

April 2011

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### Recommended Citation

Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 Chi.-Kent L. Rev. 789 (2011).

Available at: <https://scholarship.kentlaw.iit.edu/cklawreview/vol86/iss2/12>

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# JAPAN'S QUASI-JURY AND GRAND JURY SYSTEMS AS DELIBERATIVE AGENTS OF SOCIAL CHANGE: DE-COLONIAL STRATEGIES AND DELIBERATIVE PARTICIPATORY DEMOCRACY

HIROSHI FUKURAI\*

## INTRODUCTION

May 21, 2009 signaled the beginning of Japan's paradigmatic shift in its effort to democratize its judicial institutions. The Japanese government finally introduced two significant judicial institutions, i.e., the Quasi-Jury (Saiban-in) and the new Grand Jury (Kensatsu Shinsakai or Prosecutorial Review Commission (PRC)) systems.<sup>1</sup> Establishing these twin judicial bodies of lay adjudication helped broaden the institution of decision-making in criminal matters to include a representative panel of Japanese citizens chosen at random from local communities.<sup>2</sup>

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1. Editorial, *Keeping an Eye on Prosecution*, JAPAN TIMES ONLINE (May 19, 2009), <http://search.japantimes.co.jp/cgi-bin/ed20090519a1.html>; *Lay Judge System to Start Amid Uncertainties, Concerns*, JAPAN TIMES ONLINE (May 21, 2009), <http://search.japantimes.co.jp/cgi-bin/n20090521b1.html>. "Saiban-in seido" is translated as the "lay assessor" or "mixed court" system. The more appropriate translation is the "quasi-jury" system, which will be used here. See Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J., 233, 233 (2005) (discussing the difficulties in translating the Act).

2. "Kensatsu Shinsakai" is translated as the "prosecution review commission" or "committee for the inquest of prosecution." The more literal translation is the "prosecutorial review commission" system, which will be used here. See Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935, 965 (2004).

One immediate impact of the implementation of the twin systems of lay adjudication appeared when the first ever trial of an American military serviceman by a Japanese lay judge panel took place in Okinawa, Japan, soon followed by the conviction and incarceration of the soldier in a Japanese prison.<sup>3</sup> Historically, American military personnel were legally protected under the U.S.–Japan Status of Forces Agreement (SOFA) and the extra-territorial application of domestic law for members of the U.S. Armed Forces and their dependents stationed in Japan.<sup>4</sup> The introduction of the quasi-jury trial has dramatically shifted its scope of application by empowering local residents to adjudicate, in their own communities, serious crimes committed by American military personnel.

Another collateral impact of lay adjudication occurred when the PRC indicted Japan's most influential political powerbroker. Following the Japanese prosecutor's decision not to indict the politician, a civic complaint was filed against the non-prosecution decision, leading to the PRC's investigation of the alleged violation of the election contribution law and the subsequent decision to prosecute him.<sup>5</sup>

Japan's powerful politicians and economic elites have long been protected under the mantle of the government's bureaucratic network. In the past, the controversial system of "shobun seikun" (special request for instructions on prosecutorial steps to be taken) has led to many prominent political cases being dismissed or ignored from further investigation by the prosecutor's office.<sup>6</sup> According to this prosecutorial mandate, prior to initiating any prosecutorial action against influential officers or individuals such as parliament members, local government leaders, and powerful economic elites, Japan's individual prosecutors must complete preliminary reports for their supervisors all the way up to the Ministry of Justice and then wait for the supervisor's consent and further instruction.<sup>7</sup> The newly established system of civic oversight has now circumvented the government's prosecutorial process and authorized the direct, enforced prosecution of illegal activities of those among the political elite by deliberative decisions made by a civic panel of randomly chosen citizens.

3. *BeiheiniChoeki 3-4 Nen: Takushi Goto Naha Chiken Hanketsu [3-4 Year Prison Sentence to American Soldier: Taxi Robbery Ruling at Naha District Court]*, OKINAWA TIMES, May 28, 2010, [http://www.okinawatimes.co.jp/article/2010-05-28\\_6836/](http://www.okinawatimes.co.jp/article/2010-05-28_6836/) [hereinafter *Taxi Robbery Ruling*].

4. See generally Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Regarding Facilities and Areas and the Status of United States Armed Forces in Japan, U.S.–Japan, Jan. 19, 1960, 11 U.S.T. 1652.

5. Alex Martin & Setsuko Kamiya, *Ozawa Inquest Panel Rules for Indictment*, JAPAN TIMES ONLINE (Oct. 5, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101005a1.html>.

6. KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWER* 224 (1990).

7. *Id.* at 221–24.

The introduction of these two lay justice institutions—the quasi-jury and grand jury (or PRC) systems—thereby has established alternative prosecutorial venues to bring about both the indictment and lay adjudication of alleged crimes committed by those who have been formerly classified as political “untouchables.” The impact of the introduction of these twin systems has created deliberative space infusing widely held public sentiments and collective judgments in evaluating the prosecution and adjudication of individuals whose actions are considered detrimental to the interests of the general citizenry.

This paper presents a critical examination of the evolution of Japan’s twin systems of lay participation in legal decision-making and explores the potential utility of the twin systems to create and establish an effective deterrent and investigative mechanism against governmental abuse of power. Part I of this paper examines the two recent “Mogadishu-type” moments of civic insurrection through Japan’s transformative adoption of two lay judge systems, namely: (1) lay adjudication in criminal cases, exemplified by that of an American soldier in a quasi-jury trial on the Island of Okinawa; and (2) the forced prosecution of Ichiro Ozawa, former President of the Democratic Party of Japan (DPJ), by the new grand jury commission in Tokyo.

Part II examines the historical evolution of these twin systems of popular adjudication in Japan. Part III reviews the first year performance of the lay judge system, examining conviction rates, the types of crimes adjudicated, and quasi-juror representative disparities, if any, and their responses to deliberative experiences. This analytical evaluation primarily focuses on the quasi-jury system and its deliberative performance and Japanese citizens’ experience in criminal courts. Lastly, Part IV provides a list of suggestions and recommendations to improve the performance of both quasi-jury and grand jury systems. Our purpose, then, is not simply to evaluate the present state of the juridical system in Japan, but also to change and transform it in the interest of civil society.

## I. COLLATERAL IMPACTS OF INTRODUCING TWIN SYSTEMS OF LAY ADJUDICATION: PROSECUTION OF FORMERLY “UNTOUCHABLES”

### A. *Jonathan Kim and the Quasi-Jury Trial in Okinawa, Japan*

Jonathan Kim was born in 1990 to Korean parents who decided to leave South Korea and move to America.<sup>8</sup> Nearly eighteen years later, Kim joined the U.S. Marines, became an American private first class, and was later dispatched to Camp Kinser, one of thirty-seven American military bases on the Island of Okinawa, Japan.<sup>9</sup> He was assigned as a “keeper” at a military warehouse of the base camp.<sup>10</sup> Despite his dreary assignment, this Korean-American sought to advance his military career by becoming an exclusive member of the special armed forces, ultimately to be assigned to the Marine Corps' Special Operations duties.<sup>11</sup>

In order to expedite his effort to join the special operation team, he trained rigorously; he got up early every morning and went through rigorous physical exercises and Special Forces training before reporting to the warehouse.<sup>12</sup> He openly stated his military aspirations to his superiors and asked for special operation duties in his future assignments. On August 1, in downtown Naha, in order to prove his ability and impress his superiors, he decided to try out the military training of scare and intimidation tactics.<sup>13</sup> In this exercise of forced coercion and submission, he abused an indigenous fifty-eight-year-old cab driver as a target.<sup>14</sup> But the Okinawan driver physically resisted and fought back.<sup>15</sup> After a verbal and physical fight, Kim ended up injuring the taxi driver with a knife and running away

8. Interview with Ryota Ishikawa, Legal Reporter, Okinawa Times, in Naha City, Okinawa Prefecture, Japan (July 10, 2010). The interview information also includes his emailed responses to my questions on February 22 and March 12, 2010. Ishikawa closely followed the Jonathan Kim case from the pre-trial conference procedure to the completion of the quasi-jury trial and published numerous articles on the case in Okinawa Times, Okinawa's main daily newspaper.

9. CHALMERS JOHNSON, NEMESIS: THE LAST DAYS OF THE AMERICAN REPUBLIC 177(2006) (“As of 2005, [Okinawa] was host to thirty-seven of the eighty-eight American military bases in Japan.”). For the ruling, see HIDEYUKI SUZUKI, HANKETSU YOSHI [JUDGMENT SUMMARIES] [hereinafter JUDGMENT SUMMARIES] (2010) (on file with the author); see also David Allen & Chiyomi Sumida, *Kinser Marine Gets Jail Time for Robbing Cabbie*, STARS & STRIPES, May 29, 2010, available at <http://www.stripes.com/news/kinser-marine-gets-jail-time-for-robbing-cabbie-1.104603>.

10. JUDGMENT SUMMARIES, *supra* note 9, at 2; Allen & Sumida, *supra* note 9.

11. Allen & Sumida, *supra* note 9.

12. Interview with Ryota Ishikawa, *supra* note 8.

13. *Id.*

14. JUDGMENT SUMMARIES, *supra* note 9, at 1.

15. *Id.*

with a bag that contained 21,000 yen, some USD \$100 and 6,000 yen worth of change.<sup>16</sup>

Kim was soon arrested and detained in the Camp Hansen jail, and reportedly confessed the details of his motives and actions.<sup>17</sup> On October 20, the Japanese prosecutor formerly indicted him, and Kim was soon handed over to the Japanese authorities.<sup>18</sup> The prosecution called for his trial, and in February and March 2010, pre-trial conferences were held to determine appropriate evidentiary materials, testimonial schedules, and procedural plans for court hearings by a lay-judge trial.<sup>19</sup>

Jonathan Kim then became the first-ever U.S. military personnel to be tried in Japan's lay-judge tribunal. Despite the long history of lay adjudication in Japan, American military personnel had never been tried in Japan's lay judge court.<sup>20</sup> Japan once held all-citizen jury trials from 1928 to 1943, but the military government decided to suspend them in the midst of WWII.<sup>21</sup> Other American-style jury tribunals were also introduced in U.S.-occupied Okinawa between the early 1960s and 1972.<sup>22</sup> Under the American legal jurisdictional governance, Okinawan residents were allowed to participate in both petit and grand jury proceedings.<sup>23</sup>

So, too, a mixed panel of American citizens, Okinawan residents, Japanese citizens, and other Asian residents on the island participated in petit criminal jury trials in Okinawa.<sup>24</sup> This system of lay adjudication continued until 1972, when the Japanese government finally reclaimed its sovereignty

16. *Id.*

17. *Takushigoto de Beihei o Shoruisoken: Beigunjin-hikoku de Kennaihatsu no Saibanin Saibanmo* [Taxi Robbery and Committing an American Soldier to Trial: First American Soldier Defendant for the Quasi-Jury Trial in the Prefecture], RYUKYU SHIMPO, (Aug. 25, 2009) <http://ryukyushimpo.jp/news/storyid-148935-storytopic-1.html>.

18. *Zenkokuhatsu Beihei o Kiso Saibanin Saibanjiken Takushigoto Chisho* [First Ever Indictment Against American Soldier for Saiban-in Trial: Robberies of Taxi Driver], RYUKYU SHIMPO, (Oct. 21, 2009) <http://ryukyushimpo.jp/news/storyid-151575-storytopic-1.html>.

19. Interview with Ryota Ishikawa, *supra* note 8.

20. After the United States built the military bases in Japan in 1945, Okinawa became the only place where all-citizen jury trials were held from early 1960s to 1972. Research indicates that no American soldiers were ever tried by the lay judge panel. See generally Anna Dobrovolskaia, *An All-Laymen Jury System Instead of the Lay Assessor (Saiban'in) System for Japan? Anglo-American Style Jury Trials in Okinawa under the U.S. Occupation*, 12 J. JAPANESE L. 57, 66–68 (2007), available at [http://law.anu.edu.au/anjel/documents/ZJapanR/ZJapanR24/ZJapanR24\\_09\\_Dobrovolskaia.pdf](http://law.anu.edu.au/anjel/documents/ZJapanR/ZJapanR24/ZJapanR24_09_Dobrovolskaia.pdf).

21. Mamoru Urabe, *A Study on Trial by Jury in Japan*, in JAPANESE LEGAL SYSTEM 483–491 (Hideo Tanaka ed., 1976)

22. Dobrovolskaia, *supra* note 20.

23. *Id.* at 67–68.

24. *Id.* at 68–69.

over Okinawa.<sup>25</sup> During this period, no American soldiers were ever tried by lay judge systems in Japan or on the Island of Okinawa.<sup>26</sup>

The absence of the prosecution of military crimes does not indicate the absence of serious and violent crimes committed by military personnel on Okinawa. Given the effective American geographic and military status of extraterritoriality, the facts reveal otherwise: there have been a multitude of military criminal behaviors on Okinawa.

Approximately three quarters of all American military installations and base camps in Japan were established on the Island of Okinawa, and the residents of the island have witnessed multitudes of military crimes committed by soldiers and their dependents, including sexually violent crimes, drunken brawls, assaults, robberies, and hit-and-run accidents.<sup>27</sup> The local residents have also been victimized by continuous airfield noise, pollution, oil and fuel spills, and other environmental contamination around base-camps, as well as plane and helicopter crashes near and in residential areas, and other military accidents.<sup>28</sup> Since the end of WWII, these crimes and incidents have continued to victimize Okinawan residents.<sup>29</sup>

According to the Japanese government, from 1952 to 2004, American military personnel have committed crimes or caused accidents in a total of 201,481 cases that resulted in the death of 1,076 civilians.<sup>30</sup> And this governmental figure failed to account for military crimes in Okinawa between 1945 and 1972, during which Okinawa remained a virtual American military colony.

Okinawa was once an independent kingdom until it was forcefully annexed by the newly-formed Japanese government in 1879.<sup>31</sup> In coalescing as a modern sovereign state, the newly established government also took

25. *Id.* at 66.

26. See generally JAPANESE FED'N OF TRIAL LAWYERS ASS'N, OKINAWA NO BAISHIN SAIBAN [JURY TRIALS IN OKINAWA] (1992).

27. *List of Main Crimes Committed and Incidents Concerning the U.S. Military on Okinawa-Excerpts*, OKINAWA PEACE NETWORK OF L.A., [http://www.uchinanchu.org/history/list\\_of\\_crimes.htm](http://www.uchinanchu.org/history/list_of_crimes.htm) (last visited Feb 21, 2011) (Translation from Okinawa Times, October 12, 1995).

28. *Id.*; see also Yoshio Sanechika, *Anger Explodes as a U.S. Army Helicopter Crashes at Okinawa International University*, Japan Focus, Aug.27, 2004, available at <http://www.japanfocus.org/-Sanechika-Yoshio/1816>.

29. OKINAWA PEACE NETWORK OF L. A., *supra* note 27.

30. Hiroshi Hayashi, *Higashi Ajia no Beigunkichi to Seibaibai, Seihanzai [American Military Bases in East Asia, Prostitution and Sexual Crime]*, 29 AMERICA-SHI KENKYU 1 (2006), available at <http://www32.ocn.ne.jp/~modernh/paper75.pdf> (referring to crime statistics provided in the Defense Facilities Administration Agency, on July 1, 2005).

31. ANDREW GORDON, A MODERN HISTORY OF JAPAN: FROM TOKUGAWA TIMES TO THE PRESENT (2003); see also Masahide Ota, *The U.S. Occupation of Okinawa and Postwar Reforms in Japan Proper*, in DEMOCRATIZING JAPAN 284-305 (Robert Ward & Yoshikazu Sakamoto eds., 1987).

over and annexed the northern island of Hokkaido in 1868.<sup>32</sup> The Japanese government then imposed strict colonial policies in Okinawa up until the American military powerfully took over its control in the victorious Battle of Okinawa in 1945, killing over a quarter of a million people, mostly Okinawan residents, in the process.<sup>33</sup> The United States then moved onto the island, bulldozed expropriated lands, established military bases and support infrastructure, and forcibly relocated many landowners and their families to South America.<sup>34</sup>

Okinawa thereafter became an important American strategic outpost, acting as a second line of defense during the Cold War era. During both the Korean and Vietnam wars, for example, Okinawa military bases became the reserve where servicemen went for “R&R” (Rest and Recuperation), creating a subculture of bars with explicit sex shows, proliferating prostitutes, contaminating areas around base-camps, and devastating the island's subtropical ecosystem and territories.<sup>35</sup> Even after Japan established sovereignty over Okinawa in 1972, the U.S. military continued to retain control over its bases.<sup>36</sup> In essence, the people of Okinawa were entrapped in a militarily-occupied island controlled by both the Japanese and American governments. The signing of the Intergovernmental Status of Forces Agreement (SOFA) in 1960 also effectively shielded American military personnel and their dependents from Japanese prosecution through the unilateral imposition of extraterritoriality as a crucial aspect of predatory colonial policies exercised by the U.S. government in Japan.<sup>37</sup>

Nearly forty years after Japan regained political control of Okinawa, on May 24, 2010, the first ever lay judge trial of an American serviceman began at the Naha District Courthouse in the southern region of the Okinawa Island. National and local press and Japan's legal experts were on hand, closely following the trial.<sup>38</sup> The defendant's mother also traveled from her home in Philadelphia to provide emotional support to her son.<sup>39</sup> A corps of Korean media also arrived to report this first ever trial in Japan, knowing that South Korea similarly hosts large American military bases throughout

32. GORDON, *supra* note 31.

33. James S. White, *65<sup>th</sup> Anniversary of the Battle of Okinawa*, SIXTH MARINE DIVISION, <http://www.sixthmarinedivision.com/okinawa65th.htm> (last visited December 10, 2010) (“An estimated 150,000 Okinawans died during the battle. With Japanese and United States deaths added to the dead Okinawans, over a quarter of a million people died.”).

34. Ota, *supra* note 31, at 284–305.

35. JOHNSON, *supra* note 9, at 171–77.

36. *Id.*

37. *Id.*

38. Allen & Sumida, *supra* note 9.

39. *Id.*



the Korean Peninsula and had witnessed the continuous victimization of its own communities by American soldiers and their dependents.<sup>40</sup>

After the screening of potential quasi-jurors, who were selected at random from the local community, a total of five women and one man ultimately emerged as the final quasi-jurors for the trial. These six people then sat next to three professional judges also assigned to this trial, listened to the testimony of witnesses, and evaluated evidence.<sup>41</sup> Two men and one woman chosen as alternates also sat through the trial.<sup>42</sup> As guilt was already established in this case, the deliberation of the professional judges and quasi-jurors primarily focused on the determination of the appropriate sentence.<sup>43</sup> The quasi-jurors also questioned the American defendant about his motives, with one quasi-juror asking Kim, “[i]s it a fad among Marines to rob cab drivers like some game?”<sup>44</sup> Kim indicated that he regretted his action and apologized, admitting that his purpose was wrong and silly.<sup>45</sup>

On May 27, after three days of trial, the judicial panel of both lay and professional judges decided to sentence the U.S. marine to three to four years in a Japanese prison for robbery and assault of the taxi driver.<sup>46</sup> The quasi-jurors also insisted that the chief presiding judge read a statement to Kim after sentencing, indicating, “We want you to reflect and think why you committed such a crime. . . . We know you can rehabilitate. You have strength to become a good, law-abiding citizen. We believe in you.”<sup>47</sup>

Ryota Ishikawa, a legal reporter for the local newspaper *Okinawa Times*, noted a rather surprising reaction by Kim, upon hearing the sentence.<sup>48</sup> Ishikawa later found that this young Marine believed all along that, upon his conviction, he would be sent to an American military jail, not a Japanese prison, indicating his mental immaturity and cultural insensitivity.<sup>49</sup> He had expected favored treatment as a U.S. soldier, not a common resident.

In the post-verdict interview, quasi-jurors conceded that they were able to set aside their anti-American sentiments or anti-military base feel-

40. Interview with Ryota Ishikawa, *supra* note 8.

41. *Taxi Robbery Ruling*, *supra* note 3.

42. *Goto Beihei: Kodoryoku Apiruga Doki: Nahachisai [Robber Soldier to Appeal His Power of Action: Naha District Court]*, MAINICHI SHIMBUN, May 24, 2010.

43. JUDGMENT SUMMARIES, *supra* note 9, at 3.

44. Allen & Sumida, *supra* note 99.

45. *Id.*

46. JUDGMENT SUMMARIES, *supra* note 9.

47. Allen & Sumida, *supra* note 9.

48. Interview with Ryota Ishikawa, *supra* note 8.

49. *Id.*

ings in the adjudication of the criminal case. One quasi-juror said, “While I do not have a good impression of the U.S. forces due to the base issues, I was not swayed by my emotions as an Okinawa resident in the deliberations.”<sup>50</sup> The twenty-five year old male quasi-juror said that he hoped the three to four year sentence in a Japanese prison “would serve as a deterrence” to American military personnel who would otherwise commit crimes in Okinawa.<sup>51</sup>

This first-ever trial of an American soldier thus represented a break from past history—an inaugural political effort to decolonize the people on the island of Okinawa from the imposition of forced military occupation by both the Japanese and American governments. Besides the huge installation of American military bases, the island of Okinawa also houses thirty-five of Japan’s own self-defense forces bases and military installations.<sup>52</sup> Japanese military personnel have similarly committed crimes, victimizing the residents of Okinawa.<sup>53</sup> The second-ever lay judge trial in Okinawa involved a twenty-three-year-old member of the Japanese Maritime Self-Defense Force (JMSDF) who sexually assaulted an Okinawan woman in June 2009.<sup>54</sup> In January 2010, the quasi-jurors found him guilty of rape resulting in bodily injuries and gave him a three-year prison sentence, suspended for five years.<sup>55</sup>

A new historic stage of decolonialism has clearly begun. The residents of colonized Okinawa under U.S. and Japanese military jurisdictions are finding an independent legal path to protect themselves and their families from abuse. The first-ever trials of military personnel of both American and Japanese military forces by lay judge panels also signaled the beginning of the process of attaining political legitimacy and judicial sovereignty on the island.

There will be more American and Japanese military defendants subject to this judicial process, as lay adjudication begins to play an important

50. *First Ever Lay Judge Trial Sends U.S. Marine to Prison*, WEEKLY JAPAN UPDATE (May 29, 2010), <http://www.japanupdate.com?id=10342>.

51. *Id.*

52. *Kichi no Gaikyo: Okinawa no Beigun Kichi Oyobi Jieitai Kichi (Tokeishiryō)* [Military Base Conditions: U.S. Military Bases and Japanese Self-Defense Forces Bases in the Prefecture of Okinawa: Statistical Data], MILITARY BASE AFFAIRS DIVISION, IN THE PREFECTURAL OFFICE OF OKINAWA, (March 2009), 4, <http://www3.pref.okinawa.jp/site/view/contview.jsp?cateid=14&id=19687&page=1>.

53. *Recent Incidents Involving Japanese Self Defense Forces*, Okinawa Peace Network of L.A., [http://www.uchinanchu.org/history/sdf\\_incident.htm](http://www.uchinanchu.org/history/sdf_incident.htm) (last visited Feb. 21, 2011).

54. *JMSDF Sailor Nabbed for Attempted Rape*, WEEKLY JAPAN UPDATE (June 18, 2009), <http://www.japanupdate.com/?id=9573>.

55. *Motojieikan ni Yuyokei: Saibanin Saiban* [Suspended Sentence for Former Self-Defense Force Personnel: The Quasi-Jury Trial], OKINAWA TIMES, (Jan. 16, 2010), [http://www.okinawatimes.co.jp/article/2010-01-16\\_1705/](http://www.okinawatimes.co.jp/article/2010-01-16_1705/).

role in placing the burden of responsibility on military personnel's activities, thereby functioning as effective judicial oversight of the actions and conduct of joint military personnel on Okinawa.

*B. The Prosecution of the Political Power Broker Ichiro Ozawa*

Another important moment of lay adjudication began when one of Japan's most powerful politicians was indicted by a civic panel for the violation of an election campaign law. In October, 2010, the grand jury (PRC) in Tokyo returned a second indictment against Ichiro Ozawa in a case involving illegal financial records in the 2004 and 2005 reports of his fund raising organization called Rikuzankai.<sup>56</sup> Specifically, a 400 million yen loan by Ozawa to Rikuzankai was illegally used to purchase land in the Setagaya Ward in Tokyo.<sup>57</sup> This political organization failed to record the land purchase and the money spent for it in its 2004 and 2005 official funding reports.<sup>58</sup> Three Ozawa ex-aides, including Lower House lawmaker Tomohiro Ishikawa and Takanori Okubo, had already been indicted for the violation of the Political Fund Control Law after failing to specify a 400 million yen loan from Ozawa to Rikuzankai in the organization's final reports.<sup>59</sup>

Ozawa is undoubtedly one of the most influential powerbrokers behind Japan's political scene. He formerly served as a powerful Chief Secretary of the ruling Liberal Democratic Party (LDP).<sup>60</sup> After he deflected from the LDP, he became the president of Japan's main opposition party, the Democratic Party of Japan (DPJ), and served in that capacity from 2006 to 2009.<sup>61</sup> He has often been dubbed the "Shadow Shogun" of Japanese politics because of his significant influence within the DPJ, as well as his overarching political connection to key members of other political parties and bureaucratic elites within the Japanese government.<sup>62</sup>

56. Takano Takahashi, *Ozawa Sues Government Over Indictment Process*, JAPAN TIMES ONLINE, (Oct. 16, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101016a1.html>.

57. *Id.*

58. *Id.*

59. *Id.*

60. Lee Jay Walker, *Ozawa Shows His Disloyalty to Kan*, JAPAN TODAY (April 15, 2011), available at <http://www.japantoday.com/category/commentary/view/ozawa-shows-his-disloyalty-to-kan> ("Ozawa was once the former secretary-general of the Liberal Democratic Party (LDP).").

61. *Id.*

62. *Id.*; Norimitsu Onishi, *For Japan's Insider-Turned-Rebel, Decade-Old Revolution Is Still a Work in Progress*, NY TIMES, Jan. 18, 2004, available at <http://www.nytimes.com/2004/01/18/world/for-japan-s-insider-turned-rebel-decade-old-revolution-still-work-progress.html>.

Ozawa first began his political career in 1969 when he was elected to the Japanese Diet.<sup>63</sup> He then became a member of the political faction led by former Prime Minister Kakuei Tanaka.<sup>64</sup> Tanaka, who has been called a political-fixer behind Japan's political scene, has also been known for numerous financial scandals and illegal political contributions throughout his political career, including a rare conviction in the infamous Lockheed bribes which led to the loss of his position as prime minister in 1974.<sup>65</sup> With only an elementary school education and no elite family ties, he rose to political prominence and acquired his political power through the careful cultivation and development of a financial network using so called "money politics."<sup>66</sup> Tanaka finally took powerful control of the ruling Liberal Democratic Party (LDP) when he became Prime Minister in 1972.<sup>67</sup>

The political strategies used by the LDP historically focused on the development of networking relationships between top government bureaucrats and LDP power elites.<sup>68</sup> Many bureaucratic members were also actively recruited to join the LDP and became important liaisons between high ranking public servants and a group of economic elites, who in turn provided necessary political support to the ruling LDP members.<sup>69</sup>

Tanaka gathered a gigantic group of devoted politicians and the most talented administrators and bureaucrats within the Japanese government.<sup>70</sup> Their deep collusion was evident in the governmental prosecutors' general reluctance, and, in some situations, outright refusal to pursue political scandals of LDP members, financial mismanagements of large corporations, and unethical or illegal conduct of government bureaucrats, including police chiefs, prosecutors, and judges.<sup>71</sup>

After Tanaka fell ill, Shin Kanemaru, another LDP political power-broker, became Ozawa's mentor and, in 1989, helped Ozawa to become the Secretary General of the LDP.<sup>72</sup> After Kanemaru was indicted in a corrup-

63. See generally RICHARD J. SAMUELS, *LEADERS AND THEIR LEGACIES IN ITALY AND JAPAN* 316-343 (2003).

64. *Id.*

65. HAROLD R. KERBO & JOHN A. MCKINSTRY, *WHO RULES JAPAN? THE INNER CIRCLES OF ECONOMIC AND POLITICAL POWER* 102 (1995).

66. See VANWOLFFEREN, *supra* note 6, at 127-32.

67. *Id.* at 128.

68. See *id.* at 142-45.

69. *Id.* at 129 (Takaka "strengthened it with an interlocking network of [personal collaborative networking] covering the bureaucracy and the business world.").

70. See *id.* at 132;

71. *Id.* at 224 ("[P]oliticians involved will usually be allowed to emerge unscathed, and bureaucrats-turned politicians need not at all fear being publicly tainted.").

72. *Id.* at 143-44; RAY CHRISTENSEN, *ENDING THE LDP HEGEMONY: PARTY COOPERATION IN JAPAN* 27 (2000) ("Ozawa had been one of Kanemaru's lieutenants and had many personal ties with all

tion scandal, Ozawa formed the new Japan Renewal Party, causing the LDP to lose its majority of seats in the Diet and ending its thirty-eight year dominance of Japanese politics.<sup>73</sup> At the same time, Ozawa inherited many of his former mentors' political and financial ties, luring many LDP members to the new party, thereby maintaining his link to economic elites in financial and corporate circles, as well as high-ranking government bureaucrats who closely allied themselves with power brokers among the former LDP members.<sup>74</sup>

Through the powerful network of political alliance with influential government bureaucrats, it is no wonder that prosecutors twice declined to indict Ozawa for the alleged violation of the Political Fund Control Law.<sup>75</sup> Nonetheless, following each of the governmental non-indictment decisions, a group of citizens filed an official complaint to the PRC in Tokyo, creating the judicial opportunity to critically evaluate the propriety of the prosecutorial non-indictment decisions.<sup>76</sup> A second indictment decision by the PRC overruled the prosecutors' judgment, stating that there was sufficient evidence to indicate the presence of Ozawa's direct instructions to his subordinates to file misleading and incomplete reports with the government oversight officials.<sup>77</sup> Representing the new power of local citizens, the decision was reached by the eleven committee members, whose average age was approximately thirty.<sup>78</sup> Ozawa then filed a lawsuit to suspend the indictment action with the Tokyo District Court, which then rejected his request to halt prosecutorial procedures against him.<sup>79</sup>

The system of the Shobun Seikun historically shielded a group of powerful politicians and economic elites from prosecutorial investigations and subsequent indictments.<sup>80</sup> The special request for instruction by prosecutorial supervisors was not based on equitable legal consultations and

of the opposition parties."); Andrew Pollack, Shin Kanemaru, *Kingmaker in Japan Toppled by Corruption*, NEW YORK TIMES (March 29, 1996), available at <http://www.nytimes.com/1996/03/29/world/shin-kanemaru-81-kingmaker-in-japan-toppled-by-corruption.html> ("Mr. Ozawa . . . was a protege of Mr. Kanemaru. 'I myself was very much taken care of and guided by him,' Mr. Ozawa said today. 'He was a very good mentor and a benefactor.'").

73. SAMUELS, *supra* note 63, at 330–31.

74. *Id.*

75. *Prosecutors Again Decide Not to Indict Ozawa over Funds Scandal*, JAPAN TODAY, (September 30, 2010, 3:43PM), <http://www.japantoday.com/category/crime/view/prosecutors-again-decide-not-to-indict-ozawa-over-funds-scandal>.

76. Martin & Kamiya, *supra* note 5.

77. *Id.*

78. *Ozawa May File Suit over Inquest Panel*, JAPAN TIMES ONLINE (Oct. 8, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101008a1.html>.

79. *Court Rejects Ozawa's Request to Suspend Indictment Action*, JAPAN TIMES ONLINE (Oct. 19, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101019a4.html>.

80. VAN WOLFFEREN, *supra* note 6, at 224.

approval. Rather, this top-down instructional demand represented a complete political “takeover” of the criminal case by prosecutorial executives, including the Minister of Justice.<sup>81</sup> In short, the decision by individual prosecutors had become directly subject to a politician who was appointed to the position of the Minister of Justice by the Prime Minister self.<sup>82</sup> Such governmental order still remains an integral part of Japanese politics today.

Not only did the previous system offend the notion of state legitimacy in the eyes of ordinary Japanese, but it also set the population on a new path toward seeking elemental equity in the courts.<sup>83</sup> The civic panel of eleven fair-minded citizens chosen at random from local communities is now empowered to challenge and reverse the prosecutorial decision of non-indictment against powerful political and economic groups.<sup>84</sup> In October 2010, the Tokyo High Court finally appointed three lawyers to prosecute Ozawa, and those lawyers held talks with the Tokyo District Public Prosecutor’s Office to take over records of the prosecutors’ investigation and began to initiate the formal criminal prosecution of Ozawa.<sup>85</sup> This prosecutorial process represented the first important step towards establishing the notion of state legitimacy in the judicial system.

## II. EVOLUTION OF THE QUASI-JURY AND GRAND JURY SYSTEMS

The Japanese government introduced and held all-citizen jury trials prior to the end of WWII. The Jury Act was promulgated in 1923, establishing Japan’s first system of civic legal participation in criminal cases.<sup>86</sup> A total of 484 jury trials were held from 1928 to 1943: some 460 cases were concluded each lasting three days or less (ninety-five percent), and seventeen percent of jury trials resulted in the “not-guilty” verdict for the defendants.<sup>87</sup> With support from the Allied Forces, the Japanese government also established the American-style grand jury (PRC) proceedings in

81. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN*, 131 (2002).

82. *Id.*

83. *Id.*

84. See Yuka Hayashi, *Japan’s Ozawa Indicted Over Political Funds Law*, WALL ST. J., Jan. 31, 2011, <http://online.wsj.com/article/SB10001424052748703833204576115181733628572.html> (noting that Ozawa was formerly indicted on the basis of the PRC’s recommendation on January 31, 2011).

85. *Ozawa Appeals Rejection by High Court*, JAPAN TIMES ONLINE (Oct. 28, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101028a7.html>.

86. TAKASHI MARUTA, BAISHIN SAIBAN O KANGAERU [RESEARCH ON JURY TRIALS] 135 (1991).

87. CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [THE RESURRECTION OF JURY TRIALS] 12-3 (1996).

1948.<sup>88</sup> The PRC's main purpose remains to examine the prosecutors' discretion in deciding not to prosecute criminal suspects.<sup>89</sup> The PRC has reviewed nearly 140,000 cases, and more than a half million Japanese citizens have actively participated in these deliberations.<sup>90</sup> The following section examines the historical evolution of the twin systems of lay adjudication in Japan.

### A. *The Quasi-Jury (Saiban-in) System*

After the military government suspended all-citizen jury trials in 1943, no serious political attempts were mounted by the Japanese government to consider the possible reestablishment of the jury system.<sup>91</sup> Nonetheless, a number of professional groups and grassroots organizations were organized to promote and critically discuss judicial inequities of Japan's professional judge trials and to examine the causes of numerous wrongful convictions rendered by these professional judges in criminal matters.<sup>92</sup> Progressive lawyers and civic activists also called for the resurrection of the pre-war style all-citizen jury trials in order to establish a contemporary version of the jury system like those existing in the United States and European nations.<sup>93</sup>

It has been a long and difficult road for concerned citizens to bring about any equitable changes in Japan's judiciary. One of the most influential grassroots organizations was "Baishin Saiban o Kangaeru Kai" (Research Group on Jury Trial (RGJT)), which was created in 1982 under the leadership of a number of prominent and progressive defense attorneys and an award-winning legal writer from Okinawa.<sup>94</sup> Specifically, the first serious civic effort to establish the system of lay adjudication in Japan was inaugurated on April 2, 1982 at the Nippon Kyoiku Kaikan (the Japanese Educational Assembly Hall) in Hitotsubashi, Tokyo.<sup>95</sup> Its organizers and

88. Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 82 COLUM. L. REV. 684, 685 (1992).

89. *Id.*

90. SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], TOKEI SHIRYO: ICHIRAN [STATISTICAL MATERIALS: SUMMARIES](May 21, 2002), <http://www.kantei.go.jp/jp/sihouseido/kentoukai/saibanin/dai3/3siryou1.pdf> (showing statistics of the PRC proceedings from 1949 to 2001).

91. For a detailed history of the PRC, see Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-jury and Grand Jury Systems: Cross-national Analysis of Legal Consciousness and Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L. J. 315, 321 (2007).

92. *Id.* at 318–19.

93. *Id.*

94. *Id.* at 317.

95. *Id.* at 317–20.

participants included prominent defense attorney Tetsuji Kurata, legal writer Chihiro Isa (who also served in a jury trial in U.S.-occupied Okinawa in 1964), Chukyo University law professor Hideo Nishiyama, Tokyo University law professor Nobuyoshi Toshitani, Tokyo Shimbun (newspaper) legal reporter Katsuhiko Iimuro, and a number of representatives from civil rights organizations, including crime victims' rights groups and victims of wrongful convictions.<sup>96</sup> They gathered together to inaugurate the beginning of a serious and action-oriented group to discuss the political path and strategies to re-introduce the all-citizen jury trial in Japan.<sup>97</sup>

Many members of the RGJT soon began to establish similar organizations in many regional areas such as Niigata, Kumamoto, Osaka, and other rural prefectures, and began to galvanize concerned citizens to talk about the importance of civic participation in legal institutions.<sup>98</sup> They regularly held civic meetings to study different systems of lay adjudication in other countries, assess positive effects of creating civic oversight of the judiciary and prosecutions, and promote the use of non-discriminatory investigative methods and evidence collection and equitable rulings by professional judges.<sup>99</sup> The RGJT in Tokyo then became the national center for providing resources and jury-related information and, besides regularly scheduled meetings and study sessions, held an annual retreat to discuss the possible introduction of the jury trial in Japan.<sup>100</sup>

Beginning in the late 1980s and 1990s, political pressure to change the existing legal system and consider the possible re-introduction of the lay judge system in criminal cases began to emerge. In the 1980s, four convicted felons on death row were exonerated by the Japanese Supreme Court; these defendants spent a total of 130 years in prison before ultimately being released.<sup>101</sup> The media began to examine the causes of wrongful convictions and attributed them to the court's uncritical evaluation of confession evidence extracted under physical and psychological torture and the near perfect conviction rate of all indicted cases.<sup>102</sup> The Chief Justice of the Japanese Supreme Court, Koichi Yaguchi, also initiated a governmental study to examine the feasibility of establishing a jury system and sent Japa-

96. *Id.* at 317–18.

97. *Id.* at 318.

98. *Id.*

99. *Id.* at 318–19.

100. *Id.* at 319. The RGJT also began to publish its official bulletin, *Baishin Saiban* (Jury Trial) to legitimize their civic activities and advocate the establishment of citizen juries. *Id.*

101. See CHIHIRO ISA, *BAISHIN NO FUKKATSU* [REINSTATEMENT OF JURY TRIAL] 155–56 (1996) (including the Menda, Zaidagawa, Matsuyama, and Shimada cases).

102. MARUTA, *supra* note 86, at 11–14.



nese jurists overseas to study the different systems of lay adjudication used in the United States and Europe.<sup>103</sup>

In 1999, in order to create the official guideline for Japan's judicial reform, late Prime Minister Keizo Obuchi established "Shiho Seido Kaikaku Shingikai" (the Justice System Reform Council (JSRC)).<sup>104</sup> The council had thirteen members who were recruited from different political factions and economic sectors.<sup>105</sup> The interests of the Japanese government were expressed through two members of the bureaucratic elite: a former chief justice of the Hiroshima high court and a former chief prosecutor of the Nagoya Public Prosecutor's Office.<sup>106</sup> The council also included two members from "Keidanren" (the Federation of Economic Organizations) and "Keizai Doyukai" (the Japanese Association of Corporative Executives): two of Japan's most influential business organizations, as well as a former president of the Japanese Federation of Bar Associations (the association composed of practicing attorneys, hereinafter JFBA), a president of the Federation of Private Universities, a female business professor from a private university, a female popular writer, a vice president of "Rengo" (a labor organization), and a president of "Shufuren," or the Federation of Homemakers (or Housewives).<sup>107</sup> The governmental influence was evident because, besides a judge and prosecutor, six of the remaining members had previously served in various governmental committees and agencies, including a member who was a former first secretary of the Japanese embassy in Thailand.<sup>108</sup>

The term, "saiban-in" (the quasi-jury), first emerged in a reference material presented by Tokyo Law Professor Masahito Inouye in the fifty-first public meeting on March 13, 2001.<sup>109</sup> Professor Inouye then explained the need to establish the mixed court system, providing six specific suggestions for the "saiban-in seido" (the quasi-jury system): (1) the role of saiban-in (lay judges), (2) the division of roles between professional and lay judges, (3) the selection method and rights and duties of lay judges, (4) applicable criminal cases, (5) ideal methods of a trial procedure and judg-

103. See *Jitsugenshitai Shiho Eno Kokumin Sanka* [Realizing Popular Participation in Judicial Decision-Making], 13 *BAISHIN SAIBAN* [JURY TRIAL] 1-4 (Dec. 1997).

104. Anderson & Nolan, *supra* note 2 at 93.

105. TAKASHI MARUTA, SAIBAN-IN SEIDO [THE QUASI-JURY SYSTEM] 76 (2004).

106. *Id.* at 77.

107. *Id.*

108. *Id.*

109. See SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], SOSHO TETSUZUKI ENO ARATANA SANKA SEIDO KOKUSHI AN [A NEW MIXED COURT SYSTEM IN CRIMINAL PROCEDURE: A SUGGESTION FOR THE FRAMEWORK] (2001), <http://www.kantei.go.jp/jp/sihouseido/dai51/51bessi1.html>.

ment, and (6) the condition for an appeal.<sup>110</sup> It is little wonder that Inouye was later asked to chair the investigation committee to implement his own recommendation on the quasi-jury system.<sup>111</sup>

JSRC's final report came out at the sixty-second meeting on June 1, 2001, recommending that the quasi-jury trial examine all applicable cases, regardless of whether the defendant admits or denies the charges.<sup>112</sup> Similarly, the report agreed that criminal defendants should have no right to refuse the quasi-jury trial.<sup>113</sup> However, the report failed to specify the exact number of lay or professional judges to serve in the quasi-jury trial.<sup>114</sup>

In April 2002, in order to implement the recommendation, the Office for the Promotion of Justice System Reform (OPJSR) was established in the Cabinet Office, and the office created eleven separate investigation committees to implement specific recommendations in JSRC's final report.<sup>115</sup> The responsibility to deliberate on specific items of the judicial reform for the quasi-jury system was delegated to "Saiban-in Keiji Kentokai" (the Quasi-jury/Penal Matter Investigation Committee), including the task to determine the specific number of lay and professional judges for the quasi-jury trial.<sup>116</sup> The final proposal of the investigation committee was reported at the public meeting on January 29, 2004 and was later submitted to the OPJDR in the Cabinet Office.<sup>117</sup> On March 2, the Cabinet decided its final overall proposal on Japan's judicial reform entitled, "Recommendation of the Justice System Reform Council: For the Justice System to Sup-

110. *Id.*

111. MARUTA, *supra* note 105, at 126.

112. See SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], KOKUMINTEKI KIBAN NO KAKURITSU [ESTABLISHMENT OF THE POPULAR BASE OF THE JUSTICE SYSTEM] (2001), <http://www.kantei.go.jp/jp/sihouseido/dai62/pdfs/62-4.pdf>.

113. *Id.*

114. See SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY 80 (2001), [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html).

115. Those committees include: (1) Labor Study Committee (Rodo Kentokai), (2) Legal Access Investigation Committee (Shiho Akusesu Kentokai), (3) ADR investigation committee (ADR Kentokai), (4) Arbitration Investigation Committee (Chusai Kentokai) (5) Administrative Litigation Investigation Committee (Gyosei Soshu Kentokai), (6) Quasi-jury/Penal Matter Investigation Committee (Saiban-In Seido, Keiji Kentokai), (7) Public Defender System Investigation Committee (Koteki Bengo Seido Kentokai), (8) Globalization Investigation Committee (Kokusaika Kentokai), (9) Judicial Officer Training Investigation Committee (Hoso Yosei Kentokai), (10) Judicial Officer System Investigation Committee (Hoso Seido Kentokai), and (11) Intellectual Property Litigation Investigation Committee (Chiteki Zaisan Soshu Kentokai). See *Shiho Seido Kaikaku Kentokai [Justice System Reform Investigation Committees]*, SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/index.html> (last visited Feb. 20, 2011).

116. MARUTA, *supra* note 105, at 125–27.

117. *Id.* at 132.

port Japan in the 21st Century,” and submitted it to the parliament on March 16.<sup>118</sup> On May 21, 2004, the Diet passed the proposal and announced that the first quasi-jury trial would begin in May 2009.<sup>119</sup>

The Quasi-Jury Act now provides two different panels for criminal trials. A panel of three professional and six lay judges is required in a contested case, and a panel of one professional and three lay judges is used in uncontested cases where facts and issues identified by pre-trial procedure are undisputed.<sup>120</sup> Since the law also required that both the government and the Supreme Court draft court rules necessary to regulate quasi-jury trial procedures and deliberations within the existing judicial framework, the practical and logistical operation of the quasi-jury system also went through further adjustments, including the extent of evidentiary discovery, jury compensation, and pre-trial conference procedures, among many others.<sup>121</sup>

### B. *The PRC Grand Jury System*

#### 1. The Original Conception and Creation of the Japanese Grand Jury (PRC)

Grand jury proceedings are critical in bringing criminal charges in Japan. Through the joint collaborative work of the Japanese government and the Allied Forces led by the U.S. government, a civilian review commission was first established by the passage of Kensatsu Shinsakai Ho (the Prosecutorial Review Commission Law) on July 12, 1948.<sup>122</sup> The PRC is a Japanese version of an American-style grand jury system. As the leader of the office of the Supreme Commander for the Allied Powers (SCAP) occupying Japan after World War II, General Douglas McArthur saw the grand jury as an important democratic institution for engaging the public and guaranteeing legitimacy in its eyes.<sup>123</sup>

The first proposal to establish the grand jury system in Japan was included in the “Proposed Revision of Code of Criminal Procedure,” au-

118. AKIRA GOTO, SATORU SHINOMIYA, KEN NISHIMURA, & MKIA KUDO, JITSUMUKA NO TAMENO SAIBAN-IN HO NYUMON [A PRACTITIONER’S INTRODUCTION TO THE QUASI-JURY LAW] 10 (2004).

119. *Id.*

120. Saiban-in no Sanka Suru Keiji Saibanni Kansuru Horitsu [hereinafter Quasi-Jury Act], Law No. 63 of 2004, art. 2 para.3.

121. *Id.* at Supplementary Provisions, arts. 2 & 3.

122. See generally Kensatsu Shinsakai Ho, Law No. 147 of 1948 [hereinafter PRC Law] available at <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

123. West, *supra* note 88, at 697.

thored by Captain Maniscalco of the Legal Section, Public Safety Division of the SCAP.<sup>124</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 confinement for one year or more, or for life, or an indefinite period, or death, unless an indictment or presentment is made by a grand jury.”<sup>125</sup> Article 228 also specified that “[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>126</sup> However, Captain Maniscalco’s proposal was submitted to the Japanese government as a private draft and his provision regarding the jury system was not formally included as part of the final draft representing the official SCAP recommendation.<sup>127</sup>

Thomas L. Blackmore, who became the first non-Japanese person 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 significantly altered version of the U.S. grand jury system to the Japanese government.<sup>128</sup> Blackmore, who graduated from the University of Oklahoma, 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>129</sup> After he passed the Japanese bar exam, he was also admitted to practice law with full courtroom status.<sup>130</sup> Blackmore’s carefully crafted proposal then laid the foundation for the creation of the prosecutorial review commission to examine and assess prosecutorial discretions in decisions not to prosecute an accused.<sup>131</sup>

With the American influence on its creation, the PRC then became a hybrid institution, adapting the American civil and criminal grand jury systems into Japanese culture and its legal milieu. This legal system be-

124. See Ann Dobrovolskaia, *Japan's Past Experiences with the Institution of Jury Service* 31 n. 233 (Feb. 5, 2010) (presented at the Inaugural East Asian Law and Society Conference in Hong Kong) (on file with the author).

125. PRC Law, *supra* note 122, at art. 227.

126. *Id.* at art. 228.

127. *Id.*; Dobrovolskaia, *supra* note 124, at 50 n. 240.

128. JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 126 (1991).

129. Mary F. Pols, *Thomas Blakemore Spent His Life Connecting America and Japan*, SEATTLE TIMES (Mar. 1, 1994, 12:00AM), <http://community.seattletimes.nwsourc.com/archive/?date=19940301&slug=1897785>.

130. *Id.* (“[Blakemore] became the first non-Japanese to pass the Japanese bar exam and was admitted to practice law with full courtroom status, the only foreign lawyer ever to achieve that status.”).

131. JOHN OWEN HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 126, n. 12 (1991).

came similar to that of America's civil grand jury in examining and inspecting the proper functioning of local public offices, including the prosecutor's office, the police department, and local jails.<sup>132</sup> Also, similar to the U.S. criminal grand jury, the PRC has an influence on decisions to indict. A total of 207 commissions were then established in each of Japan's fifty district court jurisdictions.<sup>133</sup>

The principal function of the commission is to empanel a group of randomly-chosen Japanese citizens to examine and review a public prosecutor's exercise of discretion in decisions not to bring indictment charges against possible violators of the law.<sup>134</sup> Given the fact that nearly one hundred percent of all indictments lead to conviction in Japan,<sup>135</sup> the commissions' ex-post facto examination of the appropriateness of non-prosecution decisions is quite important in checking prosecutorial abuse of power. The near-perfect conviction of indicted cases also suggests that the abuse of prosecutorial power potentially lies in their discretion in decisions not to prosecute certain potential suspects or criminals.

Here lay the need for the PRC to protect the public, for the commission investigates cases behind closed doors.<sup>136</sup> They have the power to summon petitioners, their proxies, and witnesses for examination, to question prosecutors and ask them for additional information when necessary, and to seek special expert advice on a given case.<sup>137</sup> The investigative function begins only after a public complaint has been filed against a decision by the prosecution not to indict.<sup>138</sup> In other words, individuals or civic organizations in the public sector are empowered to launch a first strike against the prosecution in the assessment of the propriety of its decisions in criminal matters.

After assessing and deliberating about the case, the commission then submits one of three recommendations: (1) the non-indictment is proper; (2) the non-indictment is improper; or (3) the indictment is proper.<sup>139</sup> A simple majority is needed for either of the first two resolutions, while a

132. See generally Hiroshi Fukurai, *The Proposal to Establish the System of the Federal Civil Grand Jury in America* Paper Presented in the Session, "Overseeing the Overseers: From Grand Juries to Appellate Courts," at the *Law and Society Association Conference* in Montreal, Canada (May 29, 2008) (unpublished paper) (on file with the author).

133. West, *supra* note 88, at 697 n. 70. The total number of PRCs was later reduced to 165.

134. *Id.* at 697.

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

136. PRC law, *supra* note 122, at art. 37.

137. *Id.* at art. 38.

138. *Id.* at art. 30.

139. *Id.* at art. 39.

special majority of at least eight of the eleven votes is needed to pass the third resolution.<sup>140</sup> The commission then delivers a written recommendation to the prosecutor's office.<sup>141</sup>

In the past, because the prosecutor's office was the only institution with power to issue an indictment, the PRC recommendations were regarded as merely advisory.<sup>142</sup> Between 1949 and 2001, the PRC deliberated on a total of 135,963 cases.<sup>143</sup> The cases included many controversial political issues related to personal injuries, torts, and politically prominent matters. Not only has the PRC deliberated on criminal cases, but it also has examined prominent civil cases, white collar crimes, and allegations of egregious governmental misconduct, including controversial matters such as the Minamata mercury poisoning incidents, an organ transplantation case from a brain-dead donor, thalidomide scandals, incidents in which hemophiliacs contracted the HIV virus from contaminated blood products, drug-induced sufferings of millions of Japanese who contracted the hepatitis C virus from unheated pharmaceutical products previously approved by the government, and illegal campaign donations and political bribes.<sup>144</sup>

The majority of the PRC decisions supported the prosecutors' non-indictment decisions (52.9%), while they also determined that the prosecution should indict the suspects in 2,292 cases (1.7%).<sup>145</sup> The PRC also issued the resolution of "non-indictment is improper," a less serious indictment recommendation, in 10.3% of the cases.<sup>146</sup> The remaining 35.1% cases specifically examined prosecutorial decisions on alleged violations of the election law and the political funds control law.<sup>147</sup> Even among the cases in which the PRC recommended the prosecution of criminal suspects, prosecutors only brought charges in a mere 7.2% of the cases.<sup>148</sup> This limited legal authority was finally expanded by the 2004 PRC Act, which made the PRC decision legally-binding.<sup>149</sup>

140. *Id.*

141. *Id.* at art. 40.

142. KEIJI SOHO HO [KEISOHO] [C. CRIM. PRO.], 1948 art. 247 [hereinafter KEISOHO] (implying that only prosecutors have the power to issue indictments in Japan).

143. SHIHO SEIDO KAIKAKU SHINGIKAI, *supra* note 90, at tbl.1-2.

144. SUPREME COURT OF JAPAN, KENSATSU SHINSAKAI NO GAIYO [SUMMARIES OF THE PROSECUTORIAL REVIEW COMMISSION], <http://www.courts.go.jp/kensin/seido/sinsakai.html> (last visited Feb. 20, 2011).

145. SHIHO SEIDO KAIKAKU SHINGIKAI, *supra* note 90, at tb.1-2.

146. *Id.*

147. *Id.*

148. *Id.* at tbl. 1-3.

149. *Kensatsu Shinsakai Kisosoto 2kaide Kisoe [PRC: Forced Prosecution by Second Indictment Resolution]*, Asahi Shimbun (May 19, 2009 2:07 AM), <http://www.asahi.com/special/080201/TKY200905180395.html>.

Nonetheless, the far-reaching influence and significant potential ramifications of civic legal participation in the PRC have not been widely communicated to Japanese communities, suggesting that PRC duties still 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 PRC's duties.<sup>150</sup> Even among those with knowledge of the PRC system, 73.8% did not know who could actually be selected for the commission.<sup>151</sup> Public unfamiliarity with the PRC system, PRC duties, and their civic importance has also caused panic and even hysteric reactions in those who have been summoned for PRC duty.<sup>152</sup> In addition to the PRC's obscurity, confidentiality requirements and penalties imposed on PRC participants in disclosing deliberative information have further discouraged, and even scared, many people from PRC duties.<sup>153</sup>

## 2. The 2004 PRC Act and the New Legally-Binding Authority

For many decades, the JFBA insisted that the PRC decision be given a legally-binding status, instead of being treated in a mere advisory capacity to the Japanese prosecutor.<sup>154</sup> In 1973, the JFBA created an internal investigative commission to examine whether or not legally-binding authority should be given to the PRC resolution.<sup>155</sup> After two years of analysis and examination, the investigative committee submitted its recommendation to the headquarters of the JFBA, which then released its final report in 1975, recommending that the second PRC decision to issue an indictment must be given legally-binding status.<sup>156</sup>

Specifically, the recommended procedural step included the following: first, when the PRC decided that "the indictment is proper" or "the non-indictment is improper," public prosecutors were required to respond to the PRC recommendation within the next three months, whether or not the prosecutors decided to maintain their non-prosecutorial decision.<sup>157</sup> If

150. NAIKAKUFU SEIFU KOHOSHITSU [CABINET OFFICE, PUBLIC RELATIONS], KENSATSU SHINSAKAI SEIDONI KANSURU SERON CHOSA [PUBLIC OPINION POLL ON THE PRC SYSTEM] (1990), available at <http://www8.cao.go.jp/survey/h02/H02-10-02-15.html>.

151. *Id.*

152. Mitsuru Shinokura, *Shitteimasuka? Kensatsu Shinsakai [Have You Heard of Them? Prosecutorial Review Commissions]*, 205 SHOSAINO MADO 13, 14 (1991).

153. *Id.*

154. JAPANESE FED'N OF BAR ASS'NS, KENSATSU SHINSA KAI SEIDO NO KAISEIAN: SONO JUJITSU KYOKA O MEZASHITE [THE PROPOSED AMENDMENT TO THE PROSECUTORIAL REVIEW COMMISSION: TO ENRICH AND STRENGTHEN] (1975).

155. *Id.* at 1.

156. *Id.*

157. *Id.* at 28-29.

they decided not to prosecute, they had to provide explanation of their non-indictment decision to the PRC.<sup>158</sup>

Secondly, if the PRC remained unconvinced by the prosecutors' explanation and decided again that the indictment was proper for the given case, the second PRC decision had to be given the status of a binding judgment.<sup>159</sup> The public prosecutors then were required to respect the PRC decision and initiate a public action against the accused.<sup>160</sup>

The JFBA report also recommended that the second resolution must be approved by a two-thirds majority.<sup>161</sup> Further, the report suggested a new compositional structure and an alternative method of conducting the PRC session with the elimination of the quota system and the introduction of a quorum rule.<sup>162</sup> Under the existing PRC law, the deliberative forum had to consist of eleven members, though often times the forum failed to meet the minimum number of required attendance by PRC members because of work-related hardship, economic excuses, or other personal reasons.<sup>163</sup> The JFBA report thus recommended that the number of PRC members be expanded from eleven to fifteen and that a quorum rule be adopted so that the attendance of any eleven members would constitute a quorum for full deliberative discussions.<sup>164</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 that the passage of the former requires a two-thirds vote, i.e., at least eight of eleven votes.<sup>165</sup> The second passage of the decision that "the indictment is proper" must require a two-thirds majority of the entire fifteen PRC members, suggesting that at least ten votes are needed for the passage of the legally-binding indictment decision.<sup>166</sup>

Unfortunately, the JFBA's carefully-crafted proposals were not passed into law, and its suggestions and recommendations to empower the PRC institution had to wait for serious discussions yet another twenty years.<sup>167</sup> The opportunity to revisit and possibly incorporate the JFBA recommenda-

158. *Id.*

159. *Id.* at 29.

160. *Id.*

161. *Id.*

162. *Id.* at 16.

163. *Id.* 16–17.

164. *Id.*

165. *Id.* 17–18.

166. *Id.* at 18–19.

167. SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], DAI 7 KAI GIJI GAIYO [NO. 7 PROCEEDING OUTLINE] (1999), <http://www.kantei.go.jp/jp/sihouseido/991126dai7.html>.



tions finally came in the late 1990s when the introduction of another lay justice institution—the quasi-jury system—was discussed by the Justice System Reform Council.<sup>168</sup>

The revision of the PRC law, however, was not a primary objective of the council or its discussions.<sup>169</sup> Nonetheless, the necessity to revise the PRC law was first mentioned at JSRC's seventh meeting in November 1999.<sup>170</sup> However, it took another one and a half years to hold another substantial discussion on the revision of the PRC law. In the fifty-fifth meeting on April 10, 2001, the council members discussed the possibility of providing legally mandatory status to the following two resolutions: "non-indictment is improper" and "indictment is proper."<sup>171</sup> The reference material submitted to the meeting shows the comparison of different strategies and opinions from the JFBA, the Supreme Court, and the Ministry of Justice.<sup>172</sup> The Ministry of Justice recommended that only the "indictment is proper" resolution should be considered legally-binding, while the Supreme Court agreed to provide recognition of some type of legally-binding status in case of the "indictment is proper" resolution and the "non-indictment is improper" resolution only with unanimous decisions.<sup>173</sup> The JFBA suggested that the "indictment is proper" should carry the legally mandatory status and that the decisions require two-thirds of the vote.<sup>174</sup> The JFBA also asked to create the position of a "legal advisor" in support of the discussion and deliberation by the PRC members and that she/he must be a practicing attorney.<sup>175</sup>

Similar to its statement on the specification of the quasi-jury system, the final JSRC proposal was vague on the revision of the PRC law. Nevertheless, the first chapter of the proposal stated that "a system of giving legally-binding force to specific resolutions by the [PRC] shall be introduced

168. *Id.*

169. JAPANESE FED'N OF BAR ASS'NS, KOKUMIN NO SHIHO SANKA NI KANSURU IKEN [OPINION TO CITIZENS' LEGAL PARTICIPATION], (2000), <http://www.kantei.go.jp/jp/sihouseido/dai30/30bessi3.html>. The JFBA, the proponent of the movement to establish the lay adjudicatory system in Japan, submitted its final opinion and request to the JSRC to reinstate the all-citizen jury trial in Japan. Nonetheless, the document failed to mention the necessity to improve the PRC system.

170. SHIHO SEIDO KAIKAKU SHINGIKAI, *supra* note 167.

171. SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL] DAI 55 KAI GIJI GAIYO [NO. 55 PROCEEDING OUTLINE] (2001), <http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html>.

172. JAPANESE FED'N OF BAR ASS'NS, KENSATSU SHINSAKAI NO ITTEINO GIKETUNI TAISHI HOTEKI KOSOKURYOKU O FUYOSURUTAMENO HOSAKU: HOSO 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] (2001), <http://www.kantei.go.jp/jp/sihouseido/dai55/55bessi2.html>.

173. *Id.*

174. *Id.*

175. *Id.*

so as to reflect popular will more directly.”<sup>176</sup> The second chapter also stated that “[a]lthough this system has been criticized on various grounds, it has played a considerable role. While paying attention to the guarantee of the due process of law for suspects, a system should be introduced that grants legally binding effect to certain resolutions.”<sup>177</sup> While the PRC law allows commissions to submit proposals or recommendations to chief prosecutors to improve prosecutorial affairs,<sup>178</sup> the system has not functioned well. The third chapter thus stated,

Mechanisms should be introduced so as to enable the voices of the people to be heard and reflected in the management of the public prosecutors [sic] offices, including reinforcing and making effective the system for proposals and recommendations from the [PRC] . . . and proposals and recommendations along with the responses to them could be made public.<sup>179</sup>

The OPJSR then delegated authority to the Quasi-Jury/Penal Matter Investigation Committee to deliberate not only on the establishment of the quasi-jury system, but also on the revision of the PRC law.<sup>180</sup> Chairman Inouye submitted an outline on the PRC reform on November 11, 2003.<sup>181</sup> The first reform item in the outline was to make the PRC’s decision legally mandatory.<sup>182</sup> The outline also included a possibility for the commission of a legal advisor from the ranks of practicing attorneys.<sup>183</sup> In April and May 2003, the investigation committee then ran articles in newspapers, government bulletins, and legal journals to solicit public opinions and feedback.<sup>184</sup>

176. SHIHO SEIDO KAIKAKU SHINGIKAI [JUSTICE SYS. REFORM COUNCIL], KOKUMIN NO KITAI NI KOTAERU SHIHO SEIDO [The Judicial System in Response to Expectation of Citizens] (2001), <http://www.kantei.go.jp/sihouseido/report/ikensyo/iken-2.html>, translated in RECOMMENDATIONS OF THE JUSTICE SYSTEM REFORM COUNCIL: FOR A JUSTICE SYSTEM TO SUPPORT JAPAN IN THE 21ST CENTURY, [http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612\\_e.html](http://www.kantei.go.jp/foreign/policy/sihou/singikai/990612_e.html).

177. *Id.*

178. *Id.*

179. *Id.* The fourth chapter, “Establishment of the Popular Base,” also suggested the need to reinforce the PRC system. It was also mentioned in the same section that asked for the expansion of a volunteer officer system for a probation program (Hogoshi Seido). *Id.* The probation officer in Japan is administratively classified as a part-time national civil servant, but it is still non-paying volunteer work. *Id.*

180. SAIBAN-IN KEIJI KENTOKAI [QUASI-JURY/PENAL MATTER INVESTIGATION COMM.], KANGAERARERU KENSATSU SHINSAKAI SEIDO KAISEI NO GAIYO NI TSUITE [THE OUTLINE ON THE PRC’S REFORM TO CONSIDER] 1 (2003), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai29/29siryou1.pdf>.

181. *Id.*

182. *Id.* at 1.

183. *Id.* at 2.

184. SAIBAN-IN KEIJI KENTOKAI [QUASI-JURY/PENAL MATTER INVESTIGATION COMM.], SAIBAN-IN SEIDO OYOBI KENSATSU SHINSAKAI SEIDO NI TSUITENO IKENBOSHU NO KEKKA NI TSUITE [RESULTS OF PUBLIC OPINIONS ON THE QUASI-JURY AND PRC SYSTEMS] (2003), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/siryou/0307kekka.html>. The report states that the investigation committee ran articles from April 1 to May 31 to solicit public opinions.

It further set up a homepage to solicit public opinions on their new proposals and guidelines.<sup>185</sup> Many grassroots activists from the RGJT were encouraged to send their opinions and suggestions to the committee homepage.<sup>186</sup> Based on public feedback, the committee submitted its final proposal and the parliament enacted the Act to Revise the Code of Criminal Procedure (including the PRC Law) on May 28, 2004.<sup>187</sup>

The revised law finally gave the PRC legally-binding authority to demand explanations for non-prosecution decisions and made prosecution mandatory if the commission has twice recommended prosecution.<sup>188</sup> Specifically, the revised law created the following two steps to make the PRC resolution legally-binding. First, when the PRC decides that indictment is proper, prosecutors will be obliged to reconsider the propriety of their non-indictment decision, although the commission's decision is not legally binding at the time.<sup>189</sup> If prosecutors still decide not to prosecute or if they fail to indict within three months, prosecutors will be invited to explain their inaction or non-indictment decision to the commission.<sup>190</sup> The commission will then re-evaluate the case and can make a legally-binding decision in favor of indictment.<sup>191</sup> In the event of such a decision, the court must appoint a lawyer who will perform the prosecution's role until a ruling is reached.<sup>192</sup> However, the actual instruction to investigate authorities will be entrusted to prosecutors.<sup>193</sup>

The new revision of the PRC law also created the position of a "legal advisor," who will be selected from the rank of practicing attorneys.<sup>194</sup> The legal advisor is appointed when the PRC decides it necessary to obtain legal knowledge and advice,<sup>195</sup> including the latter stage of the two-step process, where prosecutors decided not to follow the commission's first

185. *Id.*

186. *Id.* The author also has sent, along with other RGJT members, a lengthy letter of suggestions to the homepage, calling for a greater civic involvement in the deliberation.

187. KEIJI SOSHOHOTO NO ICHIBU O KAISEISURU HORITSU [ACT TO REVISE THE CODE OF CRIMINAL PROCEDURE], Law No. 62 of 2004 [hereinafter PRC Act], available at <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

188. *Id.* at art. 41, para. 7.

189. *Id.* at art. 41, para. 1.

190. *Id.* at art. 41, para. 2(2); art. 41, para. 6(2).

191. *Id.* at art. 41, para. 6(1).

192. *Id.* at art. 41, para. 9(1).

193. *Id.* at art. 41, para. 9(3).

194. *Id.* at art. 39, para. 2(1).

195. *Id.*

recommendation, and the commission is required to re-evaluate prosecutors' second non-indictment decision.<sup>196</sup>

### III. EVALUATIONS OF LAY ADJUDICATORY PERFORMANCE IN JAPAN

Since the implementation of the quasi-jury trial in May 2009, the Supreme Court Office has kept detailed administrative records of a number of key procedural elements of quasi-jury trials, including the pre-trial conference arrangement; the selection of quasi-jurors and alternates; their qualification and exemption status, trials' criminal types and categories; the presence of confession evidence; the length of trials, including deliberations; sentencing decisions; and jurors' evaluations of trial experiences, including their comprehension of trial testimony, satisfactions with deliberative collaboration, and critical assessments of the judicial performance of judges, prosecutors, and defense attorneys in the courtroom. Two reports issued by the Supreme Court Office provide the first-ever comprehensive analyses of the operation of the quasi-jury trial in Japan.<sup>197</sup>

#### A. Crime Categories and Trial Assignment

In the first year of its operation, from May 21, 2009 to May 31, 2010, a total of 1,898 criminal defendants were designated for the lay judge trial.<sup>198</sup> The largest number of defendants were accused of robberies resulting in bodily injuries (25.3%), followed by murders (22.6%), arsons (9.2%), and drug-related crimes (7.1%).<sup>199</sup> As of May 31, 2010, a total of 582 defendants were found guilty, and there were no verdicts of acquittal.<sup>200</sup>

More than fifty thousand people were identified as potential jury candidates for the lay judge trial (n = 52,206); jury summons were sent to 38,715 of them, and 12,899 of them were exempted or excused from jury

196. *Id.* at art. 41, para. 4. It is legally "required" that the PRC acquires the assistance of a legal advisor in considering the second resolution on the same case.

197. SUPREME COURT OFFICE, SAIBAN-IN SAIBANO NO JISSI NI JOKYONI TSUITE: SEIDO SHIKO-HEISEI 22 NEN 5 GATSU MATSU-SOKUHO [THE IMPLEMENTATION OF THE QUASI-JURY TRIAL: BULLETIN REPORT BY THE END OF MAY 2010] (2010) [hereinafter Report-1], [http://www.courts.go.jp/saikosai/about/iinkai/saibanin\\_kondan/siry\\_09/pdf/siry\\_2.pdf](http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siry_09/pdf/siry_2.pdf); SUPREME COURT OFFICE, SAIBAN-IN SAIBAN NO JISSI NI TSUITE: TOKUBETSU SHUKEI SHIRYO [THE IMPLEMENTATION OF THE QUASI-JURY TRIAL: SPECIAL SUMMARY STATISTICS] (2010) [hereinafter REPORT-2], [http://www.courts.go.jp/saikosai/about/iinkai/saibanin\\_kondan/siry\\_07/pdf/siry\\_5.pdf](http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siry_07/pdf/siry_5.pdf). REPORT-1 provides statistical summaries of quasi-jury trial proceedings from May 21, 2009 to May 31, 2010. REPORT-2 provides additional procedural summaries of quasi-jury trials from May 21, 2009 to March 31, 2010.

198. REPORT-1, *supra* note 197, at tbl. 1-1.

199. *Id.*

200. *Id.* at 3 tbl. 2-1.

duty.<sup>201</sup> Among the remaining 25,816 qualified jury candidates, 21,321 appeared at the courthouse for jury selection (82.6%),<sup>202</sup> and 16,460 of them were excused and/or eliminated from jury duty for various reasons (77.2%).<sup>203</sup> In the end, 3,369 were selected as final jurors and 1,298 as jury alternates.<sup>204</sup>

Many factors contributed to de-selection from jury service; surprisingly, the major factor was non-selection by lot ( $n = 11,421$ ), indicating that less than three-quarters of jury candidates who attended jury selection were excluded by lot (69.4%); 15.5% were excluded by peremptory challenges, 0.6% of them were excluded by a challenge for cause, and the remaining 14.5% were excused from jury service for various personal, economic, and/or statutory reasons.<sup>205</sup>

### B. *Juror Representation and the Supreme Court Surveys*

The Japanese Supreme Court Office conducted a jury survey in 2009 and published its first report in March 2010.<sup>206</sup> By the end of December 2009, a total of 5,054 citizens were called to serve on 138 jury trials, and nearly eighty percent of them reported to the courthouse (78.7%) and were asked to respond to the survey questionnaire.<sup>207</sup> The survey found that the majority of both summoned jurors and actual jurors chosen for jury trials were male (54.1% and 53.4% for summoned and actual jurors, respectively), middle aged in 30s through 50s (63.5% and 63.4%), and full-time employees or wage-earners (58.1% and 53.7%).<sup>208</sup> While 16.8% of final jurors indicated that they were responsible for the care of a child or elderly person, they were still able to take time off, report to the courthouse, and carry out their civic duty as quasi-jurors.<sup>209</sup> Additionally, 16.4% of alternate jurors had similar caretaking responsibilities and were able to carry out jury duties.<sup>210</sup>

201. *Id.* at 5 tbl. 4.

202. *Id.*

203. *Id.* at 6 tbl. 6.

204. *Id.* at 6 tbl. 7.

205. *Id.* at 6 tbl. 6.

206. SUPREME COURT OFFICE, SAIBAN-IN TO NI TAISURU ANKE-TO: CHOSA KEKKA HOKOKUSHO [SURVEY OF THE QUASI-JURY PARTICIPANTS: INVESTIGATIVE REPORT] (2010), <http://www.moj.go.jp/content/000050865.pdf>.

207. *Id.* at 12 tbl. 1.

208. *Id.* The employment category consists only of full-time jobs. Part-time, or "Arubaito" (part-time or a second job), is considered separately.

209. *Id.* at 4.

210. *Id.*

The Supreme Court Office published its second report on lay judge trials in July 2010.<sup>211</sup> Between January and April 2010, 11,641 people reported to the courthouse, and again the majority of them were male (53.7%), middle aged (62.7% of jurors were in their thirties through fifties), and full-time employees (51.5%).<sup>212</sup> Nearly one-fifth of summoned jurors indicated that they were responsible for the care of a child or elderly person or both (19.4%).<sup>213</sup> The gender and age composition of both final jurors (n = 1,889) and alternates (n = 651) was also similar to that of the summoned jurors; the majority of them were male (55.5% and 53.1% for final and alternate jurors, respectively) and middle-aged (63.5% and 65.3%, for final and alternate jurors, respectively).<sup>214</sup> Nearly one-fifth of final and alternate jurors were also responsible for the care of a child or elderly person or both (18.0% and 19.5%).<sup>215</sup> The findings are consistent between 2009 and 2010, in which jurors are predominantly male and middle aged, and nearly one-fifth of jurors participated in a jury trial despite their caretaking responsibilities.<sup>216</sup> The interesting finding is that nearly one in ten final jurors was a full-time homemaker (10.2% and 9.4% in 2009 and 2010, respectively), suggesting that women's representation in jury trials was enhanced by willing participation of housewives.<sup>217</sup> Those with no jobs (including the retired) also made up 5.0% and 7.7% of final jurors in 2009 and 2010, respectively.<sup>218</sup>

### C. *Juror Evaluations of Participatory Experiences*

In evaluating their jury experiences, nearly all jurors indicated that they were satisfied with their involvement in the trial process (96.7% and 96.1% in 2009 and 2010, respectively).<sup>219</sup> With regard to their understanding of trial proceedings, more than two-thirds of jurors said that they did not have problems comprehending legal discussions, evidentiary materials, and courtroom testimony (70.9% and 68.6% in 2009 and 2010, respective-

211. SUPREME COURT OFFICE, SAIBAN-IN TO NI TAISURU ANKE-TO: CHOSA KEKKA HOKOKUSHO: HEISEI 22 NEN 1 GATSU - 4 GATUBUN [SURVEY OF THE QUASI-JURY PARTICIPANTS: INVESTIGATIVE REPORT BETWEEN JANUARY AND APRIL 2010] (2010), [http://www.courts.go.jp/saikosai/about/iinkai/saibanin\\_kondan/siry0\\_09/pdf/siry0\\_3.pdf](http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siry0_09/pdf/siry0_3.pdf).

212. *Id.* at 5.

213. *Id.*

214. *Id.* at 3-4.

215. *Id.*

216. *Id.*

217. *Id.*

218. *Id.*

219. SUPREME COURT OFFICE, *supra*, note 206, at 6; SUPREME COURT OFFICE, *supra* note 211, at 7.

ly).<sup>220</sup> The great majority also said that the courtroom instruction and legal explanations provided by the judge and the prosecutor were easy to follow and understand (90.7% and 80.3% for judges and prosecutors respectively in 2009; 89.5% and 77.2% in 2010, respectively), whereas less than half of jurors said that they were able to understand the defense attorney's explanations and instructions (49.8% and 47.0% in 2009 and 2010, respectively).<sup>221</sup>

The majority of jurors were also satisfied with their involvement in the deliberative process and discussions (83.1% and 77.6% in 2009 and 2010, respectively).<sup>222</sup> This positive feedback on their overall experience was contrary to the finding that the majority were initially reluctant to report to the courthouse and serve as quasi-jurors (55.7% and 52.9% in 2009 and 2010), and only a quarter of them originally wanted to serve (26.2% and 26.4% in 2009 and 2010, respectively).<sup>223</sup>

These two reports substantiate the idea that the jury trials provided a very positive experience for jurors, and that the instructions or explanations given by the judge and prosecutors were easy to follow and understand. Their experiences with the deliberative process were also uniformly positive, and nearly all jurors were satisfied with the trial experience. Nonetheless, the jurors were disappointed at the inability of defense attorneys to effectively and competently communicate with them, suggesting that defense attorneys must make efforts to improve their courtroom performance, acquire necessary communicative skills for case presentation, and develop oratory methods to effectively explain case-specific information in future jury trials.

#### D. Verdicts and Sentences

Prior to the introduction of the quasi-jury trial in 2009, Japan's professional judges convicted 99.9% of all indicted suspects in criminal matters.<sup>224</sup> This near-perfect rate of conviction also continued even after the introduction of the lay judge trial.<sup>225</sup> As of March 31, 2010, there was not a

220. SUPREME COURT OFFICE, *supra* note 211, at 8; SUPREME COURT OFFICE, *supra* note 206, at 7.

221. SUPREME COURT OFFICE, *supra* note 211, at 6; SUPREME COURT OFFICE, *supra* note 206, at 5.

222. SUPREME COURT OFFICE, *supra* note 211, at 7; SUPREME COURT OFFICE, *supra* note 206, at 6.

223. SUPREME COURT OFFICE, *supra* note 211, at 7.

224. JOHNSON, *supra* note 81, at 215 (citing numerous sources to substantiate Japan's near perfect conviction rates).

225. Makoto Ibusuki, "Quo Vadis?" *First Year Inspection of Japanese Mixed Jury Trial*, 12 *ASIAN-PAC. L. & POL'Y J.* 24, 54 (2010) ("[T]he prosecution has secured the conviction of all criminal cases and never lost a case in the first year of the saiban-in trial."), available at [www.hawaii.edu/aplpj/articles/APLPJ\\_12.1\\_ibusuki.pdf](http://www.hawaii.edu/aplpj/articles/APLPJ_12.1_ibusuki.pdf).

single acquittal verdict in a total of 444 jury trials, thereby elevating the near perfect conviction rate to an even higher level.<sup>226</sup> The perfect conviction rate was what the Japanese prosecution originally aimed for; Shozo Fujita, Director of the Supreme Public Prosecutor's Office's Department, satisfactorily stated that "[s]o far, the lay judge trials, including the selection process, have gone smoothly overall, with the lay judges actively participating, and their opinions are reflected in the trial."<sup>227</sup> The reason that all jury trials resulted in conviction, he continued to state, "is, most of all, due to the fact that lay judges and alternates have served earnestly and with sincerity. We want to express our profound appreciation."<sup>228</sup>

The first not-guilty verdict was finally rendered on June 22, 2010 in the Chiba District Court in a case involving the contraband trade of amphetamines.<sup>229</sup> In this trial, the prosecutors sought a twelve-year imprisonment term and a six million yen fine.<sup>230</sup> However, the jury found fifty-nine-year-old Kikuo Anzai not guilty of smuggling nearly one kilogram of stimulants in a bag into Narita International Airport from Malaysia in November 2009.<sup>231</sup> The lay judge panel agreed with Anzai's testimony that he was unaware of the contents of the bag.<sup>232</sup>

The second not-guilty verdict came nearly six months after the first not-guilty verdict. On December 10, 2010, seventy-one-year-old Masahiro Shirahama was found innocent of murdering and robbing an elderly couple.<sup>233</sup> This became the first acquittal in a lay judge trial in which prosecutors had sought the death penalty.<sup>234</sup>

As of March 31, 2010, a total of 444 individuals were adjudicated in the lay judge court and 120 of them pleaded not guilty (twenty-seven percent).<sup>235</sup> The average length of the trial was 3.5 days (3.3 days for the confessed cases and 4.2 days for contested cases).<sup>236</sup> The deliberation period also varied with an overall average of 425.7 minutes (seven hours and six

226. REPORT-2, *supra* note 197, at 9 tbl. 13.

227. Setsuko Kamiya, *Year One of Lay Judge System: All Convicted*, JAPAN TIMES ONLINE (May 21, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20100521a5.html>.

228. *Id.*

229. *First Full Acquittal in Lay Judge Trial: Defendant's Argument Accepted That He Was Set Up in Drug-Smuggling Case*, JAPAN TIMES ONLINE (June 23, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20100623a4.html>.

230. *Id.*

231. *Id.*

232. *Id.*

233. *Gallows Averted in a First as Lay Judges Acquit*, JAPAN TIMES ONLINE, (December 11, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20101211a1.html> [hereinafter *Gallows*].

234. *Id.*

235. REPORT-2, *supra* note 197, at 7 tbl.10.

236. *Id.*



minutes), 399.6 minutes (six hours and forty minutes) for non-contested cases, and 514.3 minutes (eight hours thirty-four minutes) for contested cases, suggesting that jurors in the average contested case required an extra two hours to complete their deliberation.<sup>237</sup>

In evaluating sentencing decisions, the most frequent decision was a seven year imprisonment term (104 out of 444 defendants), followed by 5 year (79 defendants) and 10 year (78 defendants) terms.<sup>238</sup> Seven defendants received a life sentence, of which five of them were convicted of robbery resulting in death.<sup>239</sup> More than one quarter (27.9%) of defendants also received suspended sentences.<sup>240</sup>

The significant sentencing disparity between the professional judge and quasi-jury trials was found in the probation decisions given to those with suspended sentences by the quasi-juries. Between April 1, 2008 and March 31, 2010, in the professional judge trials, 36.6% of defendants with suspended sentences received probation, while the quasi-juries granted probation to 59.2% of defendants with suspended sentences.<sup>241</sup>

Despite the more lenient decisions handed out by the quasi-juries, there was an exception: criminal defendants convicted of forcible rape received longer sentences in quasi-jury trials than professional judge trials. While the defendants most commonly received five-year sentences (36.8%), followed by seven-year sentences (20.2%) in professional judge trials, the quasi-jury's most common sentence in forcible rape cases was seven years (25.9%), followed by eleven years and five years (18.5% for both sentences).<sup>242</sup>

Overall, the profiles of Japanese jurors are similar to those found in the United States, suggesting that they are more likely to be male, middle aged, and full-time wage-earners.<sup>243</sup> Japanese jurors also agreed consistently with the side of the prosecution, convicting nearly all criminal defendants so far. Such a one-sided deliberative decision may be partly due to the fact that prosecutors exhibited superior courtroom performance compared with defense attorneys. The quasi-jurors are more likely to offer the

237. *Id.* at 8 tbl.12.

238. *Id.* at 9 tbl.13.

239. *Id.*

240. *Id.*

241. SUPREME COURT OFFICE, RYOKEI BUNPUTO NI TSUITE [DISTRIBUTION OF CRIMINAL PENALTY], 18 (2010), [http://www.courts.go.jp/saikosai/about/iinkai/saibanin\\_kondan/siryu\\_07/pdf/siryu\\_6.pdf](http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siryu_07/pdf/siryu_6.pdf).

242. *Id.* at 4.

243. *See generally*, HIROSHI FUKURAI, EDGAR W. BUTLER, & RICHARD KROOTH, RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE (1993).

condition of probation for those with suspended sentences than the professional judges. While the great majority of trials only lasted four days or less, there were a small number of trials that lasted longer, especially in contested cases. The first death penalty trial which resulted in a complete acquittal verdict, for instance, lasted forty days, perhaps the longest jury trial so far in Japan.<sup>244</sup>

#### IV. RECOMMENDATIONS FOR THE FUTURE OPERATION OF JAPAN'S TWIN LAY ADJUDICATION SYSTEMS

This section presents a critical discussion of three specific suggestions and procedural conditions to improve the operation of both the quasi-jury trial and the PRC proceeding. The specific recommendation for the quasi-jury trial includes the speedy disposition of the pre-trial conference arrangement. For the PRC proceeding, the specific suggestions include: (1) greater and broader applications of the PRC deliberation to the examination of criminal cases involving potential corporate and administrative misfeasance; and (2) clarification of the legal status of prosecutors' non-indictment decision in criminal cases involving American military personnel.

##### *A. The Speedy Disposition of Pre-Trial Conference Procedures Without Sacrificing the Integrity of the Lay Judge Trial Process*

Despite a seemingly smooth and seamless transition from inquisitorial legal proceedings to more open, adversarial jury procedures, there has been one significant drawback in the operation of the citizen judge trial: the total number of jury trials for the first year failed to reach the desired goal set by prosecutors. The Japanese government initially expected to hold around 3,000 quasi-jury trials annually.<sup>245</sup> In the first year of operation, however, the actual number of cases designated to the quasi-jury trial was approximately forty percent less than the anticipated number, and the number of completed jury trials was only a fraction of the total number of criminal cases originally assigned to lay adjudication by the Japanese government.<sup>246</sup>

244. *Gallows*, *supra* note 233.

245. JAPANESE COURT OFFICE, SAIBAN-IN SEIDO NO TAISHO TO NARU JIKEN NO KAZU, 2008 [CRIMINAL CASES QUALIFIED FOR THE QUASI-JURY TRIAL, 2008] (2008), <http://www.saibanin.courts.go.jp/shiryo/pdf/03.pdf>.

246. A total of 554 cases were completed by the end of May 2010. Report-1, *supra* note 197, Table 7. The number of "554" represents a total number of criminal cases processed by the end of May 2010, not individual criminal defendants (n=582), as shown in Tables 9 and 10. Table 2 indicates that there were 601 criminal defendants being processed by saiban-in trials. But it failed to provide the actual

The major reason for the government's inability to process the desired number of quasi-jury trials may be due to the significant amount of time spent on preparation for the pre-trial conference procedure ("Kohanmae Seiri Tetsuzuki"). Prior to the introduction of the pre-trial conference procedure in 2004,<sup>247</sup> Japan's discovery laws only required that prosecutors disclose materials or statements that they introduced into evidence at trial.<sup>248</sup> Thus, Japanese prosecutors were not required to disclose contradictory statements or confessions from the same source that might reveal weaknesses in their cases.<sup>249</sup>

Nonetheless, the newly introduced pre-trial conference forced the prosecution to disclose much broader evidence to defense lawyers, and courts also showed a tendency to support the evidential discovery, demanding greater prosecutorial disclosure of evidentiary records and information, including discretionary works used for indictment.<sup>250</sup> While the new pre-trial conference was introduced with the intention to save time by narrowing case-specific issues presented at trial and facilitating the trial process, it also necessitated that the court participants clarify the charges and applicable laws, define allegations and contested issues, demand greater disclosures of facts and evidence, establish objections related to evidence, address the use of experts if any, and determine hearing and trial dates.<sup>251</sup> As a result, the preparation for the new mandatory pre-trial arrangement procedure began to take many months to complete.

For instance, the average length of a pre-trial conference procedure was 4.2 months, i.e., 4.0 months for non-contested cases and 4.8 months for contested cases.<sup>252</sup> More than a quarter of pre-trial procedures lasted more than four months (28.8%).<sup>253</sup> But for the contested cases, nearly half required more than four months to complete the pre-trial arrangement procedure.

number of trials (i.e., criminal cases) being processed by the saiban-in system. 554, thus, represents the total number of criminal cases processed by the end of May.

247. See KEIJI SOSHOHO TO NO ICHIBU O KAISEI SURU HORITSU [ACT PARTIALLY AMENDING THE CODE OF CRIMINAL PROCEDURE], Amendment No. 62 of 2004.

248. JOHNSON, *supra* note 81, at 40–41.

249. *Id.* at 41.

250. See Ibusuki, *supra* note 225, at 56 & n. 90 ("The recent Supreme Court's judgments suggest the disclosure to be favorable for the defense."). The expansive discovery requests in the pre-trial conference were also noted by the JFBA's report, resulting in a long waiting period. Nonetheless, despite the long waiting list for *Saiban-in* trials, the JFBA supports the thorough pre-trial procedures, including greater disclosure of evidence. See Kenji Utsunomiya, *Comment on the 1st Anniversary of the Saiban-in System*, JAPAN FED'N OF B. ASS'NS (May 21, 2010), <http://www.nichibenren.or.jp/en/activities/statements/100521.html>. ("[A] sufficient period of [pre-trial conference] time must be secured for preparation of a defense.")

251. KEIJI SOSHOHO [KEISOHO] [C. CRIM. PRO.], art. 316-5.

252. REPORT-2, *supra* note 197, at 7 tbl. 9.

253. *Id.*

ture (45.8%).<sup>254</sup> The procedural disparity is also reflected in the number of procedural meetings that the pre-trial conference required. The average pre-trial conference required 3.7 meetings, i.e., 3.3 meetings for non-contested cases and 4.5 meetings for contested cases.<sup>255</sup> Only 3.4% of non-contested cases required five or more pre-trial meetings, while approximately one quarter of contested cases required five or more meetings (24.2%).<sup>256</sup>

The lengthy pre-trial conference procedure also affected the overall facilitation of the lay justice process. For instance, the average procedural period from the initial indictment to the judgment was approximately 6 months, i.e., 5.8 months in non-contested cases and 6.8 months in contested cases.<sup>257</sup> Out of 308 cases examined by the Supreme Court Office, approximately two-thirds of them (206) completed the entire criminal process from indictment to judgment within six months.<sup>258</sup> Nonetheless, the remaining one-third took more than six months, including some criminal cases which required more than a year to complete the entire criminal justice process.<sup>259</sup>

Those figures suggest that in the average six-month period from indictment to judgment, four months (two-thirds) was spent on the pre-trial conference procedure alone. Once the lengthy pre-trial conference procedure ended, the criminal case completed within two months.

In order to efficiently facilitate criminal cases, it may be necessary to shorten the lengthy preparatory period of the pre-trial conference. At present, the lengthy pre-trial conference preparation has contributed to the significant delay in the adjudication of other criminal cases. While the pre-trial conference arrangement can prevent an innocent person from unnecessary prosecution and provide him much needed legal protection, a more elaborate and efficient pre-trial conference procedure needs to be developed in the future operation of the quasi-jury trial procedure.

#### *B. Broader Investigative Applications of the PRC Oversight Function*

The most unique feature of Japan's grand jury system is its ability to extend its investigative jurisdiction beyond criminal cases to civil and administrative matters. With the PRC's new ability to issue legally binding resolutions, the PRC thus became the important institution of civic over-

254. *Id.*

255. *Id.*

256. *Id.* at 7 tbl. 10.

257. *Id.* at 8 tbl. 11-1.

258. *Id.*

259. *Id.*

sight in examining allegations of corporate predation and governmental abuse.

Immediately after the implementation of the new PRC Act in 2009, all-citizen panels issued forced indictments of the Deputy Police Chief of the Akashi Police Station in Hyogo Prefecture in January 2010<sup>260</sup> and three past presidents of JR-West, one of Japan's largest and most powerful corporations, in March 2010.<sup>261</sup>

Despite numerous calls for the prosecution of the Akashi Deputy Police Chief for his failure to institute effective police oversight to prevent a deadly stampede that occurred in Akashi City in 2001, prosecutors refused to bring charges on numerous occasions.<sup>262</sup> The deadly stampede resulted in the injuries of 274 people and the deaths of nine children, ranging in age from five months to nine years, who were crushed to death on a crowded pedestrian bridge in Hyogo Prefecture.<sup>263</sup> The PRC had deliberated on the case on numerous occasions, deciding each time that the officer should be indicted and prosecuted, but local prosecutors continued to ignore the PRC recommendations.<sup>264</sup> The prosecutors' indifferent reaction to PRC decisions continued until 2009 when the families of the victims resubmitted their complaint to the PRC, which once again decided that the officer should be indicted and prosecuted.<sup>265</sup> The second PRC decision finally forced the local prosecutors to indict and prosecute the officer.<sup>266</sup>

After setting a new precedent on the forcible indictment of the deputy police chief, the PRC in the same prefecture went on to deliberate on a corporate malfeasance case involving a train derailment incident, which killed 107 and injured 562 others.<sup>267</sup> After a brief investigation on the case, prosecutors decided not to indict the three former presidents of JR-West, indicating that they were not directly responsible for the failure to institute the Automatic Train Stop (ATS) system which could have halted the speeding train from slamming into a multi-story parking garage on the ground

260. *Ex-police Official Indicted over Stampede Under New Inquest System*, JAPAN TODAY (Apr. 20, 2010, 3:34 PM), <http://www.japantoday.com/category/crime/view/ex-police-official-indicted-over-stampede-under-new-inquest-system> [hereinafter *Ex-police*].

261. *3 Ex-JR West Presidents to be Indicted over 2005 Train Disaster*, JAPAN TODAY (Mar. 27, 2010, 6:12 AM), <http://www.japantoday.com/category/crime/view/3-ex-jr-west-heads-to-be-indicted-over-2005-train-disaster> [hereinafter *3 Ex-JR West*].

262. See Fukurai, *supra* note 91, at 346.

263. *Id.* at 345.

264. See *Id.* at 346.

265. *Ex-police*, *supra* note 260.

266. *Id.*

267. *JR West president indicted over crash*, JAPAN TIMES, July 9, 2009, <http://search.japantimes.co.jp/cgi-bin/nn20090709a1.html>.

floor of a nearby apartment building.<sup>268</sup> The PRC determined that the major factor that attributed to the deadly accident was the company's management policy of pursuing corporate profits at any cost, not the safety of their customers, as the corporation's top priority.<sup>269</sup> In March 2010, the PRC decided for the second time that the three former JR-West presidents should be indicted for professional negligence resulting in injuries and deaths.<sup>270</sup>

The recent forced prosecution of corporate and government elites also demonstrated that the PRC's investigative jurisdiction can be easily extended to the examination of possible administrative misfeasance of public officials. One such instance was seen in the PRC's investigation of the Tokyo Governor's controversial decision to punish and dismiss school teachers who refused to salute the rising-sun flag ("Hinomaru") and sing the national anthem ("Kimigayo") at graduation and enrollment ceremonies in public schools.<sup>271</sup> His controversial decisions and sanctions have raised many fears among concerned citizens and activists who experienced similar militaristic rituals in schools and work places in the pre-WWII era.<sup>272</sup> Kimigayo and Hinomaru are also still regarded by many people in Asia as symbols of Japan's wartime imperialism and militarism.<sup>273</sup>

Tokyo Governor Shintaro Ishihara remains a permanent political fixture in Japan's conservative politics.<sup>274</sup> His deceased brother, Yujiro Ishihara, was a pop-icon for many decades, and the governor has been known to exploit his deep connections with those in the media industry and influential political circles to advance his ultra-conservative political agendas and economic programs.<sup>275</sup> In October 2003, under his political leadership, the Tokyo Metropolitan Board of Education made it compulsory to stand up, face the national flag, and sing the national anthem at graduation and enrollment ceremonies in public schools in Tokyo.<sup>276</sup> The Board of Educa-

268. *See id.*

269. Editorial, *JR West's Actions Show Lack of Remorse, Resolve*, DAILY YOMIURI, Oct. 24, 2009, at 4, available at 2009 WLNR 21059183.

270. 3 *Ex-JR West*, *supra* note 261.

271. *Tokyo Teachers to Sue Education Board over Compulsory Anthem Singing*, JAPAN ECON. NEWSWIRE, Jan. 24, 2004 [hereinafter *TokyoTeachers*].

272. See Anthony Faiola, *Tokyo Teacher is Punished for Pacifist Stance*, WASH. POST, Aug. 30, 2005, <http://www.washingtonpost.com/wp-dyn/content/article/2005/08/29/AR2005082901865.html>.

273. *Id.*

274. Doug Struck, *Tokyo's Brash Leader Seen as Potential Prime Minister*, SEATTLE TIMES (Mar. 25, 2003), <http://community.seattletimes.nwsourc.com/archive/?date=20030325&slug=japan25> (quoting Ishihara as saying, "'Your paper once called me a Japanese devil incarnate. . . I loved it'").

275. See *Shintaro Ishihara Writes Biography of Cherished Younger Brother Yujiro*, DAILY YOMIURI, July 9, 1996, at 3, available at 1996 WLNR 1267781.

276. *Tokyo Teachers*, *supra* note 271.

tion also authorized stiff punishment for those who failed to follow the directive.<sup>277</sup> As a result, many teachers were subjected to punitive measures such as reprimands, pay cuts, suspensions from work, and prohibitions against rehiring after retirement.<sup>278</sup>

The public pressure to examine Ishihara's controversial decisions and subsequent dismissals of public teachers forced prosecutors to investigate the allegations of political misfeasance.<sup>279</sup> In December 2005, however, the prosecutors announced that they decided not to indict Ishihara or his associates.<sup>280</sup> Immediately after the prosecutorial dismissal, former teachers and a support group filed a complaint with the PRC in Tokyo.<sup>281</sup> The civic panel deliberated on the complaint and decided in October, 2006 that the original non-indictment decision was proper.<sup>282</sup> Nonetheless, the panel also issued a strong warning to Ishihara that "the leadership of the Tokyo Metropolitan Board of Education could be perceived to be heavy-handed and it must exercise its leadership very carefully."<sup>283</sup>

In a different civil case filed by the dismissed teachers, however, the ruling came out differently. The Tokyo District Court ordered the Tokyo Metropolitan Government to compensate the dismissed teachers because they had been unfairly punished by Ishihara's government under the directive of the Board of Education.<sup>284</sup>

Despite the PRC's exculpatory decision on the misfeasance allegation, the PRC deliberation on the controversial decisions by Ishihara and his associates clearly demonstrated that the civic panel is equipped with the legal authority to play a significant role in examining the propriety of political decisions rendered by powerful public officials. The PRC also demonstrated its willingness to examine politically controversial cases involving the question of nationalism, collective identities of national communities,

277. *Id.*

278. See Faiola, *supra* note 272.

279. Noboru Ashizawa, *Hinomaru, Kimigayo no Kyoseiwa Yurusanai [No Compulsion Regarding Japan's National Flag and National Anthem]*, JANJAN (Feb. 28, 2006), <http://www.news.janjan.jp/government/0602/0602269930/1.php>.

280. *Id.*

281. *Id.*

282. *Hinomaru Kimigayo Mondai, Tochijiwa Fukiso Soto, Kensatsu Shinsakai [On Issues of Rising-Sun Flag and National Anthem, 'Non-Indictment of the Governor is Proper,' According to the PRC Decision]*, ASAHI SHIMBUN, Oct. 11, 2006.

283. *Id.*

284. See *City Hall to Appeal 'Kimigayo' Ruling*, JAPAN TIMES ONLINE (Sept. 23, 2006), <http://search.japantimes.co.jp/cgi-bin/nn20060923a2.html>. The same Tokyo district court also gave mixed rulings on other similar cases. In March 2009, the Tokyo District Court rejected a suit filed by 172 teachers who were punished for refusing to sing the national anthem at school events. Mariko Kato, *172 Teachers Lose Suit Over "Kimigayo,"* JAPAN TIMES ONLINE (March 27, 2009), <http://search.japantimes.co.jp/cgi-bin/nn20090327a4.html>.

and the teaching of patriotism in educational institutions. The PRC's political role has become even more important today because courts in different regions began to legitimize the firing of teachers for their refusal to follow similar directives. In February 2008, the Hiroshima District Court ruled that standing up to sing the national anthem was "no more than a social courtesy," and the directive did not infringe on the freedom of will.<sup>285</sup> In May 2010, the Hiroshima High Court upheld the lower court's ruling and rejected an appeal filed by the same Hiroshima teachers who were often portrayed as non-patriots or ideological outcasts.<sup>286</sup> Governmental policies used to silence political dissenters and controversial decisions by political elites to promote nationalism must be subject to critical examination by the all-citizen PRC panels and their collaborative deliberation in coming years.

### C. Clarification of the Initial Non-Indictment Decision in Relation to Military Crimes

Lastly, there remains international jurisdictional uncertainty with respect to how a Japanese prosecutor's initial decision not to indict an American suspect is to be interpreted within the framework of the existing intergovernmental agreements, including the SOFA and other intergovernmental protocols.

The American government may insist that the original non-indictment decision by Japanese prosecutors' should be interpreted as the Japanese government's legal declaration to forfeit any further prosecution of military personnel,<sup>287</sup> thereby nullifying the binding power of the PRC's subsequent

285. *Court Upholds Teacher "Kimigayo" Reprimands*, JAPAN TIMES ONLINE (May 25, 2010), <http://search.japantimes.co.jp/cgi-bin/nn20100525a7.html> [hereinafter *Court Upholds*]. In Kanagawa Prefecture, just south of Tokyo, the Prefectural Educational Board decided not to punish teachers who refused to sing the national anthem. Nonetheless, they sent the directive to schools to create a list of teachers who refused to do so. See *Kyosei no Nai Jiyuna Gakko Ni: Kanagawa no Hinomaru, Kimigayo Soshō Genkoku Dancho* [Schools Without Enforced Rituals: Plaintiff Leader for Hinomaru, Kimigayo Suit in Kanagawa], BARA: MATAHA HIDAMARI NO NEKO (May 6, 2008, 9:05:14 PM), [http://blog.goo.ne.jp/harumi-s\\_2005/e/401875dd80b92d245980c51565146dca](http://blog.goo.ne.jp/harumi-s_2005/e/401875dd80b92d245980c51565146dca).

286. *Court upholds, supra* note 285.

287. *Beihei Hanzai: Komu Mo Sinsakai Taisho* [American Military Crimes: On-Duty Crimes Similarly Subject to PRC Investigations], AKAHATA (Apr. 23, 2010), [http://www.jcp.or.jp/akahata/aik10/2010-04-23/2010042302\\_02\\_1.html](http://www.jcp.or.jp/akahata/aik10/2010-04-23/2010042302_02_1.html) [hereinafter *American Military Crimes*]. Article XIV of SOFA states:

Japanese authorities shall have the primary right to exercise jurisdiction over the person and their employees ... in relation to offenses committed in Japan and punishable by the law of Japan. In those cases in which the Japanese authorities decide not to exercise such jurisdiction they shall notify the military authorities of the United States as soon as possible.

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. XIV, ¶ 8, Jan. 19, 1960, 11 U.S.T. 1652. The Japanese prosecutors' decision not to indict military personnel thus can be taken as their decision "not to exercise" jurisdiction in the future prosecution of military suspects.



recommendation for forceful prosecution. The Japanese government, on the other hand, may insist that the American government respect the Japanese judicial system and legal custom and culture, including the new PRC law and the legally binding status of individual citizens' collective verdict to indict and prosecute military personnel.

Politicians have also been asked to provide the legal foundation for Japan's legal primacy of prosecutorial rights over American military defendants on the jurisdictional basis. On April 22, 2010, when questioned about the role of the PRC's investigation of civic complaints filed alleging criminal activity involving American military personnel, Senior Vice-Minister of Justice Koichi Kato stated that the PRC is legally empowered to investigate not only off-duty crimes committed by military personnel, but on-duty crimes as well.<sup>288</sup> While the U.S. government currently holds the rights to exercise primary jurisdiction over on-duty crimes and/or accidents caused by military personnel, Kato challenged this notion and insisted on Japan's jurisdictional preeminence by recognizing the PRC's authority to investigate all civic complaints, including allegations of on-duty military crimes.

When questioned on the status of the legally binding power of the PRC's second resolution concerning military defendants, Kato also stated that "[the legality of the PRC resolution] is one of the major [legal] questions to be clarified."<sup>289</sup> His statement was in response to an internal memo previously circulated among Ministry of Justice personnel. The memo entitled "Tsutatsu, Shitsugi Oto, Shiryō Shu" (Communications and Q&A-Related Support Materials) indicated that the original non-indictment decision by the Japanese prosecutors may forfeit Japan's original jurisdiction over crimes or accidents caused by American armed forces personnel.<sup>290</sup> Kato's statement clearly indicates that the Japanese government is still willing to draw the interpretive boundaries of applicable Japanese laws in determining the proper legal status of American military personnel and the extent of the PRC's power to initiate forceful prosecutions in military-related crimes.

In either case, legal controversies and possible political contestation over the interpretive boundaries of applicable American and Japanese laws in determining the proper legal status of American military felons should

288. *American Military Crimes*, *supra* note 287.

289. *Beihei Hanzai Kiso ni Seiyaku: Kensatsushin Giketu no Koryoku Tadasu* [Limit to the PRC's Forceful Prosecution: Clarifying the Power of the PRC], AKAHATA, Apr. 25, 2010, [http://www.jcp.or.jp/akahata/aik10/2010-04-25/2010042504\\_01\\_0.html](http://www.jcp.or.jp/akahata/aik10/2010-04-25/2010042504_01_0.html).

290. *Id.*

be welcomed and further facilitated. These issues tend to expose the unequal balance of power embodied in intergovernmental agreements and legal inequities as part of the unilateral imposition of extra-territoriality, which operates to undercut local law and jurisdiction. Given the long history of Okinawan residents' victimization at the hands of American military personnel and their dependents and the failure of the American military to punish culprits properly, the PRC's legally binding recommendations can help create a public forum on the island of Okinawa. At issue is the equity of intergovernmental agreements on special immunities and unilateral exemption from local prosecutorial processes, police interference, and/or other measures of legal constraints. The public debate over jurisdictional inequalities may also force both the American and Japanese governments to hold discussions on the redeployment of military personnel and the reconstitution of military facilities within Japan or outside the Japanese islands.

#### CONCLUSION

This paper began with a critical analysis of Japan's first ever trial of an American soldier by a quasi-jury panel in Okinawa, and the forced prosecution of Ichiro Ozawa, perhaps the most important political power broker in the post-WWII era, by the PRC panel in Tokyo. A detailed analysis of the evolution of the twin systems of popular adjudication indicates that the advent of these legal institutions was not a historical aberration, but rather has deep political roots in Japan's long civic struggles and grassroots movements to establish the lay judge system for criminal matters.

Although the new systems of lay adjudication faced many obstacles, Japanese society has finally created a vehicle capable of providing an important check on elite political and judicial power, at last restoring credibility in the legal system through transparency, civic participation, and legal education. The new systems also advanced the equitable legitimization of the decolonial and emancipatory strategies through citizen jury participation in Okinawa. Yet, whether or not the Japanese people can fully maximize the political utilization of the twin lay judge systems to emancipate themselves from governmental domination and corporate control is another question that needs to be answered in coming years.

