *Saiban-in seido oyobi kensatsu shinsakai ni tsuiteno iken boshu no kekka gaiyo* [Resulting outlines of public opinions on the lay assessor and PRC systems] 9 (July 2003), available at

<http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai22/22siryou1.pdf>).

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

<sup>52</sup> *Id.*

<sup>53</sup> PRC Act, *supra* note 31.

resolution legally binding. When prosecutors issue a decision not to indict in a given case and the PRC decides that indictment is in fact proper, prosecutors are obliged to reconsider their non-indictment decision. If prosecutors decide for a second time not to prosecute, or if they do not indict within three months, the prosecutors will be asked to explain their inaction or non-indictment decision to the commission.<sup>54</sup> The PRC will then reconsider the case and if it makes a decision to indict, this decision becomes legally binding.<sup>55</sup> The court appoints a lawyer to perform the prosecution's role until a ruling is reached,<sup>56</sup> but the actual instruction to investigate authorities will be entrusted to prosecutors.<sup>57</sup>

Under the revision to the PRC Law, a practicing attorney is appointed as a "legal advisor" when the PRC decides that legal knowledge and advice is necessary.<sup>58</sup> This is particularly relevant to the second step of the process, when the commission may reevaluate the prosecutors' second decision not to indict.<sup>59</sup>

### C. *The PRC Selection Procedure*

The new PRC Act tries to ensure active discussion among local residents selected for PRC duty by providing the procedural means and selection mechanisms to achieve a broader and cross-sectional representation of the population. While the PRC selection procedure is quite similar to the lay assessor selection process, the electoral commission initiates the latter procedure. For PRC selection, the Prosecutorial Review Commission Office (PRCO), a governmental administrative office, is responsible for the selection of PRC members. First, the new PRC Act specifies that the director of PRCO shall determine an approximate number of PRC members needed for the next year, as well as a specific allocation of prospective PRC members to be selected from each village, town, and city within the court's jurisdiction.<sup>60</sup> At the second selection stage, each allocation of PRC members is reported to relevant local electoral administrative commissions.<sup>61</sup> Prospective members are divided into four different reserve pools, each consisting of at least one hundred prospective jurors.<sup>62</sup> At this stage, based on the

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<sup>54</sup> *Id.* arts. 41(2)(2), 41(6)(2).

<sup>55</sup> *Id.* art. 41(6)(1).

<sup>56</sup> *Id.* art. 41(9)(1).

<sup>57</sup> *Id.* art. 41(9)(3).

<sup>58</sup> *Id.*

<sup>59</sup> *Id.* art. 41(4) (requiring by law that the PRC has assistance of a legal advisor when considering the second resolution of the same case).

<sup>60</sup> *Id.* art. 9(1).

<sup>61</sup> *Id.*

<sup>62</sup> *Id.* art. 9(2).

number of prospective PRC members for each geographical unit, the election administrative commission selects PRC candidates from their electoral register, creating “the Proposed List of PRC Candidates,” and sends this list to the PRCO.<sup>63</sup>

Similar to the lay assessor selection procedure, once the proposed list is created, the deceased, people with felony convictions, and residents who do not meet the qualifications are filtered out.<sup>64</sup> The selected candidates are contacted by the election administrative commission and screened for their qualifications.<sup>65</sup>

The election administrative commission then selects a necessary number of qualified candidates and places them in each of four PRC reserves via lottery.<sup>66</sup> The specific date and place of random selection for PRC candidates must be conducted in the presence of a district judge and a prosecutor.<sup>67</sup>

Detailed procedures are required for a fair selection of PRC members. Each PRC member must serve a term of six months. While lay assessors serve for an individual case, PRC members must continue to serve on the commission for a half-year, with about one-fourth of the eleven members being replaced every three months. In the actual selection of PRC members, the director of the PRCO randomly selects five jury candidates from the first reserve by December 28th, six jury candidates from the second reserve by March 31st, five candidates from the third reserve by June 30th, and six candidates from the fourth reserve by September 30th of each year.<sup>68</sup>

Once PRC members appear at the courthouse, the chief justice of the court or the superior court judge instructs them about their duties and administers an oath.<sup>69</sup> A PRC foreperson is then appointed to lead the deliberation.<sup>70</sup> The PRC foreperson is similar to that of an American jury. This differs from a lay assessor trial, which according to the Lay Assessor Act does not require a deliberative leader among the lay judges, the professional judge is assumed to take on the leadership role in deliberative discussions.<sup>71</sup>

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<sup>63</sup> *Id.* art. 10(1)(2)(3).

<sup>64</sup> *Id.* art. 12(1).

<sup>65</sup> *Id.* art. 12(4).

<sup>66</sup> *Id.* art. 13(1).

<sup>67</sup> *Id.* art. 13(2).

<sup>68</sup> *Id.* art. 13(1).

<sup>69</sup> *Id.* art. 16(1)(2)(3)(4).

<sup>70</sup> *Id.* art. 15(1).

<sup>71</sup> See *Saiban-in no sanko suru keiji saiban ni kansuru hōritsu* [Law concerning the participation of law assessors in criminal trials], Law No. 63 of 2004 [hereinafter the Lay Assessor Act]. *Saiban-in seido* is translated as “the lay assessor” or “the quasi-jury” system. 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*

Despite some notable procedural and logistical differences between the lay assessor and PRC selection procedures, there are also similarities. Both systems exclude and disqualify politicians, elected officials, and those who perform vital political and criminal justice functions from participating. Prior to the appearance of potential candidates at the courthouse, both selection procedures share similar selection steps and logistical requirements for the creation of candidate lists. Nonetheless, the major and significant difference lies in the fact that the PRC selection does not have an equivalent to *voir dire*. Another difference is that the lay assessor selection primarily relies on the district court to administer various procedural tasks during selection. The PRC selection procedure is administered by PRCO. PRCO provides direct or indirect assistance in the procedural steps throughout the whole process to select the final group of PRC members and its foreperson.

Given the lengthy commitment of PRC duty and the rigorous selection procedures governing the preparation of the PRC candidate list and qualified pool, the composition of PRC members may not represent an accurate cross-section of the community. Jury research in the United States has found significant representative disparities and social inequities among American grand jurors on the basis of race, ethnicity, gender, and social class.<sup>72</sup> In Japan, a preliminary study has found that Japanese PRC members were more likely to be male and in their 40s and 50s.<sup>73</sup> While there is no known study that examines the demographics of PRC members, there may be concerns about the underrepresentation of Japan's ethnic minorities such as Burakumins (Japan's so called untouchables), Ainus, Koreans, Chinese, Brazilian, and other immigrant groups from Southeast Asia and the Middle East.<sup>74</sup> As the same ethnic groups make up a rather sizable segment of criminal defendants, it may be important to research ethnic makeup and explore ethnic diversity of PRC membership.

The schematic diagram of the eight stages of PRC selection is shown in Figure 1.

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Figure 1

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*Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233, 233-35 (2004) (overviewing and then translating the Lay Assessor Act).

<sup>72</sup> See generally HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (State Univ. of N.Y. Press, 2003).

<sup>73</sup> Fukurai, *supra* note 24, at 334-36 (summarizing the research on civic participation in Japan).

<sup>74</sup> See generally SHEFFIELD CTR. FOR JAPANESE STUDIES, JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY vii (Michael Weiner ed., 2d. ed., 2009) (seeking, in part, to evaluate the construction of the Japanese identity and the life of minorities in contemporary Japan).

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### III. THE POWER STRUGGLES BETWEEN THE PRC AND THE JAPANESE PROSECUTION

The Japanese prosecutors were once given the exclusive power to issue an indictment against a suspect. The 2004 PRC Act has changed the prosecutor's role and has empowered the civic panel with rights to indict suspected criminals.

The following two criminal cases received national attention because both incidents led to the deaths and injuries of hundreds of civilians, including children and women. The civic complaints were submitted to the local PRCs to review the decision not to indict a group of individuals who were allegedly responsible for the accidents. In one of the cases, despite multiple decisions by local prosecutors not to indict and repeated requests by victims' families to review the propriety of the prosecutors' decisions, the PRC's decision reversed the prosecutors and led to the forced indictment of a deputy chief police officer.

#### A. *The Asahi Stampede Incident*<sup>75</sup>

The 2010 PRC decision on the Asahi Stampede Incident set an important precedent in Japan's legal history. Until then, Japanese prosecutors had routinely paid little attention to, if not ignored, the PRC's resolutions. The 2004 PRC Act changed the power matrix of the relationship between the prosecution and the PRC.

In 2010, the PRC in Hyogo Prefecture recommended the prosecution of the Deputy Chief Officer of the Akashi police station for the injuries of 247 people and the death of eleven people, including nine children, who were crushed to death in the stampede incident in Akashi City in Hyogo Prefecture. Hyogo Prefecture has a total of five PRCs in its jurisdiction: (1) the First Kobe PRC, (2) the Second Kobe PRC, (3) Itami PRC, (4) Himeji PRC, and (5) Toyooka PRC.<sup>76</sup> The decision of the

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<sup>75</sup> In an earlier paper, I provided an account of this incident prior to the enactment of the new PRC law. Fukurai, *supra* note 24, at 345-47. In this Part, I summarize the background facts as presented in my past paper and then describe the many developments that have taken place since the enactment of the new PRC law.

<sup>76</sup> *Zenkoku no kensatsu shinsakai ichiran-hyō* [List of All Prosecutorial Review Commissions in Japan], SAIBANSHO [COURTS IN JAPAN], <http://www.courts.go.jp/kensin/seido/itiran.html> (last visited on Apr. 24, 2010),.

Second Kobe PRC after it deliberated on the Akashi incident forced the Japanese prosecution to formally bring action against the police officer.

This deadly accident happened on July 21, 2001, when 130,000 people attended a fireworks display organized by the Akashi Municipal government. After 8:30 p.m., the stampede occurred on a narrow pedestrian bridge, which connects a train station and the shoreline where the fireworks display took place. The incident was blamed on youths who allegedly caused overcrowding because they had sat and watched fireworks on the bridge.<sup>77</sup> However, a report by the municipality revealed that those youths actually helped rescue victims of the incident by calling for help and moving the crowd and children to safety.<sup>78</sup> The same report also found the local police, the city government, and a security firm jointly responsible for the incident because they were forewarned of a risk of stampede when during a millennium celebration in December 2000, nearly 3,000 people surged onto the same bridge.<sup>79</sup> Finally, the report faulted the Akashi police for failing to take any precautionary measures on the bridge.<sup>80</sup> Nevertheless, in December 2002, the Prosecutors Office did not indict the heads of the Akashi police. Families of the victims promptly filed an appeal of the non-indictment decision, and in April 2004, the PRC issued an "indictment is proper" resolution, finding that two officers failed to devise and implement precautionary measures, which would have prevented the incident.<sup>81</sup>

Prosecutors still refused to indict and the families of victims requested review of the second non-indictment decision. In December 2005, the PRC delivered another "indictment is proper" resolution, which the prosecutors dismissed yet again six months later.<sup>82</sup> The families of victims announced in November 2006 that they would file a third appeal of the prosecutor's non-indictment decision once the new PRC law is enacted and a PRC's decision can be made legally binding.<sup>83</sup>

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<sup>77</sup> *Youth Suspected in Akashi Fireworks Fatal Stampede*, KYODO NEWS SERVICE, July 23, 2001 (reporting the police attributed the stampede to the youth).

<sup>78</sup> *Akashi hodōkyō jiko: Gokaisareta yaneno ueno shinjitsu* [*The Akashi Pedestrian Bridge Accident: The Misunderstood 'Above the Roof' Truth*], KOBE SHIMBUN, Aug. 5, 2001.

<sup>79</sup> *Panel Finds City, Police at Fault in Fireworks Stampede*, JAPAN ECON. NEWSWIRE, Jan. 30, 2002; *Hodōkyō jiko: Akashishiga hōtekisekinin hajimete meiji* [*Pedestrian Accident: The City of Akashi Recognizes Its Culpability for the First Time*], KOBE SHIMBUN, Feb. 11, 2002, <http://www.kobe-np.co.jp/backnumber/asagiri/0003520294.shtml>.

<sup>80</sup> *Paper Sent on 12 in Overpass Disaster*, DAILY YOMIURI, May 10, 2002.

<sup>81</sup> *Indictment of Cops Urged in Bridge Deaths*, DAILY YOMIURI, Apr. 24, 2004.

<sup>82</sup> *Prosecutors Again Refuse to Indict Cops over Crush*, DAILY YOMIURI, June 26, 2006.

<sup>83</sup> *Moto shochōra 3 dome no kiso mōshitae he* [*The Third Motion to be Filed to Prosecute the Former Chief*], KOBE SHIMBUN, Nov. 2, 2006, <http://www.kobe-np.co.jp/backnumber/asagiri/0003520186.shtml>.



On May 21, 2009, the day that new PRC law went into effect, the families filed another appeal of the non-indictment decision and the PRC determined, on July 30, that “indictment is proper” for the third time.<sup>84</sup> As the Chief of the Akashi police station died in July 2007, the PRC’s indictment decision only covered the prosecution of the former Deputy Chief. The prosecutor decided, once again, after another brief investigation, not to indict the officer in October.<sup>85</sup>

The victims of the Akashi incident filed the petition again, and on December 7th, the PRC began to deliberate on the fourth non-indictment decision by the prosecutors.<sup>86</sup> The petitioner’s claim also included a specific request for the victims to voice their opinions and issues on the case.<sup>87</sup> On January 8, 2010, as required by the new PRC law in cases of disagreement with the PRC’s indictment decision, the Kobe Prosecutor’s Office provided their explanation of the fourth non-indictment decision, as well as their professional opinions and current position on the criminal case.<sup>88</sup>

On January 27, 2010, after many years of review, the Kobe PRC finally issued the second recommendation of prosecution against the deputy officer, thereby reversing a series of previous non-indictment decisions by the prosecutor.<sup>89</sup> Specifically, the PRC’s recommendation stated that former Deputy Chief of Police Kazuaki Sakaki should be charged with professional negligence resulting in death and injury by failing to prevent a fatal stampede.<sup>90</sup> The Kobe PRC decision also became the first case of automatic indictment since the revised PRC law came into force. The three defense lawyers were appointed by the court to take on

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<sup>84</sup> *Moto fukushochō 3 dome no kiso sōtō giketsu kensatsushin* [The Third Time Resolution for the Indictment is Proper for Deputy Police Officer by the Prosecutorial Review Commission], KOBE SHIMBUN, July 30, 2009, <http://www.kobe-np.co.jp/backnumber/asagiri/0003520188.shtml>.

<sup>85</sup> *Akashi hodōkyō jiko 4 dome fukiso: shimin kankaku mushi* [Non-Prosecution Decision for the Fourth Time Against the Former Deputy Officer of the Akashi Police: Civic Common Sense Ignored], KOBE SHIMBUN, Oct. 5, 2009, <http://www.kobe-np.co.jp/backnumber/asagiri/0003520221.shtml>.

<sup>86</sup> *Akashi hodōkyō jiko, kensatsu shinsakai ga saishinsa kaishi* [On the Akashi Pedestrian Bridge Case, PRC Began to Deliberate], KŌMUIIN NO FUSHŌJI [PUBLIC OFFICER’S SCANDALS] (Dec. 7, 2009, 11:29PM), <http://cat.cscblog.jp/content/0000953005.html>.

<sup>87</sup> *Id.*

<sup>88</sup> *Akashi hodōkyō jiko towa: Jiko wo meguru keika (2010 nen 1 gatsu)* [On the Akashi Pedestrian Bridge Case: The Incident’s Legal Process in January 2010], JIJICOM (Jan. 27, 2010), [http://www.jiji.com/jc/v?p=ve\\_soc\\_jiko-akashi-kisogiketu20100127at53b](http://www.jiji.com/jc/v?p=ve_soc_jiko-akashi-kisogiketu20100127at53b).

<sup>89</sup> *Akashi hodōkyō jiko: Naze koredake jikanga kakattanoka – Izoku kaiken* [Akashi Pedestrian Incidents: Why Did It Take This Long? – Testimony of Victims’ Families], SANKEI NEWS, Jan. 27, 2010.

<sup>90</sup> *Id.*

the role of prosecutors, initiate the criminal proceeding, and begin the formal prosecution of the officer.<sup>91</sup>

### B. *The Fukuchisen Derailment Incident*

Another explosive case about the disagreement of prosecutorial decisions and the PRC's deliberative outcome is the 2005 train derailment that killed 107 people and injured 555 others. Like the Akashi pedestrian stampede accident, this massive victimization of civilians also took place in Hyogo Prefecture. On April 25, 2005, a train on the West Japan Railway (JR West) Fukuchiyama Line derailed. Five of the seven cars derailed, and both the first and second cars slammed into an apartment building near the tracks. The first car crashed into a multi-story parking garage in the ground floor of the apartment and was compacted to half its original length, while the second car rammed into the building wall and was fractured into an L shape.<sup>92</sup>

This was the most serious railway accident since the 1963 Yokohama rail crash, which killed 161 and injured 120 passengers.<sup>93</sup> The 2005 accident occurred when the Fukuchiyama Line train took a tight curve at excessive speed and slammed into a high-rise residential complex. The First Kobe PRC determined that the major factor in the accident was the company's management policy that made profits, not the safety of its customers, the firm's top priority.<sup>94</sup>

On July 8, 2009, the prosecutors indicted the JR West President Masao Yamazaki after concluding that the tragedy could have been prevented if the curve had the Automatic Train Stop (ATS) system, which is used to halt trains. He was indicted for professional negligence resulting in deaths and injuries.<sup>95</sup> Yamazaki also made the announcement, on the same day of his indictment, that he would resign his post, although he still remained on the JR West's Board of Directors.

<sup>91</sup> *Akashi hodōkyō jiko: Shitei bengoshi ga kensatu kanyaku – Muzukashii kōhanka* [Akashi Pedestrian Incidents: Court Appointed Lawyers as Prosecutors – Difficult Court Proceeding Ahead], SANKEI NEWS, Jan. 27, 2010.

<sup>92</sup> *Death Toll from Crash May Top 100*, JAPAN TIMES, Apr. 28, 2005, <http://search.japantimes.co.jp/cgi-bin/nn20050428a2.html>; *Train crash kills 71, injuries 441*, JAPAN TIMES, Apr. 26, 2005, <http://search.japantimes.co.jp/cgi-bin/nn20050426a1.html>; Japan Confederation of Railway Workers' Unions, Statement on the Train-Derailed Accident on JR West Co.'s Fukuchiyama Line (Apr. 26, 2005), [http://www.jru7.net/statement/2005/0426\\_accident.htm](http://www.jru7.net/statement/2005/0426_accident.htm).

<sup>93</sup> *Kokutetsu tsurumi jiko* [Japan Railway Tsurumi Accident], SHŌWA NO NYŪSU [NEWS IN THE SHOWA ERA], Nov. 9, 1963, <http://showa.mainichi.jp/news/1963/11/post-2e9b.html>.

<sup>94</sup> *JR West's Actions Show Lack of Remorse, Resolve*, DAILY YOMIURI, Oct. 24, 2009, at 4.

<sup>95</sup> *JR West President Indicted Over Crash*, JAPAN TIMES, July 9, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20090709a1.html>.

The prosecutors also decided not to bring charges against eight former JR West executives in charge of safety measures, three former managers and the 23-year-old driver who was killed in the wreck.<sup>96</sup> In August, families of victims submitted a complaint to the PRC, indicating that two former JR West presidents also be indicted because of their collateral failure to install an advanced version of the ATS system at the site.<sup>97</sup> On October 22, the Kobe PRC decided that three past presidents of the JR West be indicted and submitted their recommendation to the Kobe Prosecutor's Office.<sup>98</sup> On December 4, after investigative work on the case, the Kobe prosecutors announced that they would not indict the three former presidents, indicating that they had no direct responsibility of instituting an advanced version of the ATS system at the curb of the derailment.<sup>99</sup>

Meanwhile, long before a draft of the final report on the causes of the accident was released, JR West executives were found to have been given information relating to the derailment from the government's Aircraft and Railway Accidents Investigation Commission.<sup>100</sup> The report by a third-party investigative body on the information leak revealed that JR West had been concerned with how it could convince the commission and the victims' families of its view that the accident was not foreseeable.<sup>101</sup> The investigative report also indicated, "there was a corporate culture that prioritized protection of the company's interests over those of the accident victims as well as public sentiment."<sup>102</sup>

In January, victims' families filed a complaint to the prosecutors' non-indictment decisions against the three JR West presidents.<sup>103</sup> On January 19, 2010, against two former transportation managers, the Kobe PRC decided the "the non-indictment is improper" decision and sent the

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<sup>96</sup> *Id.*

<sup>97</sup> *Amagasaki Crash Kin Push for Charges*, JAPAN TIMES, Aug. 22, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20090822a5.html>.

<sup>98</sup> *Crash Inquest Panel: Indict Ex-JR West Heads*, JAPAN TIMES, Oct. 23, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20091023a1.html>.

<sup>99</sup> *JR nishi no rekidai 3 shachō wo futatabi fukisoni, Takarazukasen de Kōbe hiken [Non-Indictment Again for Three Past JR West Presidents, on the Takarazuka Derailment Incident, by the Kobe Prosecutors]*, ASAHI SHIMBUN, Dec. 5, 2009, <http://www.asahi.com/kansai/travel/news/OSK200912050058.html>.

<sup>100</sup> *Info Leak Report Criticize JR West*, DAILY YOMIURI, Nov. 19, 2009, at 1.

<sup>101</sup> *Id.*

<sup>102</sup> Yoko Inoue & Ken Iguchi, *Report Slams JR West's Corporate Culture*, DAILY YOMIURI, Nov. 20, 2009, at 3.

<sup>103</sup> *Fukuchiyamasen sassenjiko: Kensatsu shinsakai izoku kara iken chōshu [Fukuchiyama Derailment Accident: The PRC Listens to Victims' Families]*, MAINICHI SHIMBUN, Feb. 25, 2010, <http://mainichi.jp/select/jiken/news/20100225k0000e040043000c.html> [hereinafter *Fukuchiyamasen*].

recommendation to the prosecutors.<sup>104</sup> Against three former JR West past presidents, the PRC summoned the families of victims and solicited their opinions on the case.<sup>105</sup> The prosecutors were also summoned to explain the PRC decisions based on their own investigation on the case.<sup>106</sup>

On March 26, the First Kobe PRC decided for the second time that the three former JR West presidents be indicted for professional negligence resulting in injury and death.<sup>107</sup> On April 23, three court-appointed lawyers formally filed charges against the three presidents for their failure to take railway safety measures, thereby causing the fatal train derailment.<sup>108</sup>

The PRC has thus served as an important civic watchdog of the Japanese government and has critically reviewed its exercise of discretion in decisions not to indict the accused, including powerful government officials, political heavyweights, and economic elites. How do lay participants view their civic duties and responsibilities in examining highly publicized cases such as the Akashi Stampede incident and Fukuchiyama-Line derailment case? Were they overwhelmed by the civic responsibility or able to meet the challenges of fair and equitable decision making? What does lay participation mean to ordinary citizens who take part in deliberations of politically contested and highly publicized cases?

The next section examines the legal consciousness of ordinary citizens by summarizing the results of recent surveys and interviews with former PRC members. These studies explore whether or not lay participation in legal decision making has influenced their sense of civic responsibility, their confidence in deliberative discussions with fellow members, and general perceptions and attitudes about the court, the prosecutors, and the police, as well as their own abilities to render just and equitable decisions.

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<sup>104</sup> *Moto unyu buchō fukiso wa futō* [Improper Non-Prosecution for Former Transportation Managers], Jichi Tsushin, January 29, 2010, available at <http://www.jiji.com/jc/zc?k=201001/2010012900757>.

<sup>105</sup> *Fukuchiyamasen*, *supra* note 103.

<sup>106</sup> *Id.*

<sup>107</sup> *Fukuchiyama-sen jiko: JR nishi rekidai 3 shachō no kisogiketsu: Kōbe daiichi kensatsu* [Fukuchiyama-Line Derailment Incident: Kobe PRC Decides on Indictment Against Three JR-West Presidents], MAINICHI SHIMBUN, Mar. 26, 2010.

<sup>108</sup> *JR nishi no rekidai 3 shachō wo kyōsei kiso* [Forced Indictments Against Three JR West Presidents], SANKEI NEWS, Apr. 26, 2010.

#### IV. LAY PARTICIPATION IN THE PROSECUTORIAL REVIEW COMMISSION: EMPIRICAL QUESTIONS AND ANALYSIS

Since its inception in 1948, more than half million Japanese citizens have participated in PRC service.<sup>109</sup> A large number of participants have engaged in deliberative discussions for more than six decades; however, did PRC participants feel comfortable with their civic duties and responsibilities? Did the experience encourage them to participate in other civic duties and influence their opinions and attitudes about the criminal court and justice systems? Or more simply, did they enjoy their experience? The following section summarizes the analytic results of Japanese respondents with regard to their experiences of civic legal participation in the PRC. Preliminary data and results were first published in an earlier study of mine that conducted a cross-national comparison of the legal experiences of Japanese and American jurors.<sup>110</sup> Any numerical discrepancies between this Part and my previous study are slight and as a result of updated statistical analysis.

##### A. *The 2005–2006 PRC Survey*

The survey and interview data was collected with the assistance of the Prosecutorial Review Commission Society.<sup>111</sup> Two hundred twenty-nine members in 11 prefectural and regional offices filled out a survey questionnaire, and follow-up interviews were conducted with those members who were willing to do so by either telephone or in an informal personal setting.<sup>112</sup> A total of 137 respondents said that they reviewed and examined actual cases and participated in deliberations.<sup>113</sup> The

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<sup>109</sup> *Overview of the Prosecutorial Review Commission, supra* note 25.

<sup>110</sup> For detailed information on the methodology and analysis used to generate the results discussed in this Part, see Fukurai, *supra* note 24, at 333-44.

<sup>111</sup> *Id.* The Prosecutorial Review Commission Society was established in 1955 to promote popular legal participation and publicize the importance of its duty in Japan. Currently many regional branch offices exist all over Japan. While more than half a million people have served on review commissions, not everyone automatically becomes a member of the society. The active conduct of business of the society is only supported by members' volunteer work. There are variations as to the extent of activities and member recruitments among regional branches. When the JFBA asked the society members to respond to a survey questionnaire in 2000 in one of the largest surveys ever conducted on popular legal participation, 2,315 members completed the questionnaire. See JAPANESE FEDERATION OF BAR ASSOCIATIONS, *Kensatsu shinsa kyōkaiin ni taisuru ankēto kekka hōkokusho* [*The Final Reports of the Results of JFBA Survey*] (2000).

<sup>112</sup> Fukurai, *supra* note 24, at 334.

<sup>113</sup> *Id.*

respondents answered almost seventy questions, pertaining to a variety of topics including their willingness to participate, perceived obstacles to legal participation, confidence in civilian legal participation and in jurors' abilities, and fear of retaliation due to service.<sup>114</sup> Respondents answered these questions with a score of 1 to 5 based on the extent of their agreement (i.e., "1" represents strongly agree and "5" represents strongly disagree), but were also given the opportunity to express general views on their legal participation and PRC service.<sup>115</sup>

The survey revealed that the majority of PRC respondents were in their 60s and 70s, reflecting the age of the PRC Society's members, and that the majority of PRC members served in their 40s and 50s.<sup>116</sup> Also, many respondents have been in the PRC Society for a long time, averaging over 20 years.<sup>117</sup> Over 70% of respondents expressed support for the introduction of the all-citizen jury system in Japan.<sup>118</sup> One interesting finding from my previous study is that the respondents who served in the Japanese grand jury share similar age and economic profiles with American jurors.<sup>119</sup>

### B. *Deliberative Experiences*

In terms of deliberative experiences, all the responses tended to reflect a positive attitude and enthusiastic opinion about lay participation, regardless of whether the PRC members were presented with deliberative opportunities to review and generate recommendations for actual cases. Yet, PRC respondents who actually participated in case deliberations tended to feel that their experiences were more positive.<sup>120</sup> A majority of respondents with deliberative experience (76.3%) expressed willingness to serve on a committee in the future. The difference between PRC members with and without deliberative experience was statistically significant, suggesting that those with deliberative experiences are more willing to serve again than those without experience. Despite this *ex post* positive

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 336.

<sup>117</sup> *Id.* ("Many have been in the PRC Society for a long time—members who served in their 20s have been in the Society for an average of 31.3 years, and those who served in their 30s and 40s (45.4% of the respondents) for an average of 27.6 and 20.7 years, respectively.")

<sup>118</sup> *Id.* at Table 1.

<sup>119</sup> *Id.* at 336. American jurors also tend to be middle-aged, white-collar workers or employees in a stable primary labor market, and of higher income. See HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 64 (1993).

<sup>120</sup> Fukurai, *supra* note 24, at 336.

reaction to the PRC, respondents were not as enthusiastic to serve initially.<sup>121</sup>

An overwhelming majority of PRC members (96.9%) supported the requirement of prosecutorial explanations after a decision that indictment is in fact proper.<sup>122</sup> However, only 53.0% of PRC members who had meaningful deliberative experiences believed that the participation of prosecutors would assist in the decision making process.<sup>123</sup> In addition, 29.1% of the PRC members with deliberative experience also indicated that participation by Japanese prosecutors is not necessary for reaching a decision. These findings may prove relevant for the lay assessor system, where both professional and lay judges deliberate together to determine the trial outcome. Surprisingly, an overwhelming majority (97.0%) of PRC members with deliberative experiences favor the imposition of a confidentiality rule on all PRC participants.<sup>124</sup>

### C. *Perceptions about Lay Participation*<sup>125</sup>

PRC members' attitudes and perception about lay participation in a lay justice trial were also examined. My analysis focused on the statistical significance of differences in responses between PRC members with and without deliberative experiences, as well as between male and female PRC members within each group. The majority of PRC respondents expressed their willingness to serve as lay assessors (except PRC women without deliberative experiences). This finding is higher than the results of a similar poll, taken at the similar period, on people's lay participatory enthusiasm in Japan. The 2006 national survey by the Cabinet Office of the Japanese Government showed that, among 1,795 randomly chosen Japanese citizens, only 5.6% wanted to serve, while 15.2% indicated they were more or less willing to serve as lay assessors.<sup>126</sup> Those with deliberative experiences are more enthusiastic about lay participation than those without deliberative experience and male respondents were more willing to serve than women PRC members at a statistically significant level ( $p < .05$ ). Nearly all PRC members

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<sup>121</sup> *Id.* tbl.2.

<sup>122</sup> *Id.*

<sup>123</sup> *Id.*

<sup>124</sup> *Id.*

<sup>125</sup> Many of the findings in this Part were published in my past paper. *Id.* at 337-41. Here I provide unpublished findings concerning lay participation, such as statistical analyses of the differences in attitudes between male and female PRC members.

<sup>126</sup> *Saiban-in seido ni kansuru tokubetsu yoron chōsa no gaiyō* [Outline of the Special Poll Concerning the Lay Assessor System], NAIKAKUFU SEIFU KŌHŌSHITSU [PUBLIC RELATIONS SECTION OF THE CABINET OFFICE OF THE JAPANESE GOVERNMENT], 3 (Feb. 2006), <http://www8.cao.go.jp/survey/tokubetu/h18/h18-saiban.pdf>.

indicated that they would be willing to participate if it was their duty to serve.<sup>127</sup>

The large majority of PRC members also felt that active legal engagement by local residents in lay participation might function as an effective deterrent against crimes in their communities, as well against overzealous prosecutions and inequitable judgments in criminal trials. PRC members with deliberative experience felt more strongly than those without deliberative experience that lay participation would be a stronger deterrent against prosecutorial bias and inequitable outcomes in court at a statistically significant level ( $p < .05$ ).

The respondents answered questions regarding work responsibilities and whether they presented obstacles or barriers to participation. More than three-quarters of all PRC members felt that it would be easier for them to serve if they could pick the date of jury service six months in advance.<sup>128</sup> While all PRC members showed a willingness to participate, participatory experience in deliberation led to a higher—and statistically significant—level of participatory enthusiasm ( $p < .05$ ). In addition, the majority of both PRC groups felt that their employers showed understanding towards jury duty.<sup>129</sup>

The survey then examined respondents' confidence in civilians to fulfill the responsibilities of jury duty, such as to deliver a fair verdict and to remain objective in evaluating evidence. Male PRC members consistently showed greater confidence than female PRC members in laypersons' abilities to determine both verdict and penalty and to evaluate objectively facts and evidence despite potentially prejudicial media reports. Male PRC members were also less likely than female PRC members to feel overwhelmed in judging defendants and punishing them for their crimes ( $p < .10$ ). At the same time, PRC members with deliberative experience felt less burdened by the responsibilities of lay participation than those without deliberative experiences.<sup>130</sup> This difference in perception between the two PRC groups is statistically significant ( $p < .01$ ). The majority of both PRC groups also expressed doubts about the lay assessor system as the most appropriate adjudicative method and fear of rendering wrongful judgments. Nevertheless, PRC members with deliberative experiences consistently shared less fear, uncertainty, and doubt about the risks of wrongful verdicts than those without deliberative experiences.

The majority of both PRC groups also voiced great concern about threats to their personal safety as a result of lay participation, possibly for

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<sup>127</sup> Fukurai, *supra* note 24, at 339.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*



fear of retaliation by the convicted defendant and/or their families and dependents.<sup>131</sup> While male PRC respondents with deliberative experience showed greater confidence in their ability to make a fair judgment in such situations than those without deliberative experience, PRC members generally remain fearful of potential retaliation by defendants and their families.

*D. Confidence in the Criminal Justice System and the News Media*

The survey findings are consistent with the proposition that people with jury experience tend to show a higher level of confidence in the system of government and justice.<sup>132</sup> PRC members expressed overwhelming confidence in prosecutors and courts, regardless of any difference in deliberative experience.<sup>133</sup> PRC members' confidence in both the police and defense attorneys was considerably heightened by participation in deliberative participation, except for female PRC members without deliberative experience. Deliberative experience also elevated PRC members' confidence in lay assessors for both genders.

As compared to the high level of confidence that flowed from PRC members' deliberative participation, confidence in the media remained relatively low. An interesting finding is that deliberative experience lowered PRC women's confidence in both newspapers and televisions, while deliberative participation elevated the level of confidence in public media among PRC men.

*E. Lessons from PRC Participation and Experience*

Survey responses and follow-up, person-to-person interviews revealed that many PRC members reflected on their experiences and provided what they have learned from their participatory experience and useful information that helped facilitate their critical review of criminal cases, in which the Japanese prosecution exercised the discretion in

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<sup>131</sup> *Id.*

<sup>132</sup> See generally John Gastil *et al.*, *Seeing is Believing: The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implications for International Jury Reform* 18-20 (unpublished manuscript) (on file with East Asia Law Review); cf. Mark West & John Gastil, *Deliberation at the Margins: Participant Accounts of Face-to-Face Public Deliberation at the 1999-2000 World Trade Protests in Seattle and Prague*, 5 QUALITATIVE RES. REP. IN COMM. 1, 1-2 (2004) (discussing the connection between public deliberation and civic engagement with regard to the WTO protests).

<sup>133</sup> Fukurai, *supra* note 24, at 340 Table 4 ("An interesting finding is the near complete confidence expressed by Japanese PRC respondents in prosecutors (99.2% and 100.0% for those with and without deliberative experience, respectively) . . .").

decisions not to bring indictment charges. Many PRC members also provided what had assisted them in facilitating their participatory duties for the duration of six months

A fifty-seven-year-old, male company employee who served in the PRC twenty-two years ago, reflected on his experience, stating that the participatory experience “enabled me to study and learn legal problems and issues. At the same time, it gave me a very different worldview.” A fifty-two-year-old man, who worked on his family business and served as a PRC member five years ago, stated, “To tell you the truth, I was extremely nervous at the beginning. However, a pamphlet and video at the courthouse helped me understand my duty. . . . [The participatory experience] is something I truly cherish today, especially enabling me to understand the structural mechanism and legal relations among the prosecution, the court system, and the police.” A sixty-one-year-old, male restaurant owner said, “My wife’s support was crucial as we own our own business, which also narrowed the scope of my life-experience. This duty expanded my knowledge and enabled me to visit different institutions and facilities unrelated to my ordinary daily activities.” Another seventy-two-year-old man, who served thirteen years ago, indicated, “While my life had no direct connection to the legal world, I was ecstatic when I first read investigative reports. With the encouragement from the PRC support staff, I remember that I attended the second meeting with tremendous enthusiasm.”

An eighty-five-year-old woman, who served as a PRC member twenty-five years ago, stated, “This participatory experience helped eliminate the strict and authoritative image of the court, enlarge the friendship circle, and expand my vision.” A sixty-eight-year-old woman, who served when she was twenty-six years old, stated, “I acquired a better understanding of the function of the prosecution and police as governmental organizations, as well as procedural formalities.” Another fifty-eight-year-old woman, who is a homemaker and served when she was forty-six, complained about her PRC experience, declaring, “I had extreme difficulties in understanding the content of court records because many specialized terminologies were used. While I tried to use the statute books, I routinely had a headache during discussions and got me truly exhausted.” Another seventy-six-year-old man, who was a certified tax accountant when he served as a PRC member fifteen years ago, indicated, “my experience as a public servant for forty years helped acquire sufficient knowledge for the job and helped perform my duty smoothly.”

A sixty-six-year-old man who served in the Kanagawa PRC in 2001 indicated that he became the first person to serve while he worked in

the National Defense Academy.<sup>134</sup> Even though the first meeting failed to create a lively deliberative atmosphere, “the active interaction of opinions and views were common from the second meeting.”<sup>135</sup> When asked of the requirement that the prosecutors must explain their non-indictment decision following the PRC decision to indict the suspect under the new system, he stated, “The PRC has the right to know the prosecutors’ rationale for their non-prosecutorial decision. It will serve as an important informative basis for future deliberations.”<sup>136</sup> A fifty-two-year-old woman who served in the Aichi PRC twenty-two years ago stated that the most memorable part of my PRC duty was that, “I realized the existence of such an important participatory system, as I was totally ignorant of it.”<sup>137</sup> As to public knowledge on the PRC system, she said “when I tried to talk about my experience, a few people responded by saying that ‘I have seen it on TV,’ and I feel not many people know about the system.”<sup>138</sup>

A sixty-nine-year-old woman, who was a company employee when she served in the Kyoto PRC, said that the PRC experience posed “a new challenge to the world of which I had no knowledge, though I knew that [the experience] will definitely help me reconnect to my society, and my involvement will bring benefits to the overall process.” Another fifty-nine-year-old woman, who owned her own business when she served in the Kyoto PRC, indicated that she was always doubtful whether or not she was able to truly get involved in the investigative process without making any errors. She stated, “[i]f those cases directly affect me, I will be doing whatever necessary to solve the problems. But they are not. I felt I must strive to do the best and study for the betterment until the day I die.” A fifty-eight-year-old woman who owned her family business and served in the Kyoto PRC stated that the PRC experience “helped raise my curiosity on legal matters and I was able to incorporate and apply my common sense knowledge to the deliberative debates, especially from the perspective of an ordinary citizen.”

A sixty-four-year-old man, who was a company employee when he served in the PRC, participated in the investigation of a traffic accident case that resulted in death, indicating his realization from the deliberative session that it “introduced many different viewpoints and opinions

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<sup>134</sup> Interview by Naoko Tamura with Toshichika Usui (Dec. 14, 2005) (on file with the author).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.*

<sup>137</sup> Interview by Naoko Tamura with Mieko Narita (Dec. 13, 2005) (on file with the author).

<sup>138</sup> *Id.*

through active participation by other members, all of which helped produce the equitable final recommendation.”

As noted, the positive responses of PRC members towards their legal experiences and their willingness for future participation comport with previous research findings that jury experience contributes to positive attitudes towards the criminal justice system.<sup>139</sup> Despite this greater confidence, which manifests itself in PRC members’ willingness to serve, civilian legal participants are subject to strict confidentiality requirements under Lay Assessor and PRC laws.<sup>140</sup> The disclosure by lay assessors of deliberation secrets or secrets learned during deliberation can result in severe penalties and imprisonment as stipulated in the Lay Assessor Act.<sup>141</sup> The PRC Act takes after the Lay Assessor Act in imposing penalties and imprisonment on PRC members for disclosure of deliberation related secrets.

It bears emphasis, however, that lay assessor participation has not been widely publicized. As less than 20% of PRC members indicated that lay assessor duties were widely known in their communities, the probability that the lay duty of the prosecutorial review commission is known and recognized in Japan is certainly low.<sup>142</sup> To increase the public exposure of the lay assessor system and to dispel the apprehension of individuals selected for PRC duty, the Ministry of Justice along with the Supreme Court and the JFBA engaged in outreach and sponsored approximately 4,000 forums and symposiums, which attracted about 200,000 attendees.<sup>143</sup> These efforts perhaps pale in comparison to those undertaken prior to the first jury trial in 1928 in Japan. At the time, the pre-war Japanese government held 3,339 nation-wide lectures and forums to educate the public, attracting a total of 1.2 million attendees<sup>144</sup> and produced and distributed over 8 million copies of educational pamphlets and materials on jury service.<sup>145</sup> To get a sense of the magnitude and scope of the government’s efforts in the past, it is important to note that

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<sup>139</sup> See *supra* note 132 and accompanying text.

<sup>140</sup> Fukurai, *supra* note 24, at 341.

<sup>141</sup> Lay Assessor Act, *supra* note 71, art. 79.

<sup>142</sup> See Naikakufu seifu kōhōshitsu [Cabinet Office for Public Relations], *Kensatsu shinsakai seido ni kansuru yoron chōsa* [Public Opinion Poll on the PRC System] (Oct. 1990), <http://www8.cao.go.jp/survey/h02/H02-10-02-15.html> (providing results of national survey, which showed that almost 70% of respondents had no knowledge of the PRC system).

<sup>143</sup> Fukurai, *supra* note 24, at 342 (citing Press Release, Homusho [Ministry of Justice], *Daijin kakugi go kishakaiken no gaiyō* [Outline of Press Meeting by Minister] (Mar. 17, 2006), <http://warp.ndl.go.jp/info:ndljp/pid/243775/web.moj.go.jp/SPEECH/POINT/sp060317-01.html>).

<sup>144</sup> *Id.*

<sup>145</sup> TAKASHI MARUTA, SAIBAN-IN SEIDO [THE LAY ASSESSOR SYSTEM] 187 (2004).

only 3% of the entire Japanese population was even eligible for jury service.<sup>146</sup>

#### V. DISCUSSION: FUTURE STRATEGY TO PROMOTE LAY OVERSIGHT OF GOVERNMENTAL DISCRETION OF PROSECUTION

While the PRC still remains virtually unknown to the Japanese citizenry, the binding power provided by the new PRC law has the potential to transform this all-citizen review commission into a position of political prominence and to enable the commission to act as an influential legal institution. Indeed, with its binding power, the new PRC is legally-equipped with the authority, not only to review the propriety of prosecutorial discretion, but also to reverse prosecutors' non-indictment decisions involving misconduct or crimes committed by people in local communities including foreign residents. For example, the PRC in Okinawa has the potential to alter the criminal prosecution of incidents and the crimes committed by military personnel and thus, to enable the residents of Okinawa to gain legal and judicial independence, not only from the military domination of the entire island, but also from Japan's political and corporate influence.

In the past, the Japanese prosecutor was prevented from initiating the legal prosecution of military personnel and/or their dependents, due (1) to the secret intergovernmental agreement that prevented potential prosecutions of certain less serious crimes committed by military personnel; or (2) to logistical and investigative incapacities to issue an indictment that resulted from the protected custody, which the military provided to shield suspected soldiers from thorough investigations by Japanese prosecutors or police.

Aside from their inability to issue a proper indictment in military-related cases, Japanese prosecutors also have been reluctant to issue an indictment in criminal cases involving powerful Japanese politicians, their governmental allies or associates, and economic elites with deep political clout and business influence. For example, in March 2005, a citizen complaint was filed to review the non-indictment decision in an illegal political donation case against then Former Vice President of the Liberal Democratic Party, Taku Yamasaki, who stated that he received ¥50 million donation from the Japan Dentist Association (JDA) in a paper bag and kept it in his locker for a month.<sup>147</sup> Despite evidence of the false

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<sup>146</sup> *Id.*

<sup>147</sup> Reiji Yoshida, *LDP Body Accused of Hiding Donations with Faked Receipts*, JAPAN TIMES, Oct. 19, 2004, <http://search.japantimes.co.jp/cgi-bin/nn20041019a1.html>.

receipts, the JDA's director general's admission of money delivery instructions, and Yamasaki's own admission that he personally received the money, the Tokyo District Public Prosecutors Office decided in January 2005 not to prosecute Yamasaki. A complaint was filed to review the non-indictment decision in March 2005.<sup>148</sup> The Second Tokyo PRC issued an "indictment is proper" resolution in July 2005.<sup>149</sup> While the prosecutors reopened the case against Yamasaki, in less than two months they again decided not to prosecute them.<sup>150</sup>

Such prosecutorial reluctance emerged despite the fact that investigations often revealed incontrovertible evidence that individuals of high regards indeed had engaged in bribery, scandalous illegal political donations, insider trading, egregious misfeasance, bid-rigging in public construction projects, abuse of political power, or other illegal conduct and unethical behavior.<sup>151</sup> Many political and business elites were able to escape indictment because Japanese prosecutors were oftentimes forced to make politically-calculated decisions not to prosecute people of prominent social status and power. The controversial *shobun seikun* (special requests for instructions on prosecutorial steps to be taken) system of responsibility within the Japanese prosecutor's office, for example, has led to the dismissal of many political cases or from the termination of further investigation. Karel von Wolferen, who wrote *The Enigma of Japanese Powers*, once stated, "Individual prosecutors ... are expected, before taking action against influential officials, ministers, Diet members or local government leaders, to write preliminary reports for their supervisors all the way up to the ministry of justice, and to wait for their consent."<sup>152</sup> The interconnected networks of the bureaucratic decision-making process within the Japanese government often result in the outright dismissal of the criminal charges or circumvention of the periphery of legal definitions

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<sup>148</sup> *Inquest Panel Says LDP's Yamasaki Deserves Indictment*, JAPAN ECON. NEWSWIRE, July 27, 2005.

<sup>149</sup> *Id.*

<sup>150</sup> Tsutomu Nanbara & Atsuko Kobayashi, *Revised Prosecution Law Reflects Public Sentiments*, DAILY YOMIURI, June 4, 2009, at 4 (reviewing the non-indictment decision by the prosecution against Taku Yamasaki, stating that "[i]n connection with the dubious political donations involving former LDP Vice President Taku Yamasaki and the JDF, the committee decided in favor of indictment" but that "the prosecution did not alter its decision not to prosecute").

<sup>151</sup> *Id.*; see also DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 130-32 (2002) (observing the Japanese prosecutor's use of the "kessai" system that requires Japanese prosecutors to seek consultation and approval from their superiors in "managing and coordinating" the prosecution of criminal defendants of "high profile cases"); KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWERS* 224-25 (1990) (observing that many political corruption cases in Japan were dismissed by the Japanese prosecutors).

<sup>152</sup> Van Wolferen, *supra* note 151, at 223-24.

to ensure that prosecutorial axes were laid on insignificant issues or less-important activities.

In many politically charged cases, it takes well-organized civic efforts from outside the political and business establishment to force prosecutors to issue indictments against political heavyweights. However, there is a new and different strategy available against prosecutorial "non-action," illustrated in the following example.

A. *Misfeasance Allegation Against Political Heavyweights*<sup>153</sup>

Many public school teachers in Tokyo have been recently dismissed by Governor Shintaro Ishihara and his officers because they refused to salute the flag of the rising sun and sing the national anthem at graduation and enrollment ceremonies.<sup>154</sup> Governor Ishihara remains a famous celebrity in Japanese politics. His deceased brother was a pop icon for many decades and Ishihara is known to use his connections in the media industry and influential political circles to advance his conservative political agenda and pro-business economic policies.<sup>155</sup> Many school teachers decided to protest the top-down, politically motivated directive to stand up and face the flag and sing the national anthem, despite the punishment that Governor Ishihara had authorized the Tokyo Metropolitan Board of Education to impose. In 2004, 243 teachers were punished for their disobedience<sup>156</sup> and by March 2009, 422 schoolteachers have been either fired or punished for their disobedience.<sup>157</sup>

Many dismissed teachers, their families, and their lawyers organized to form a political alliance and decided to file an official complaint with the prosecutor's office in 2004 against Governor Ishihara and his superintendents who sit on the Tokyo Metropolitan Board of

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<sup>153</sup> The incident discussed in this Part was mentioned briefly in my earlier paper. Fukurai, *supra* note 24, 329-30. I again summarize the key facts here.

<sup>154</sup> *Tokyo Teachers to Sue Education Board over Compulsory Anthem Singing*, JAPAN ECONOMIC NEWSWIRE, Jan. 24, 2004.

<sup>155</sup> See, e.g., *Ishihara gundan Ishinomaki de otoko no takidashi* [*Ishihara Promotions and the Emergency Kitchen at Ishinomaki*], SPORTS HOCHI (Apr. 15, 2011), <http://hochi.yomiuri.co.jp/entertainment/news/20110415-OHT1T00006.htm> (indicating many prominent actors such as Tetsuya Watari, Hiroshi Tachi, and Masaki Kanda in the Ishihara Promotions all worked with Yujiro Ishihara and supported his brother Shintaro Ishihara in his political campaigns).

<sup>156</sup> Norimitsu Onishi, *Tokyo's Flag Law: Proud Patriotism, or Indoctrination?* N.Y. TIMES, Dec. 16, 2004, at A1.

<sup>157</sup> HIKAIKOSHA NO KAI, KIMIGAYO KYŌSEI KAICO SAIBAN KEIKA [THE PROGRESS OF THE LAWSUITS ARISING FROM FIRINGS RELATED TO THE FORCED SINGING OF THE NATIONAL ANTHEM] (Mar. 31, 2009), <http://www.ne.jp/asahi/office/takeda/kimigayo-saiban.html>.

Education.<sup>158</sup> However, the teachers' demand for accountability was met with great resistance. The teachers had to submit their complaints five times until prosecutors finally agreed to meet them and hear their grievance and complaints, despite the dictates of applicable criminal procedure. Section 241(2) of Japan's Criminal Code of Procedure specifically requires that when a complaint or an accusation is made orally, a police officer or public prosecutor is required to make a written statement of such a complaint.<sup>159</sup> More importantly, Section 242 of the criminal code does not permit prosecutors to refuse a complaint and thereby requires a criminal investigation and the announcement of results.<sup>160</sup>

On December 28, 2005, after investigative deliberation, the prosecutor announced the decision not to indict, so in February 2006, the dismissed teachers filed a complaint with the PRC in Tokyo.<sup>161</sup> The Tokyo PRC deliberated the complaint and finally decided in November 2006 that the original non-indictment decision was proper, but also issued a rebuke against Ishihara and his subordinates, suggesting their actions were "heavy handed."<sup>162</sup> Meanwhile, in another civil case filed by the dismissed teachers, on September 21, 2006, the Tokyo District Court ordered the Tokyo Metropolitan Government to compensate the teachers because Ishihara's government, under the directive of the Tokyo Board of Education, unfairly punished them.<sup>163</sup>

Despite the commission's exculpatory decision on the misfeasance allegation of political elites and governmental heavyweights, the above case clearly demonstrated that the PRC has the legal authority to play a significant role in politically sensitive cases involving possible governmental misconduct and the abuse of power by public officials. The

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<sup>158</sup> *Japanese Teachers Bring Legal Action Against Governor over Flag, Anthem*, AGENCE FRANCE PRESSE, Dec. 20, 2004.

<sup>159</sup> KEIJI SOSHŌHŌ [C. CRIM. PRO.] art. 241(2) ("A public prosecutor or judicial police official shall make a written statement when they have received an oral complaint or accusation.").

<sup>160</sup> *Id.* art. 242 ("A judicial police officer shall, when they have received a complaint or accusation, send the document and articles of evidence regarding the complaint or the accusation to a public prosecutor immediately.").

<sup>161</sup> Noboru Ashizawa, *Hinomaru, kimigayo no kyōsei wa yurusanai* [No Compulsion Regarding Japan's National Flag and National Anthem], JAPAN ALTERNATIVE NEWS FOR JUSTICES AND NEW CULTURES (Feb. 28, 2006), <http://www.janjan.jp/government/0602/0602269930/1.php>.

<sup>162</sup> *Kokkikokka de "fukiso wa sōtō" giketsu: "Komuin no shokumu suikō wo" to kensatsu shinsakai* [On Issues of Rising-sun Flag and National Anthem, 'Non-Indictment is Proper,' Focus on the Prosecution of Duties, According to the PRC Decision], SEESAA BLOG, Dec. 12, 2006, <http://mondlicht.seesaa.net/article/30078288.html>.

<sup>163</sup> *City Hall to Appeal 'Kimigayo' Ruling*, JAPAN TIMES, Sept. 23, 2006, <http://search.japantimes.co.jp/cgi-bin/nn20060923a2.html>.



PRC will have an equally powerful impact on the critical evaluation of prosecutors' non-indictment decisions involving allegedly criminal activities of military personnel and their dependents in Okinawa.

*B. Indictment of Military Personnel and Their Dependents*

For cases of criminal negligence or misconduct by military personnel in Okinawa, the local PRC can critically examine the non-indictment decisions by the prosecution. In Okinawa Prefecture, there are three prosecutorial review commissions located on three separate islands: (1) the Naha PRC in Naha City, Okinawa's capital city; (2) the Hirara PRC in the Island of Miyako; and (3) the Ishigaki PRC in the Island of Ishigaki.<sup>164</sup> As the major American military bases are established and operated on the island of Okinawa, the PRC in Naha City is the primary recipient of citizens' complaints and grievances concerning criminal conduct of military personnel in Okinawa.

Okinawa hosts thirty-seven of the eighty-eight American military bases in Japan, covering a total area of 233 square kilometers and representing 75% of the territory occupied by U.S. military facilities in Japan.<sup>165</sup> This is despite the fact that Okinawa represents less than 1% of Japan's total land area. The highly concentrated placement of the American military establishment in Okinawa has historically created a multitude of social and legal problems, including the proliferation of crimes committed by military personnel. Indeed Okinawa residents have witnessed a long history of foreign soldiers, and their families stationed in the island, victimizing the local community. The U.S.–Japanese Status of Forces Agreement (SOFA) nonetheless effectively shielded military felons from extraterritorial application of U.S. law, thereby effectively sidestepping Japanese law.<sup>166</sup>

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<sup>164</sup> *List of All Prosecutorial Review Commissions in Japan*, *supra* note 76.

<sup>165</sup> *Okinawa: Effects of Long-Term US Military Presence: History of U.S. Military Presence*, OKINAWA WOMEN ACT AGAINST MILITARY VIOLENCE, 1 (2007), <http://www.genuinesecurity.org/partners/report/Okinawa.pdf> (“Seventy-five percent of the U.S. military facilities in Japan are located in Okinawa, although Okinawa is only 0.6% of the land area of Japan.”).

<sup>166</sup> CHALMERS JOHNSON, *NEMESIS: THE LAST DAYS OF THE AMERICAN EMPIRE 180-81* (2006) (“All servicemen in Okinawa know that if, after committing a rape, robbery, or assault, they can make it back to base, they will remain in American custody until indicted even if the Japanese execute a warrant for their capture.”); *New Okinawa Hit-and-Run Strains U.S.-Japan Alliance*, ANPO (Nov. 22, 2009), <http://anpomovie.com/en/?m=200911> (“[T]he SOFA unfairly protects U.S. service personnel from the consequences of their behavior.”).

The new PRC offers the potential to ensure that military personnel who commit heinous crimes against Okinawans will be fairly indicted and prosecuted.<sup>167</sup> After the Japanese prosecutors decide not to take action against American soldiers, individual citizens can initiate an indictment by submitting a complaint or accusatory claim to a police officer or a prosecutor in Okinawa. As stated earlier, Section 242 of the Japanese Criminal Code of Procedure requires that, upon receipt of a complaint or accusation, a judicial police report is required to forward promptly the documents and related evidence to the attention of the prosecutor.<sup>168</sup> Similarly, Section 260 requires that, once the prosecutor has made the non-prosecution decision, the prosecutor must promptly notify the person who filed the original complaint.<sup>169</sup> Section 261 also specifies that the prosecutor must promptly notify the reason for the non-indictment to the individual or party who filed the original complaint or accusation of the reason for the non-indictment decision.<sup>170</sup>

When the original complainant decides to pursue the case, he or she then may submit a citizen's complaint of prosecutors' non-indictment decision to the PRC. A judicial panel comprised of local residents chosen at random from the local community is then empowered to examine the merit of the complaint, summon witnesses if necessary, and deliberate on the prosecutor's non-indictment decision.

If the PRC's second decision recommends indictment of military personnel, the Japanese government must begin the criminal prosecution of alleged American soldiers. Of course, the alleged crime committed by military personnel must be legally classified as heinous or of material significance, in order to support the adjudication of the lay assessor panel.

Once an American soldier is indicted, the soldier will face a lay assessor trial, regardless of whether or not there has been an admission of

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<sup>167</sup> The PRC will have the potential to influence the prosecutorial decisions despite the recent discovery of the secret Status of Forces Agreement (SOFA) that has been signed between the Japanese and American governments. Japanese historian Shoji Niihara discovered the 1957 secret agreement between both governments, in which the Japanese government renounced the jurisdiction over certain criminal offenses committed by military personnel. According to Niihara, such a bilateral agreement forced the Japanese prosecutors from making indictment decisions in many serious crimes committed by U.S. servicemen in the past.

<sup>168</sup> KEIJIJOSHOŌHŌ [C.CRIM. PRO.] art. 242.

<sup>169</sup> *Id.* art. 260 ("When a public prosecutor has instituted prosecution or made a disposition not to institute prosecution regarding a case with respect to which a complaint, accusation or claim has been filed, the public prosecutor shall notify the person who filed the complaint, accusation or claim promptly.").

<sup>170</sup> *Id.* art. 261 ("If, in a case with respect to which complaint, accusation or demand has been lodged, or disposition not to institute a public action has been made, a public prosecutor shall, upon request, of the complainant, accuser or person who made the demand, promptly inform them of the reasons therefore.").

guilt. In either case, the lay assessor panel with a differing number of professional and lay judges will adjudicate the crime. If the soldier pleads not guilty, the judicial panel of three professional and six lay judges will listen to witnesses, examine material or forensic evidence presented by counsel, and evaluate any other relevant material or evidence pertinent to the case. If the defendant pleads guilty to criminal charges, a panel of one professional and three lay judges will then evaluate the evidence in the case and determine the severity of the sentence.

In addition to the possible indictment of American soldiers, the PRC can also play an equally powerful role in evaluating the involvement of the American military headquarters in Okinawa and Japanese governmental policies and joint military projects. Such governmental endeavors include the construction of new installations and defense facilities on Okinawa Island, as well as military practices and exercises that caused health hazards and physical harm resulting in injuries to, and even deaths of, local residents.

### C. *Okinawa and Environmental Devastation*

U.S. military bases and defense installations worldwide have caused significant environmental damage and pollution to nearby areas and surrounding regions.<sup>171</sup> Okinawa remains no exception to the harmful environmental effects of the military presence and routine exercises by the armed units of the American forces on the island. In 1947, base pollutions in Iheya led to the death of eight people from arsenic poisoning.<sup>172</sup> Even after the reversion of Okinawa to Japan in 1972, oil and fuel spills continued to cause significant environmental damages near American bases.<sup>173</sup> Today, local residents learn of pollution and releases of harmful substances, only after the damages spill to the area that transcends the

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<sup>171</sup> See generally JUDY EHLEN & RUSSELL S. HARMON, *THE ENVIRONMENTAL LEGACY OF MILITARY OPERATIONS* (2001). Cf. Aaron Schwabach, *Environmental Damage Resulting from the NATO Military Action in Yugoslavia*, 25 COLUMBIA J. ENVTL. L. 117, 118-19 (2000) (detailing environmental damage caused by NATO's bombing campaign of Yugoslavia).

<sup>172</sup> Hayashi Kiminori et al., *Overcoming American Military Base Pollution in Asia: Japan, Okinawa, Philippines*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS, <http://www.japanfocus.org/-Hayashi-Kiminori/3185> (last visited Feb. 23, 2011).

<sup>173</sup> *Id.*; see also JOHNSON, *supra* note 166, at 173 (observing that the pollution was committed without fear of liability because Article 6 of Japan and South Korea SOFAs "is a typical and often deeply resented aspect of U.S. SOFAs and an invitation to the U.S. military to pollute in any way it wants without fear of accountability"); *Today's U.S. Military Bases in Okinawa*, OKINAWA SUMMIT 2000 ARCHIVES, [http://www.pref.okinawa.jp/summit/a\\_la/peace/beigun/index2.htm](http://www.pref.okinawa.jp/summit/a_la/peace/beigun/index2.htm) (last visited Apr. 24, 2011) (describing "[e]nvironmental pollution caused by red soil erosion and oil spills from military bases").

boundary of military bases and into immediate surroundings. At Kadena Air Base, the large jet fuel spill on May 25, 2007, which lasted for four days, provides a recent example of the massive environmental and ecological damages nearby residential areas and districts.<sup>174</sup>

Serious environmental pollution and damage still linger at the former military bases areas that have been returned to Okinawa by the U.S. military.<sup>175</sup> The former U.S. Communication Station at Onna Point, which was returned to the Japanese government in November 1995, was found to have an extremely high level of toxic substances, such as polychlorinated biphenyl (PCB), cadmium, mercury, lead, and arsenic.<sup>176</sup>

Numerous U.S. armed forces in the Fukuchi Dam's reservoir have polluted the water as a result of river crossing exercise, and thereby, threatened the daily activities of the majority of local residents on the island. The Fukuchi dam provides water to the 1.2 million residents of the island. Recent investigations have found that the water has been polluted by grenades, flares, and hundreds of paintballs used by American military personnel in training exercises.<sup>177</sup> In 1997, the U.S. Marines also admitted to using depleted uranium munitions on the islands west of Kume Island in violation of the bilateral agreement on the Law for the Regulation of Nuclear Power in Japan.<sup>178</sup>

Despite massive pollutants left behind by old military installations and significant environmental damages caused by training exercises of the U.S. military, the American government remains immune from potential prosecution or even the required restorative process necessary to remedy the environmental devastation. Article VI of SOFA indicates that the U.S. military does not bear any responsibility for repairing or restoring any damage to the environment, specifying that "[t]he United States is not obliged . . . to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration."<sup>179</sup> This SOFA provision unilaterally allows the U.S. military to damage with impunity

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<sup>174</sup> *Id.*

<sup>175</sup> *Id.*

<sup>176</sup> EXEC. OFFICE OF THE GOVERNOR, OKINAWA PREFECTURAL GOV'T, U.S. MILITARY ISSUES IN OKINAWA (2004), available at [http://www3.pref.okinawa.jp/site/contents/attach/7005/pamphlet\(English\).pdf](http://www3.pref.okinawa.jp/site/contents/attach/7005/pamphlet(English).pdf).

<sup>177</sup> *Okinawa Dams Checked for Dangerous Objects*, WEEKLY JAPAN UPDATE (Jan. 19 2007), <http://www.japanupdate.com/?id=7335>.

<sup>178</sup> Ui Jun, *U.S. Military Bases and Environmental Problems*, THE ASIA-PACIFIC JOURNAL: JAPAN FOCUS, [http://www.japanfocus.org/\\_Ui\\_Jun-U\\_S\\_Military\\_Bases\\_and\\_Environmental\\_Problems/](http://www.japanfocus.org/_Ui_Jun-U_S_Military_Bases_and_Environmental_Problems/) (last visited Feb. 23, 2011).

<sup>179</sup> Agreement Under Article VI of the Treaty of Mutual Cooperation and Security: Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.-Japan, art. IV, ¶ 1, Jan. 19, 1960, 11 U.S.T. 1652.

the natural environment, natural resources, and delicate tropical ecosystems of the islands.

The new proposed construction of an offshore U.S. military base off the coast of a small fishing village of Henoko also endangers a unique subtropical ecosystem and the biologically diverse marine life around the island of Okinawa. In 1996, the American government agreed to close the much criticized Futenma Marine Corps Air Station which was located in the middle of very dense residential areas in the city of Ginowan. The presence of the marine airfield has posed a health hazard and safety concern to local residents for decades. The American government has insisted that its closure had to be contingent upon its relocation to Henoko in northern Okinawa.<sup>180</sup>

Henoko is located in Nago City, which is the home of the old Marine Corps base of Camp Schwab. A new, sea-based airfield facility will be constructed, including a 2,500 meter runway built on a coral reef, thereby eliminating potential protests from nearby residents over the danger of serious accidents and noises.<sup>181</sup> Henoko's surrounding reef has been home to an endangered dugong classified in the Washington Convention for International Trade in Endangered Species (CITES), which requires a dugong and its habitat to be handled under the strictest of regulations.<sup>182</sup>

After the Japanese government agreed to pay for the construction of the new airfield and began to create seabed drilling platforms over the coral reefs, nearly thirty thousand Okinawans and supporters from other Japanese prefectures and international environmental groups including Greenpeace engaged in a sit-in that temporarily halted logistical work prior to the full-scale construction process. Some civic activists in diving suits tried to prevent the underwater construction by acting as a barricade to government divers and contractors hired by the state. In April 2004, under the authority given by Naha Defense Facilities Administration Bureau (NDFAB) under the Japan Defense Facility Administration Agency (DFAA), the governmental agency and local companies subcontracted by the DFAA continued to conduct extensive drilling surveys of the military construction site, prior to the environmental assessment required by Japanese law.

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<sup>180</sup> David Allen & Chiyomi Sumida, 'It's Done,' *Rumsfeld Says of Troops Realignment Agreement for Okinawa*, STARS AND STRIPES (Nov. 5, 2005), <http://www.stripes.com/news/it-s-done-rumsfeld-says-of-troop-realignment-agreement-for-okinawa-1.40607>.

<sup>181</sup> *Id.*

<sup>182</sup> *Joint Declaration to Save the Dugong and Protect Yambaru Against Construction of an Offshore US Military Base and Inland Helipads*, ASS'N TO PROTECT THE NORTHERNMOST DUGONG (Jan. 2000), <http://sea-dugong.org/english/main/joint.html>.

An underwater battle began. During the massive protest, a group of Okinawan activists and civic groups decided to physically prevent governmental drilling activities and underwater surveys. On numerous occasions off the bay of Henoko, underwater activists were physically assaulted by Japanese Self Defense Force divers. Reverend Natsume Taira, one of the active protesters who tried to block the underwater environmental survey, was attacked and assaulted by Japanese Self Defense Force (JSDF) divers who turned off the oxygen valve on his scuba air tank, causing him to nearly drown. JSDF divers and contracted divers also attacked other protesting divers by with hammers, kicking them, and pulling off their masks.<sup>183</sup>

The newly installed power of the PRC resolution can offer a radically different strategy to protest and prevent this joint state-corporate project, which is perceived as detrimental to the social and political interests of Henoko's local residents and other areas in Okinawa.<sup>184</sup> For instance, civic activists and Okinawa residents, including protesting divers, can take full advantage of the PRC's authority to review a prosecutor's decision and therefore, feel empowered to file complaints with the local Prosecutors Office and to allege criminal behavior and felonious activities by JSDF divers and contracted divers who were privately hired to conduct an environmental assessment, and the private firms contracted by the government to assist in a drilling survey of the coral reef. After a group of activists files a complaint or accusation of criminal conduct with local police officers or prosecutors, a prosecutor is required to make a written statement of such a complaint or accusation, investigate the alleged misconduct, and determine whether to file charges against the divers and workers hired by governmental agencies and contractors.

If a politically motivated prosecutor rejects such arguments and returns a non-indictment decision, the citizen's complaint may be submitted to the PRC for reconsideration of the non-prosecution decision. The PRC must then call for a hearing and summon witnesses, including civic activists who participated in the protest, private and JSDF divers who allegedly attacked protesting civic divers, government officers who issued environmental surveys, and contractors who hired private divers.

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<sup>183</sup> Chris Salzberg, *Japan: Protester Nearly Killed at Henoko Bay*, GLOBAL VOICES (July 29, 2007), <http://globalvoicesonline.org/2007/07/29/japan-protester-nearly-killed-at-henoko-bay/>.

<sup>184</sup> The conflict between Okinawan residents and both the Japanese and U.S. governments stems from a 1996 bilateral governmental decision to replace the existing Futenma U.S. military base with a sea-based facility off the east coast of Henoko in Okinawa. See MINISTRY OF FOREIGN AFFAIRS OF JAPAN, THE SACO FINAL REPORT ON FUTENMA AIR STATION (AN INTEGRAL PART OF THE SACO REPORT) (1996), available at <http://www.mofa.go.jp/region/n-america/us/security/96saco2.html>.

The PRC can also question prosecutors and ask them for any additional evidence or information relevant to the case if necessary. A judicial panel of eleven Okinawa residents chosen at random from the local community can then determine whether or not the prosecutors' exercise of discretion in decision not to indict was a proper decision for the given case. If the commission determines twice that the prosecution of the accused is proper, the commission's resolution becomes legally binding and forces the prosecutors to reverse the previous non-indictment decision. The second recommendation also forces the prosecution to begin a formal criminal prosecution against both government and private divers and other relevant agencies, including private firms that provided logistical assistance to underwater environmental surveys. In the case of a forced indictment, Japanese prosecutors are required to work collaboratively with court-appointed lawyers in their supplementary investigations. Based on materials and information collected from investigation, the lay assessors can then try a suspected party that is indicted under the forced indictment system and make a final determination on the criminal charges in question.

It may be a long, arduous path protecting Okinawans and the environment—but the PRC provides an effective legal avenue to challenge joint state-corporate efforts that may harm Okinawans' interests.

*D. Potential Problems of the PRC's Power to Review Alleged Military Crimes*

There are two major obstacles to the PRC's ability to review and reverse a prosecutorial decision involving military personnel and their dependents. The first barrier is a recent phenomenon of judicial police officers or the public prosecutor ignoring, or even rejecting, an accusation or complaint filed by citizens. Even if the complaint or accusation were accepted, public officers have been accused of abuse: altering the content of the complaint to make it less significant, deliberately deciding not to act upon it, refusing to write a formal complaint to submit to their superiors, or requesting the original party to withdraw their complaint.<sup>185</sup> Citizens recently complained about the large number of neglected or ignored complaints and accusations by Japanese prosecutors and police officers. The following case illustrates one such incident.

In October 1999, twenty-one year old Japanese female college student Shiori Ino was murdered by the accomplice of her ex-boyfriend Kazuhiko Komatsu, a twenty-six year old who had a long history of

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<sup>185</sup> *Police Chief Reprimanded Over Stalking Death Conduct*, JAPAN TIMES, Mar. 21, 2003, <http://search.japantimes.co.jp/cgi-bin/nn20030321b4.html>; *Three Ex-Cops Sentenced for Avoiding Stalker Case*, JAPAN TIMES, Sept. 8, 2000, <http://search.japantimes.co.jp/cgi-bin/nn20000908a5.html>.

stalking Ino.<sup>186</sup> Her murder exposed a series of neglected duties and obligations by the Saitama prefectural police, which, long before her murder, received multiple complaints that Komatsu was stalking Ino and her family.<sup>187</sup>

Ino was followed for ten months and implored the Saitama police to look into her case, stating that her boyfriend was constantly stalking her after their break-up and that his friends distributed hundreds of handouts defaming her. In July 1999, Ino finally decided to make a formal criminal complaint against the police for failing to look into the stalking and harassment allegations. However, the police refused to act on the complaint and falsified an official report to make it look as if no official complaint had ever been filed.<sup>188</sup> Furthermore, after receiving the complaint, officers at Ageo Police Station in Saitama Prefecture wrote a final report stating Ino was merely being harassed, and thus, neglected to do the extra work to draft a formal complaint to be submitted to their superiors.<sup>189</sup> An internal investigation also substantiated that three police officers altered Ino's criminal complaint so they would not have to pursue the case.<sup>190</sup>

Ino's murder added momentum to the movement to enact an anti-stalking law, which finally took effect in November 2000.<sup>191</sup> Nevertheless, the dereliction of duties by public police officers is still very common. In 2005, JFBA surveyed trial lawyers about the dereliction of duties and obligations by police and prosecutors. More than two-thirds of lawyers (70%) reported that police have refused to accept a complaint filed on behalf of their clients.<sup>192</sup> An organized effort is necessary to ensure that police officers and prosecutors will properly review the content of a complaint filed by individual citizens.

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<sup>186</sup> Yumi Wijers-Hasegawa, *Kin of Stalking Victim Seek Justice: Parents Want Link Between Murder, Police Inaction Noted*, JAPAN TIMES, June 12, 2003, <http://search.japantimes.co.jp/cgi-bin/nn20030612a2.html>; *Victim Snubbed by Police: Ringleader in Coed Slaying Gets Life Term*, JAPAN TIMES, Dec. 26, 2003, <http://search.japantimes.co.jp/cgi-bin/nn20031226a2.html>.

<sup>187</sup> See Wijers-Hasegawa, *supra* note 187 ("After Ino filed a formal complaint, officers at Ageo Police Station in Saitama Prefecture wrote a report that she was merely being harassed so they could avoid the extra work involved in submitting a formal complaint to their superiors. Three officers have been convicted for falsifying the report.")

<sup>188</sup> *Id.*

<sup>189</sup> *Id.*

<sup>190</sup> Kenichi Ino, *Cops Sentenced for Ignoring Pleas*, ASSOCIATED PRESS, Sept. 7, 2000.

<sup>191</sup> See *Case Sparked Anti Stalking Law: Two Get Long Sentences for '99 Slaying*, JAPAN TIMES, July 18, 2001, <http://search.japantimes.co.jp/cgi-bin/nn20010718a5.html> ("Partly as a result of the killing of Ino, the antistalking [sic] law took effect last November.")

<sup>192</sup> *Bengoshi no 53% ga Fuman: Keisatsu no Kokuso eno taio [53% of Lawyers Dissatisfied by the Police Treatment of Complaints]*, CHUNICHI SHIMBUN, May 15, 2006, <http://www6.big.or.jp/~beyond/akutoku/news/2006/0514-27.html>.



The second barrier involves uncertainty with respect to how a Japanese prosecutor's initial decision not to indict an American suspect should be interpreted within the framework of existing intergovernmental agreements, including the SOFA and other intergovernmental protocols, some of which still remain unearthed but may have the potential to exert significant impact on the interpretation of the proper legal status of American military personnel in a Japanese criminal proceeding.

Given the uncertain legal status of American military personnel, a battle on the legal terrain may follow. The American government may insist that the original non-indictment decision by the prosecutors' office should be interpreted as the Japanese government's decision to forfeit the further prosecution of military personnel, thereby nullifying the legality of the PRC's subsequent recommendation for prosecution. The Japanese government, on the other hand, may insist that the American government must respect the Japanese judicial system and legal culture, including the new PRC law and the legally binding status of individual citizens' collective decision to indict and prosecute military personnel.

In either case, legal and political contestation over the interpretive boundaries of applicable American and Japanese laws in determining the proper legal status of American military felons should be welcomed and further facilitated. These debates tend to expose the unequal balance of power embodied in intergovernmental agreements and the legal inequities that are part of the unilateral imposition of extra-territoriality, which operated to undercut local law and jurisdiction. Given the long history of Okinawan residents' victimization by the hands of American military personnel and their dependents and the failure of the American military to punish them properly, the PRC's legally binding recommendation helps create a public forum. At question are the equity of intergovernmental agreements on the special immunities and unilateral exemption from local prosecutorial processes, police interference, and/or other measures of legal constraint. The public debate over the jurisdictional inequalities may also force the American and Japanese governments to hold discussions on the redeployment of military personnel and the reconstitution of military facilities within Japan.

## VI. CONCLUSION

Japan has had a dark history when it comes to the prosecution of political elites, government officials, and business executives with deep connection to political circles. A civic panel of eleven residents in Hyogo Prefecture decided to break this mold and prosecute a deputy police chief under the enforced indictment system of the new PRC Law, which took effect in May 2009. The prosecution of the deputy police chief was

followed by the PRC's second indictment against three past presidents of the powerful Japan Railway company. In both cases, Japanese public prosecutors repeatedly decided not to indict political and economic elites, despite a public outcry and strong popular demands for their prosecution. Finally, civic complaint by victims and their families to the PRC initiated a public hearing, and the PRC was able to review the incidents and issue the indictments in both cases.

This Article proposes new strategies for the PRC to function as an effective oversight institution for governmental decisions and activities in Japan. Today's PRC, which possesses legally binding power in its deliberative decision, can also offer the great potential to ensure that military personnel and Japanese government officials who commit nefarious crimes against ordinary citizens will be fairly indicted and duly prosecuted. After prosecutors decide not to prosecute military personnel, a local complaint to the PRC against the non-prosecution decision can initiate an inquiry process and allow a citizens' panel to review, challenge, and possibly reverse the prosecutors' decision. The PRC's legally binding resolution has also become an important channel through which ordinary people's moral sentiments—their sense of justice, fairness, and accountability—can be expressed, articulated, and reflected in the deliberation of criminal cases.