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The Prosecution Review Commission Process – Historical Analysis and Some Suggestions for Change

CARL F. GOODMAN*

In 2013 I wrote an article entitled Prosecution Review Commission, The Public Interest, and the Rights of the Accused: The Need for a “Grown Up” in the Room.¹ In that Article I suggested that:

the PRC—as presently structured—has the potential to damage the personal reputations of Japanese and other nationals, undermine Japan’s relations with foreign countries, and harm Japanese democracy. These effects flow from the “reformed” PRC law taking away the “Japanese government’s control over the indictment process” and replacing it with the unbridled discretion of lay persons whose focus may be unduly skewed by the notoriety of the event or potential accused. Members of the PRC lack the authority to consider the bigger picture because they have been mandated to perform a narrow role that looks solely at the event, rather than how indictment can affect the standing of the potential accused or Japan’s bigger interests.²

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1. 22 PAC. RIM L&P JOURNAL 1 (2013).
2. *Ibid.* at 4.

I made several suggestions for changes in the law. One suggestion “would create an additional body—learned in the law, removed from the prosecutor service, and above politics, composed of people whose experience assures that the interests of the accused, the government, and the public are considered before a PRC mandated prosecution goes forward.” At the time the article was written there had been 5 cases referred to prosecution by the newly empowered Prosecution Review Commission process of which 2 had resulted in not guilty verdicts with 3 cases pending. As of today’s date there have been a total of 9 PRC mandated prosecution cases; in 7 of these 9 cases the defendants were found not guilty at trial (the latest of these 9 cases (the case against three officials of Tokyo Electric Power Company (TEPCO) for professional negligence in connection with their alleged failure to sufficiently protect TEPCO’s nuclear facilities from the tsunami that led to the Fukushima Nuclear Tragedy) will likely be subject to several years of appeals before being finalized).

In the 2 cases where a guilty verdict was rendered, neither defendant was sentenced to incarceration. In one of those cases the defendant was fined the equivalent of \$90 for what appears to have been a bar room tussle and in the other (involving a sumo instructor who injured a student) the defendant was given a suspended sentence. The \$90 fine case was one of the only 3 cases where mandatory indictment involved a “public figure.” That case implicated a Mayor of a small town. The other 2 public figure cases (both found not guilty after trial) involved a police official and an Opposition Party figure prominent in the only successful situations where the Ruling LDP Party was voted out of office. The police officer was found not guilty because the prosecution was brought outside the time limits set by the applicable statute of limitations. The Opposition Party figure was found not guilty but as noted in the 2013 article, not before the mandatory indictment “had serious political repercussions in Japan and caused political turmoil in the first non-Liberal Democratic Party majority elected party and government in the Post War era.”

In 2019 we are considering again the effect of public participation in the Japanese criminal Justice system by way of the Saiban’in trial and the PRC Mandated Prosecution procedure. With 10 years of experience it is time to consider whether the PRC process has been a net benefit to Japan and its citizens or whether it has created more problems than benefits. I continue to believe that the mandated prosecution system has caused more harm than good and that modifications of the system are called for to protect the rights of the innocent. With 5 years of additional indictments by PRC’s and trials in such cases the case for amendment of the law has been strengthened.

Like the Saiban’in Mixed Lay and Professional trial system (for a limited number of cases), the PRC system involves private citizen members of the

public in Japan's criminal procedure system. I am a strong supporter of participation by the public in the criminal procedure process. But my concern for public participation deals with my concern for the rights of the accused while Mandatory Prosecution is, I believe, grounded in victim's rights concerns. My concern for the rights of the accused are grounded in the reality that the public Prosecutor's Office is an arm of the State and that the State may have an interest in silencing or punishing citizens who do not support the Party in power or the policies of the State and that the criminal process is a way of silencing and/or punishing dissent. Moreover in a criminal case the Prosecutor's Office has a distinct advantage—it is part of a huge apparatus that contains trained police and prosecutors with laboratories to examine evidence and professionals in various fields to provide testimony and opinions that are relevant to the case. It also has the power to question suspects (without the suspect's counsel being present) for an extended period of time in an effort to extract a confession. Indeed, in most cases that are prosecuted by the Prosecution Service the defendant has confessed prior to trial. If the charges are disputed at trial the trial may become an issue not of guilt or innocence but whether the confession is reliable.

The defendant lacks the resources of the prosecution team and lacks the funds to match the State's pocket book. Some of the advantages of the State continue in a PRC mandated prosecution—counsel for the prosecution is appointed by a court and is paid by the State; it has the reports of laboratory tests and interviews and other investigatory reports of the initial police/prosecutor investigations. The Public Prosecutor's office will have testified at the PRC proceedings giving the PRC prosecutor a file to work with. Yet in 7 out of 9 PRC mandated prosecution cases the defendant has been found not guilty. We should, as we review the PRC process and results of mandated prosecutions ask ourselves why the Professional Judges who decide PRC Mandated Prosecution cases have to date in virtually 80% of the cases disagreed with the PRC and found the defendant not guilty. Do the figures tell us something that we have not seen because we are focused on the results rather than why those results have followed PRC prosecutions? Can it be that Judges have such high regard for the Prosecutor Service, both as to its prowess in solving crimes and in its use of discretion to suspend prosecution or opt not to prosecute that Judges for the most part decide that the Prosecutor was right not to proceed and does so by finding the charged Party not guilty?

In a "normal" indictment case the most important adverse effects on the defendant's case are seen at the early stages of the criminal process when the suspect is first arrested and then subjected to many long days of questioning by prosecutors; without counsel being present to aid the suspect. Prosecutors

see the early stage as the time when they can extract a confession from the suspect—and they are usually correct. If they need more time to get a confession they have mechanisms to get the time they need. For example, they may charge the suspect with a new or related crime, e.g., a suspect can be charged over time with hiding a dead body, kidnapping and ultimately the crime that is actually being investigated—murder. Each new charge gives the prosecutor a new 23 day window to continue interrogation.

Most criminal trials in Japan involve a defendant who has confessed and much of the trial is devoted to determining whether the confession is reliable. After questioning the suspect who has confessed will be indicted and become an accused; suspects who do not confess (a very low percentage) but nonetheless are deemed by the prosecutors to be guilty will also be charged after questioning. It is at the arrest stage and then the indictment stage that the accused in a normal indictment case is held up to the public limelight and becomes an “indicted” person. This is particularly significant in Japan, a society where, whether the case is tried to a Saiban’in Panel or a single Judge trial, well over 95% of those accused/indicted who go to trial are found guilty. So too a similarly high percentage of cases involve a defendant who has confessed. The rare not guilty verdict may well come too late to rehabilitate the damaged reputation of the accused.

In Mandatory Prosecution cases the accused will remain unindicted until after the PRC has twice ruled that the prosecutors were wrong in failing to indict. The case will probably have made the headlines when the PRC made its initial decision for prosecution and will make headlines again when the party is made a subject of Mandatory Prosecution. The case will, typically, take some additional time to be tried because there will have been no indictment by prosecutors so the private lawyer who is appointed prosecuting counsel will need to familiarize himself/herself with the facts and prepare for trial. The trial will take time because it is likely that there has been no confession—if there had been a confession the case would have been prosecuted in the normal course or a suspension of prosecution would have resolved the case. The typical not guilty verdict (almost 80% of PRC Mandatory Prosecution cases—7 out of the 9 cases tried under Mandatory Prosecution—end with a not guilty verdict) will take some additional time to be rendered and the likely appeals will take even more time. Throughout this time the press may well debate the issue of guilt and the matter will (as it remains an open and an unusual case) remain in the public eye. The accused party remains an accused person notwithstanding the Public Prosecutors decided not to indict. The publicity likely will create additional opportunities to damage the accused’s reputation.

The harm to the defendant’s reputation comes from the indictment and continues through the verdict in the case and may not be relieved by the not

guilty verdict. Other harms may ensue depending on circumstances. Ichiro Ozawa's criminal prosecution required him to step down from a leadership position in the Opposition Party that was seeking to unseat the virtually perennial LDP leadership in the Diet. Consequently he was disqualified from acting in the attempt to unseat the ruling party—a consequence that may have seriously affected the election and certainly adversely affected his standing as a politician. If one believes that the continued dominance of the LDP comes not from overwhelming public approval of the LDP but because the Opposition has been found to lack the ability or capacity to effectively govern the likelihood is that Ozawa's absence from the political scene was a factor in the election. The charge of lack of ability to effectively govern would have been significantly more difficult to lie at Ozawa's doorstep than it was at the door steps of Prime Ministers Yukio Hatoyama, Naoto Kan and Yoshihiko Noda all Democratic Party of Japan Prime Ministers (over a period of just over 3 years).

Part 1 – The Role of the State in Preventing Private Vengeance

In the mythical American West men strode the streets armed and ready to protect their space, their property, their wife, etc. The West was seen as mostly lawless although it appears that if law came from the barrel of a gun because of the prevalence of firearms there should have been more law than there is today. Myth has a powerful effect in defining a society both to itself and to others. But we should recall that myth is after all myth. Even in the mythical West there was a role for government in the settlement of disputes between people. The local sheriff (typically an elected official) played a role in diffusing disputes and in asserting the State's right to protect citizens and enforce the law. Criminal law played its assigned role of regulating conduct that was deemed so abhorrent to be not just unlawful but illegal. Jury trial in serious criminal cases remained. But why was the state involved in what likely were essentially private disputes? What is wrong with having the Earp brothers settle their feud with the Clanton clan by shooting it out at the OK Corral? What interest does the State have in peaceably resolving the dispute between the Hadley and the McCoy clans? Why didn't Hadley simply sue McCoy if there were a dispute?

Criminal law is an aspect of public law wherein the State designs and enforces rules so as to prevent private wars and uncivilized resolution of disputes so that members of society can peaceably live together in a civil society. Most disputes can be and are resolved through "civil" as distinguished from "criminal" law mechanisms. Such civil mechanisms include the law of torts (delicts) which provides a remedy to an injured person hurt by the wrongful conduct of another. Thus ordinary automobile

accidents do not rise to a criminal law concern but are resolved through a ticket for a traffic infraction (mollifying the State) or through compensation under the tort or delict law, while “trial” may be held in a civil (not criminal) court or by way of an alternative dispute resolution body. Some conduct is so abhorrent, so destructive of civil society that the State can step in and exercise its right to maintain law and order. Such conduct in the auto accident case would include, for example, vehicular homicide in which a party is killed as a consequence of an act of driving that is grossly negligent or driving under the influence of alcohol or other mind altering substances or a hit and run case in which a driver strikes a pedestrian and instead of stopping to give aid picks up and runs away. Leaving the scene may result in exacerbating the injury to the pedestrian; allowing grossly negligent drivers to walk away from an accident where the party in the right is severely injured or killed might be seen as destructive of society by putting approval on such conduct because no criminal penalty is exacted by the State. In a civil society there is a requirement that one stops and renders aid. The role of criminal law is to enforce what are deemed to be important civic norms to make life better for the society in general. The role of the civil law tort lawsuit is to compensate the victim for the injury caused by one’s negligence. There is a reason why a criminal case is entitled “People of the State of X v. defendant”; it is society (the People) that is being protected by the criminal law—the personal injury to the victim or the victim’s family is a matter for the civil law—for the tort or delict lawsuit.

To enforce civic norms criminal law makes the State a principal player in enforcing law among people. The State’s role in civil law matters such as compensating a person who has suffered a delict at the hands of another is to define rules regulating what is and what is not a wrong and providing a civilized mechanism for resolving interpersonal disputes regarding such alleged wrongs that caused damage. Punishment of the tortfeasor is not part of the calculation or part of the trial. The civil court system and civil court rules are state created and maintained so that compensation for injury may be given to those harmed. The State’s role is exemplified by the Judge, who is a state employee. Alternative dispute resolution mechanisms, such as arbitration may substitute for the State (as is frequently the case in Japan). Of course the results of a criminal case may affect the civil tort case. The issues tried in the criminal case and decided against the criminal defendant need not be tried again. Rules that estop a defendant from litigating facts it has already litigated and were decided against the defendant in a Common Law system need not be litigated again. This is especially so when a defendant is found guilty of a crime as the burden of proof to establish guilt is higher in a criminal case (beyond a reasonable doubt) than in a civil case (a preponderance of the evidence). A not guilty verdict is not entitled to the

same effect because the burden of proof in a civil setting is lesser than to prove guilt—it may be that the criminal case failed because the higher standard of beyond a reasonable doubt could not be met but the civil damages standard of preponderance of the evidence was met. In a sense they are *res adjudicata*. In civil law societies the victim may also rely on the criminal conviction to assert a right to compensation, either as a part of the criminal trial or following but based on the judgment in the criminal trial. A recent reform in Japan allows the victim to not only participate in the trial of the criminal case but also to ask for monetary damages from the defendant at the close of the criminal case.³

The power to enforce the law through criminal adjudication includes the power to incarcerate citizens whose conduct is so obstructive of civilized society that they are separated from the rest of society and imprisoned as a punishment (or as a means of assuring that for at least some period of time they will not be free to commit additional crimes). This is an improvement from the days when those who acted outside the criminal law were either maimed or killed. And even in many modern societies (Japan and the United States included) capital punishment still is recognized as a means of enforcing conduct deemed so hurtful to civil intercourse that death is deemed an appropriate remedy. Treason, the crime that John Adams and other Founders of the United States were engaged in was, and remains, punishable by death.

Criminal law enforcement is fraught with dangers of possible abuse. The State, as an entity may have interests of its own. Rulers of the State, especially rulers with an authoritarian bent, surely have their own interests in regulating the conduct of citizens; especially citizen conduct that can diffuse, limit or overthrow a ruler's power. King George III's government likely would have sought the death penalty had John Adams been caught and

3. See Matsui, Justice for the Accused or Justice for Victims?: The Protection of Victims' Rights in Japan, 13 *ASIAN-PACIFIC LAW & POLICY JOURNAL* 54, 80 (2011). "Victims may request that the defendant pay damages before the end of criminal trial. This measure is available only to heirs of deceased victims or victims injured as a result of an intentional crime, rape or forcible obscene act, child abduction, abduction for ransom, and other offenses. The application fee is 2,000 yen (roughly \$26 USD), which is quite inexpensive compared to the complaint fee, which must be paid in order to file a civil suit. The judges who handled the criminal case will determine the defendant's civil liability after conviction. To determine the defendant's civil liability, the judges will use the same evidence adduced at the criminal trials and court transcripts, which lessens the burden on the victims. Hearings are limited to four times. When judges believe that the defendant is liable, they order the defendant to pay damages. If the defendant accepts the order, the order will have the same force of law as the judgment of the court. If the defendant refuses to accept the order within two weeks after it is issued, the case will be transferred to another court as a regular civil suit. Nevertheless, the court can use the evidence and trial transcripts from the criminal trials. This system is generally called a—damage order system. This system substantially reduces the burden on victims who seek damages." (Footnotes omitted.)

transported back to England. Autocratic governors may see imprisonment, death or even damage to reputation and the threat of imprisonment of opponents as the best means for preserving their authoritarian rule. States and autocratic rulers of States have police and prosecutor powers and bureaucracies at their disposal. These powers include the power, in some situations, to take away freedom of citizens; which raises the questions “who polices the police” and “who prosecutes the prosecutors” and who decides the case—a Judge, a Jury or a Saiban’in Panel? To moderate the power of the State to obstruct and/or take away the rights of citizens, societies have adopted some mechanisms to allow citizen’s to have direct participation in the criminal law process.

The common law petite jury serves the function of allowing the “public” (through the jurors selected to decide a case) to stand between the public officials who may be seen as aligned on one side of the case—the police, prosecutors and Judges—and ordinary citizens or residents accused of criminal conduct, on the other side. To temper the power of the State actors the decision reached in the case is made by a body of ordinary citizens (or at least ordinary citizens are given a veto power over the decision of the State actor public employees). The Saiban’in System was adopted to provide a voice for the public in deciding guilt or innocence (and having a say in the sentencing of those found guilty) in cases involving certain high profile crimes. Under this citizen participation system ordinary citizens can check or moderate the voice of the Judges, while the voice of the Judges can equally check or moderate the voice of the lay jurors.

The PRC while having private citizen involvement does not have the same ability to check the actions of the prosecutor service. It cannot review and/or reject the prosecutor’s decision to prosecute a crime and thus potentially take away the freedom and/or reputation of citizens. In Japan there is no public input when a prosecutor decides to prosecute. There is only PRC public input when a prosecutor decides **not** to prosecute. But the harm of the potential abusive power of the State is not involved in the decision not to prosecute it is involved in the decision to prosecute. Japan has no equivalent of the Federal Grand Jury that provides citizens who stand between the State (represented by the prosecutor) and the suspect and which can refuse to allow the State Prosecutor to prosecute an individual; or not prosecute for a crime that carries a high punishment rather than a crime with a lesser punishment. The PRC cannot reject the prosecutor’s attempt to take away a citizen’s or resident’s freedom—it can only require that someone **be prosecuted** for an alleged crime and thus made subject to the power of the State after the State has itself concluded that the citizen/resident not be subjected to the criminal law process and (potentially) the criminal law punishment. While such a process may be relevant and appropriate when the

subject of the complaint is the State itself or a significant State Actor no PRC case has yet led to conviction of a significant State actor—a small town mayor involved in an after working hours bar room brawl (a fine equivalent to \$90 USD.) hardly represent the type of or level of potential corruption that the Occupation was seeking to reach by suggesting the initial PRC statute. The small town Mayor was not charged for conduct performed in his capacity as Mayor—he was charged with an out of office off duty pushing of a woman in a bar in a case where a principal witness recanted his testimony on appeal—but as is usual in Japan the conviction was nonetheless upheld.

The United States Constitution's Bill of Rights is filled with rights granted to those accused or suspected of committing a crime. Thus:

The Fourth Amendment prevents the government from engaging in unreasonable searches and seizures and further provides that “no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized”,

The Fifth Amendment not only protects the suspect or accused by granting such person the right to remain silent and thereby not incriminate him/herself thereby making it incumbent on the prosecutor to prove guilt. The Fifth Amendment also provides, “No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb” and further provides that no person shall be “deprived of life, liberty, or property, without due process of law”,

The Sixth Amendment provides “the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed” and gives the accused the right to confront witnesses against him/her.

John Adams, perhaps the most vocal voice for starting the American Revolution, could take comfort in these amendments especially the amendments that provided for a Grand Jury indictment for felonies and the right to trial in the district where the crime was committed. Adams had committed treason—he had advocated and stirred others to revolution against the lawful government. He knew that if charged in Massachusetts no Massachusetts Grand Jury would indict him and further that if the Crown could force a Grand Jury to indict no Massachusetts Petite Jury (the district

wherein the crime was committed was Massachusetts) would convict. The founders were well aware of what it meant to be accused of crime. They were personally and directly concerned with the rights of the accused. Because the State was the moving party and influence in a criminal trial they were concerned with restricting and limiting the power of the State by giving the accused in criminal cases rights against the State. They were not simply less concerned about questions concerning the rights of the victim of a crime they were unconcerned with such questions. It was government, the new United States Government they were creating, that was seen as the potential threat to personal liberty and thus the government's powers were to be limited by the people's rights. Victim's rights are not contained in the Bill of Rights and were not the subject of the criminal law. The Constitution's primary concern was to regulate, contain and control the power of the government. Victims seeking compensation were relegated to the civil law courts and the Common Law. Such victims if suing under the Common Law, such as suing for the tort of assault arising out of a sexual assault (a criminal act punishable by the State through criminal prosecution), were afforded the Common Law right to trial by jury if the claimed damages exceeded the sum of \$20.⁴ In such a jury trial case ordinary citizens would decide the case (after being briefed on the law by the presiding Judge) and would also be involved in determining the amount of damages recoverable for the harm caused by the defendant (assuming a judgment for the Plaintiff).

The PRC law would not have allayed John Adams's concerns. If anything it would have exacerbated his concerns because it expands the power of the State mechanism to do harm by allowing citizens to determine that a criminal case be brought against others even when the State mechanism, the Prosecutor Service, has decided that no crime has been committed or if a crime has been committed that prosecution against the suspect should not proceed. It does not cabin and prevent private vengeance; it enables private vengeance and cabins prosecutorial discretion to look the other way. It not only pays the expenses of carrying out such vengeance by paying the private attorney who prosecutes the Mandatory Prosecution case (while the defendant must shoulder its own expenses) but publicly accuses the defendant of committing a crime thus adversely affecting reputation and holds over the defendant's head the threat that the State will take away personal freedom. Rather than limiting private vengeance it enables private vengeance and makes the State a party to such vengeance. It is a private party (or private parties) who initiate the complaint to a PRC for review of the

4. The Seventh Amendment to the Constitution provides: "In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law."

prosecutor's no prosecution determination.

Victims, of course, have a legitimate concern that their rights be protected and the civil justice system in Japan may fail them in some respects in this regard. Unlike the United States civil legal system damage assessment in a Japanese civil case is a matter for the Judge not a matter for a jury made up of ordinary citizens. Judges tend to follow what other Judges have done so that damages in certain areas—automobile accident cases, recently expanded medical malpractice case, etc.—are standardized. And monetary damages in Japan are low compared to American damage standards. Japanese law recognizes set offs from damage awards when other sources of compensation come into play—Japan has no “collateral source” rule such as exists in the U.S. Punitive damages are against Japanese public policy and not available to Japanese plaintiffs. So too, foreign judgments for punitive damages are not granted comity by Japanese Courts.⁵ Moreover, it may be more difficult for plaintiff in a civil suit to meet its burden of proof in Japan where the judge must (except in cases where the burden of proof has been shifted by legislation) be convinced that the plaintiff is correct rather than the more liberal weight of the evidence standard generally applicable in the United States.⁶

To help crime victims receive compensation for the harm caused by the criminal conduct proved at the trial Japan enacted legislation to permit victims to participate in certain categories of criminal cases brought by the State and to ask for damages in such criminal cases. As Professor Setsuo Miyazawa has earlier noted:

In cases involving serious crimes such as homicide, injury, rape, professional negligence resulting in death or injury, or kidnapping, the victim, surviving family member or their legal agent may sit behind the prosecutor in the trial, may seek explanations from the prosecutor about his exercise of his legal authorities, may question witnesses and defendant, and may present an opinion following the examination of all evidence, including sentence. Once the court has found the defendant guilty, the same court may order the defendant to pay a civil damage upon application from the victim.⁷

How such victim participation affects the Judges hearing the case—

5. Case No. 1993 (0) No.1762 (Supreme Court, Petty Bench, 7/11/97).

6. See generally, Carl F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* (Kluwer Law Int'l, 4th rev. ed., 2017) Chapter 14, Section 14.03 [B] [3].

7. Setsuo Miyazawa, *Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives*, 42 *INTERNATIONAL JOURNAL OF LAW, CRIME AND JUSTICE* 71, 74 (2014).

especially citizen Judges on Saiban'in Panels in, for example, homicide cases—is yet to be determined. Here again the victim's rights movement may have made it more difficult for the defendant to get a fair trial in which emotion plays second fiddle to the facts as demonstrated by the evidence presented in open court.

If victims are denied appropriate monetary damages in civil cases and thus must seek compensation through vengeance sought under the criminal law then the civil law should be amended to allow victims to recover more reasonable damage awards. While this may be difficult to achieve and especially difficult in Japan's male oriented society in cases involving sexual assault, that is no excuse for abusing the criminal Justice system in ways that may provide an opening for an authoritarian government to abuse the system for its own purposes. Freedoms of the defendant in a criminal trial benefit us all as we all may someday be a defendant and as we all need to protect the democratic system from potential abuse by State actors. As currently structured the PRC does not aid in this goal—it does not provide protections against wrongful prosecution or wrongful conviction.

Part 2 – The Harm Caused by the Current System which Allows Mandatory Indictment by the Prosecution Review Commission

A. First Do No Harm

1. Taking the air out of the discussion of whether there should be public participation that can limit the ability of the Public Prosecutor to indict

The concept that a doctor should “first do no harm,” that she should take into account the harm that treatment may cause to the patient before a decision to proceed is made is well known in the medical field. I suggest it has equal relevance in the legal arena. I believe that by submitting ourselves to debate and discussion of the PRC Mandatory Prosecution system without at the same time discussing the proper role of the public to screen the prosecutor's decision to indict, we draw attention away from the more important issues of how to properly make use of citizen participation in the early stages of the criminal process to assure that Prosecutors do not abuse their indictment power. The PRC is limited solely to checking the prosecutor's ability to allow a person or entity to go free without a trial. Yet this right to “prosecutor discretion” is a long-standing right both in U.S. law

and Japanese law and is frequently used in Japan.⁸ The 2014 White Paper on Crime informs us that Japanese prosecutors frequently utilize their authority to exercise their discretion not to prosecute. Indeed, statistics in that report disclose that prosecutors refused to indict someone in more than 90% of cases referred to them by the police in 2013 and that they suspended prosecution in more than 50% of referrals.⁹ These percentages relate to cases referred to the prosecutor's office by the police—they do not take account of the cases that are washed out at the police level in order to give the suspect an opportunity to rehabilitate. Both Japanese Police and Prosecutors appear to have greater understanding of the need to rehabilitate those who violate the law than do Police and Prosecutors in the United States where Criminal Law has more of any “eye for an eye” and “let the punishment fit the crime” than a rehabilitation emphasis.

A suspension of prosecution is essentially a determination by the prosecutor that the defendant is guilty but that rehabilitation is likely if the defendant is given a second chance.¹⁰ Suspension of prosecution traces its origins to at least 1909. It is rooted in Japan's preference for deterrence of crime via rehabilitation over punishment. Rehabilitation is more likely to be achieved if the subject does not have a criminal record that stands in the way of responsible employment and making a new crime free life. A prison is by definition composed of a society of “outlaws,” i.e., those who have in common the fact that they have acted outside the law. This is not a good society in which to nurture crime free values.

Suspension of Prosecution is an example of giving a person a second chance—but a real chance not a chance hampered by a criminal conviction of record. If the subject refuses to make use of that second chance the subject is not likely to be treated so easily a second time. Suspension takes into account the victim and frequently will require making the victim whole financially as well as requiring the accused to make a formal apology to the victim. The potential pool of victims aggrieved by the suspension or no prosecution decision is large and the number of Mandatory Prosecution cases

8. Not only can a prosecutor in Japan exercise discretion by refusing to indict and prosecute, (*Japan v. Fukumoto*, 1006 Hanji 22 (Sup. Ct. 6/26/81—prosecutor within his discretionary rights in prosecuting only one side in bribery case) but the Prosecutor Service may “suspend prosecutions” in cases where the Prosecutor believes the defendant is guilty (and indeed believes that the Prosecutor Service will be successful at trial). Suspension starts with the assumption of guilt provable at trial but allows for the case to atrophy because the prosecutor believes that the defendant can be rehabilitated and that “suspension” will allow for rehabilitation whereas trial and conviction will impede rehabilitation. See Carl F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* (Kluwer Law Int'l, 4th rev. ed., 2017) p. 384 fn. 204 and materials cited therein.

9. White Paper on Crime 2014 Chart 2-2-2-1; .

10. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* (Kluwer Law Int'l, 4th rev. ed., 2017).

is quite small—9 to date. The seeming contradiction may be accounted for in part by the fact that PRC's tend not to suggest indictment—indictments in the 9 cases all either involved a noteworthy event, perhaps involving a corporation that caused harm but whose management was not indicted by the prosecutor's office or a political personage. Since PRC's tend not to recommend indictment after the Public Prosecutor has decided not to indict (or at least tend not to recommend indictment two times so as to cause mandatory indictment)¹¹ we do not know whether PRC's would, if given the chance, choose to reject indictment in any cases where the prosecutor has decided to indict. But, there should be public participation in the important decision to charge a member of the public with a serious criminal offense and the public, through representation on a panel such as the PRC should be allowed to say NO to the prosecutor, especially when the freedom and/or freedoms of other citizens is at stake. The power to indict and take away freedom is too great a power to leave in the hands of government officials without some form of public review. The Grand Jury provides for such review and can provide a model for public participation in the decision to accept or reject a Prosecutor's indictment decision. Expanding the PRC law to provide for such review in cases of filing charges for serious crimes would, it is suggested, be a valuable addition to the PRC law and to public participation in the criminal process in Japan.

The question of whether PRC's would support indictment is not raised by the PRC law because the PRC has no authority to review the decision to indict and while the number of cases where indictments are issued is reduced by the benevolence of prosecutors in Japan¹² there remain many cases where prosecutors proceed based on little more than scant evidence or a defendant's confession obtained under circumstances that would be subject to question in the United States. Japanese suspects are not entitled to "Miranda rights" and "Miranda warnings" and are not allowed to have counsel present during interrogation sessions. The opportunity of the prosecutor to question a suspect without counsel being present and to do so for an extended period of time (typically 23 days, but which may be further extended) may lead to false confessions. False confession cases are gaining more notoriety in Japan just as they are in the United States. Indeed the disclosure of many false confession cases has spurred the movement toward full recording of

11. Since adoption of the amended PRC law allowing Mandatory Prosecution ten years ago only 9 cases have been subject to Mandatory Prosecution—an average of less than 1 per year.

12. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317 (1992).

police/prosecutor interviews of suspects in Japan.¹³ A grand jury type mechanism could provide for a public window on the procedures by which confession was obtained.

The question of whether the PRC or some other body with the power of an American Grand Jury would indict is a serious question. Just as the petite jury in the United States serves as a buffer between the Judge and the Prosecutor (both employees of the State) on one side, and the defendant and counsel (both (typically) not employees of the State)¹⁴ on the other, so too the Grand Jury is a buffer between the Prosecutor and the public.¹⁵ In an American federal criminal case an indictment is required before a serious crime case can proceed and that indictment when sought by the prosecutor is in the hands of the Grand Jury. No similar buffer exists in Japan and while a PRC looks to some extent like a Grand Jury it lacks the basic function of the Grand Jury—to protect the public against a too active prosecutor by deciding whether the prosecutor has enough evidence to make out a *prima facie* case of the suspect's guilt before a person is formally charged with, i.e., indicted for a serious crime. That question is not asked in Japan; in part because academics and others are spending time dealing with the mandatory indictment authority of the PRC (used less than once a year on average) not the lack of authority of the PRC or any other body to deny a prosecutor the right to indict. Yet it is the right to indict that is the more serious as charging a person with a crime is the first step in the process by which the State as an entity can take away freedom of citizens. And because the number of PRC cases that lead to mandatory indictment has yet to reach 10 over the life of the new Mandatory Prosecution amendment while many thousands of indictments have been issued during the same period, the potential greater problem or issue is being sidetracked. Looking at the PRC mandatory indictment process while not considering a role for a PRC or Grand Jury style review of indictments is, I suggest, looking at citizen participation in criminal Justice matters in Japan through the wrong end of the telescope. The result is that a big problem is made small and a small

13. Jiji Press, 6/7/18, *Police Fully Recorded Large Share of Grillings*. Data in the article shows *some recording* of interrogation had been achieved in 81.9 percent of interrogations while in cases tried before a Saiban' in Panel full recording were had in over 70% of cases in 2017.

14. *Duncan v. Louisiana*, 391 U.S. 145 (1968); “The guarantees of jury trial in the Federal and State Constitutions reflect a profound judgment about the way in which law should be enforced and justice administered. A right to jury trial is granted to criminal defendants in order to prevent oppression by the Government. Those who wrote our constitutions knew from history and experience that it was necessary to protect against unfounded criminal charges brought to eliminate enemies and against judges too responsive to the voice of higher authority. The framers of the constitutions strove to create an independent judiciary but insisted upon further protection against arbitrary action. Providing an accused with the right to be tried by a jury of his peers gave him an inestimable safeguard against the corrupt or overzealous prosecutor and against the compliant, biased, or eccentric judge.”

15. *United States v. Williams*, 504 U.S. 36 (1992).

problem is regarded as big. By sucking the air out of discussion of tempering or subjecting to question the **decisions of prosecutors—agents of the State—to indict** the PRC mandatory indictment discussion may be creating harm by sidetracking discussion of whether there is an appropriate role of citizens in determining whether an indictment should issue. What should be discussed is whether the PRC should be given the power of the Grand Jury to accept or reject an indictment based on whether the prosecution can make out a prima facie case of guilt.

B. Do No Harm from a Substantive Prospective

Do no harm has both a procedural aspect and a substantive aspect. On the procedure side it should be noted that harm can occur to the criminal justice process by simply accepting things as they are and not questioning matters, as noted above. On the substantive side, allowing a group of citizens to force a prosecution when the professional prosecutors have decided otherwise may result (and as the first 9 cases tried under the PRC mandatory indictment procedure shows has resulted) in substantial harm. Although only 9 Mandatory Prosecution cases have been filed, that harm has already flowed to parties indicted; the Japanese public and to Japan's political system.

1. Harm to the Accused

An accused person is subjected to harm in the early stages of all criminal cases. While he/she may have a right to counsel that right is limited in Japan by the prosecutor's right to make its case. Moreover while the accused has a right to bail the reality is that bail does not come into play until the accused becomes a defendant—has been charged, i.e., indicted. While judges can grant bail at an earlier stage the "right" is illusory as bail is not just typically but virtually always, denied at an early stage—and typically denied until the accused has confessed; paving the way for indictment and conviction.¹⁶ The formalistic grounds for denial of bail are that there is fear the accused defendant will conceal or destroy evidence.¹⁷ When bail is granted (as it was eventually in Ghosn's case—months after his arrest and indictment) the

16. "The Code of Criminal Procedure allows bail at the discretion of the judge, but serious crimes, habitual defendants, those previously sentenced to imprisonment for over ten years and those without a fixed address cannot get bail. Judges may deny bail if there is danger that a defendant will destroy evidence or cause harm to others once released. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 405 (Kluwer Law Int'l, 4th rev. ed. 2017).

17. Reuters, 1/15/19, *Tokyo court denies Nissan Ghosn's latest bail request* "It is rare in Japan for defendants who deny their charges to be granted bail ahead of trial."

former head of Nissan it was hedged with serious damaging conditions—he is forbidden to see his wife while out on bail.¹⁸ Indeed since Japan lacks the same speedy trial rules as are applied in the United States the Constitutional right to a speedy trial is virtually meaningless. Ghosn’s trial is scheduled to begin in April 2020 after having been postponed, at the request of prosecutors, from an originally scheduled September 2019 date.¹⁹ He was arrested in November 2018 meaning trial is scheduled to begin almost a year and a half after his arrest. Whether a further extension of the trial date will be sought and granted is unclear at this time. Meanwhile, while he is out on bail he is forbidden to see his wife. The failure to provide bail—at least before the defendant confesses—has been referred to as “hostage Justice” as the accused is held hostage until he confesses. So far, it appears that bail has not been an issue in PRC Mandatory Prosecution cases. Perhaps that is because the Prosecutor service had not brought the charges and the police had not arrested the accused, leading to the conclusion that there was no need to extract a confession from the subject of the PRC review and Mandatory Prosecution.

Once the PRC Mandatory Prosecution process has been initiated the other adverse effects of being a defendant in a criminal case do come into play. Moreover as PRC cases are rare some consequences may come into play with increased impact. Thus the fact of PRC indictment (because rare) becomes a newsworthy matter bringing the charges to the notice of friends, business associates, neighbors and indeed the public at large. The PRC process will likely keep the pressure of having been indicted and now the subject of a criminal trial on the suspect for an extended (years long) period of time as the process winds through its required stages of PRC suggestion for indictment, Prosecutor review of the matter and decision and then return to a PRC procedure to consider the prosecutors denial to prosecute and now awaiting the trial and then the decision by the Court. The emotional highs and lows encountered by the accused during this several year process must be enormous. Reputation is placed under a microscope and this cannot be in the interest of the party being prosecuted. As Japanese criminal cases tend to take a long time before resolved, a cloud may hang over the head of the

18. Kyodo News, 4/26/19, *Ex-Nissan boss Ghosn released on bail, but barred contact with wife*, <https://english.kyodonews.net/news/2019/04/08879582d268-urgent-ghosn-granted-release-on-bail-by-tokyo-district-court.html>. Bail was granted in April 2019. If trial is started in April 2020 as anticipated he will have been forced not to see his wife for at least a year. Better than not being out of jail on bail—but surely punitive.

19. Nikkei Asia Review, 3/20/19, Yusuke Konishi, *Ghosn trial to start in September under accelerated process*. As the dates clearly show his original trial date was set in March 2019 to start 6 months later “under an expedited procedure.” However in September 2019 it was rescheduled at the request of the prosecutors, for April 2020. JAPAN TODAY, 9/21/19, *Prosecutors set April date for Ghosn hearings. Ghosn was initially arrested in November 2018*.

accused for years.

Costs will begin to pile up as the accused will hire counsel to defend against the charges (while the PRC gets a Court appointed counsel paid by the State) and likely will have incurred expenses while the PRC process was being played out as the accused sought to sway the views of the PRC. The accused party has likely been under suspicion for a long period of time while the PRC two stage procedures continued to determine whether the prosecutors improperly refused to indict.

The defense expenses likely will multiply as the case moves forward as it must inexorably do. Putting on a defense is expensive. Time must feel as if it has almost stood still as the trial itself will in all likelihood take an extended period of time. (Japanese criminal trials—except for Saiban'in trials—do not take place in a compact period of time and proceedings do not continue on a daily basis until completed.) The time from reference to the PRC through trial will likely feel as if it is crawling as the defendant tries to hold his life together while assisting his counsel in his defense. If his employer keeps him on he will be fortunate—even an employer who wants to keep him on might feel it cannot because his mind is clearly going to be on his trial not his job and the Japanese trial is, except in Saiban'in cases a long running affair. His life will be in turmoil. If he is found not guilty—the typical result in PRC mandated trials—he will never recover the years lost while his defense was being tried at the PRC and in court. The fear that he will be convicted—even though he knows/believes in his innocence—will take an enormous toll on his psychological well-being. All of this occurring in a scenario where the professional prosecutors have determined he should not be charged and tried. When found not guilty (assuming that result) he will need to rebuild his life but can never regain the time lost to his defense or the psychological trauma he has undergone.

What public interest—as distinguished from personal vengeance is served—especially as the first decade statistics regarding Mandatory Prosecution cases shows that he is most likely to be exonerated. Do the Judges know something that the PRC members do not know? Do they know that if the prosecutor has decided not to prosecute Judges are predisposed to believe that he is most likely to be correct? Do they know that the Prosecutor Service has such power/reputation/standing with the Court that the decision on the Prosecutor will, except in the rare case, be upheld by the Judicial Branch and that this deference to the Prosecutor Service may apply to both its decisions to prosecute and not to prosecute? The Court knows that prosecutor tried cases are almost always won by the prosecutor and the Court knows that prosecutors use their discretion to dismiss or “suspend prosecution” in a high percentage of cases—even serious crime cases. Does this mean that the private lawyer appointed to prosecute the case must both

prove that the prosecutor was wrong in exercising its discretion as well as bearing the burden of showing that the defendant is guilty?

Are Judges less likely to dismiss a PRC Mandatory Prosecution case on legal grounds early in the trial process than they are to dismiss other cases? The PRC Mandatory Prosecution case against the Vice Chief of Police was eventually decided in favor of the defendant because it was untimely brought; the statute of limitations had run—the same grounds on which the public prosecutors had decided it was not proper to indict. But time was not a seriously contested fact issue in the case. The reality was that time did not require an extended trial process—it required someone with an adding machine and knowledge of the law. Why wasn't the case dismissed at an early stage based on the numerical counting of days, months or years? Could it be that the Judges considered that they needed to allow a normal trial to take its course because the PRC process had led to the indictment and it would be an insult to the PRC process and members to dismiss the case too soon? Could the Court have waited to deal with this legal issue out of concern that the public and/or the PRC would object or complain that not enough time was taken to determine the legal question if the trial process was upended by an early decision to dismiss on purely legal grounds? One would expect defense counsel to raise the limitations argument early in the case—yet it took an extended period of time for the court to dismiss on Statute of Limitations grounds. Every day the case was pending was another day that the Vice Chief of Police had to suffer because of the faulty indictment. Is this an appropriate role for Judges or for the Judicial Process in general?

If the accused is successful at the trial court level the matter is not finished—appeals taking more years are likely in the offing. Japanese appeals are not restricted to the record made in the trial court as is the rule in the United States. New evidence may be presented and new arguments made at the appeal level. To the PRC prosecutor there is no downside to appeal and indeed the lawyer may feel an obligation to appeal to show that he is doing his duty to the PRC that twice rejected the Public Prosecutors' determination. Appeal will involve more expense to the accused, both financial and psychological.

It should be emphasized that while the sample is small (it is the only sample we have) it does show that something in the order of 75% of all Mandatory Prosecution cases end in not guilty verdicts. And this in a society and legal system where conviction rates in criminal cases brought by the Prosecutor Service exceed 95%.

Of course if the accused is in fact guilty there could be justification for such psychological and financial consequences. BUT, the few PRC Mandatory Prosecution cases disclose that a guilty verdict is the rarity (2 out

of 9) and prison time for the defendant, is to date, non-existent. On the other hand, a measure of vengeance has been extracted from the accused.

2. Harm to the General Public

The clearest example of harm to the public interest is the Chinese Ship Captain case. A Chinese ship captain was tried on a PRC mandated indictment that charged him with fault in a confrontation with Japanese Coast Guard vessels close to the Senkaku islands. The Japanese government contended that he was violating Japanese territorial waters. China also claims the Islands. After seizure of the Captain's boat his crew, but not the Captain, was allowed to return to Japan. An international dispute between Japan and China was magnified when China cut off Japan's supply of Chinese produced "rare earth" metals endangering the Japanese electronics industry. Japan eventually sent the Captain back to China and no prosecution by the professional prosecutors was initiated. It appeared the matter was over. However, a complaint was filed with a PRC on Okinawa and the PRC on two occasions determined that the Captain should be indicted. The Mandatory Prosecution resulted in a criminal case against the Captain. China refused to return the Captain to Japan to stand trial. As process of the Japanese court, where the trial was to be held, could not be served on the Captain in the time required by Japanese court rules (because the Captain was at home in China), the case was eventually dismissed. But not before it harmed several industries in Japan (including the electronics industry, a main stay of Japan's economy) as well as damaging Japan's relations with China—Japan's nearest big country neighbor and its second largest trading partner.

The harm to Japanese/Chinese relations was not simply tactical it was real and has had an extended effect. It is likely that the Foreign Affairs Ministry worked long and hard to try to repair the damaged relations between China and Japan. How long lasting the harm remained or even if a fragment still remains is uncertain. Harm was, of course, avoidable—except that the PRC process once started was on "auto pilot" and once the PRC twice said the Captain should be indicted there was no choice but to do so. China could hardly be expected to accept this explanation.

Clearly Mandatory Prosecution in the Ship Captain case was not in the interest of the Japanese public. Why was the ship captain indicted? Was it because he was Chinese or was it because he was testing Japan's claim to sovereignty over the Senkaku Islands? Or was it because the PRC met in Okinawa, which has its own disputes (including historical and American Base issues) with the Japanese Government housed in Tokyo? What motivated the PRC? We do not know. But it is difficult to believe that it

was because anyone realistically thought the Captain would be tried in Japan, convicted in Japan and pay some penalty in Japan. Were such events even considered by the PRC whose role was simply to decide whether the Captain should have been charged by the Prosecutor's Office? China reacted to the indictment in the way one would expect a Great Power with authoritarian leadership would react—it felt insulted and cut Japan off from supplies of materials that were needed by one of Japan's largest industries to show its displeasure. Japan had released the Captain before PRC proceedings but the PRC process continued and he was indicted under the Mandatory Prosecution process. The case was dismissed because the Captain hadn't been served with process in a timely manner. But that eventuality was clearly predictable prior to the PRC proceedings. He was in China when the PRC process resulting in Mandatory Prosecution began and when it finished. The Japanese Government's relation with its large neighbor and second largest trading partner—China—was severely damaged. Diplomacy could not play its designated role—the PRC could not be stopped.

It is likely that the Japanese foreign Office was greatly distressed by the mandatory proceeding against the ship captain. The PRC's action certainly did not help diplomacy surrounding the Senkaku Islands dispute nor relations with China in general. A trial would not have been in Japan's industrial and/or economic interest. While trial was avoided, indictment had not been in Japan's industrial or economic interest.

Once the PRC Mandatory Prosecution determination is handed down all the various complications arising from being an indicted person begin to flow. So too all the complications for Japan (as a nation) flow. The Government of Japan could not stop the Chinese Ship Captain criminal prosecution—the Government was held hostage to the PRC Mandatory Prosecution which, in turn, had to run its inevitable course; dismissal of the charges.

While the Chinese Ship Captain case is the clearest case of general public interest damage, the PRC Mandated Prosecution against Ichiro Ozawa is likely the case which best illustrates how the public interest can be (and likely was) damaged by a process that once begun is on auto pilot with no possibility of government or official or expert review.

Ichiro Ozawa was required to step down from his leadership position in the Opposition Party. The Party in turn needed to keep a distance from Ozawa so as not to be painted in the upcoming election with the same brush that had painted Ozawa. Ozawa was, for all intents and purposes not involved in the election that followed his PRC Mandatory Prosecution charge. The effects on Japan's democracy may have been significant.

Ozawa was not just any politician—he had been the leader of a successful attempt to oust the LDP from its almost perennial status as ruling

Party since its foundation brought about by the merger of the rival conservative Liberal and Democratic Parties. He had been a senior executive of the Ruling LDP before forming his own Party. He was a significant player in Japanese politics. While his political mentors had been brought down by professional prosecutors Ozawa had been spared because of lack of evidence.

Ichiro Ozawa's criminal prosecution required him to step down from a leadership position in the Opposition Party that was seeking to unseat the virtually perennial LDP leadership in the Diet. Consequently he was a minor figure in the attempt to unseat the ruling party—a consequence that may have seriously affected the election. This is especially so if one believes (as I do) that the continued dominance of the LDP comes not from overwhelming public approval of the LDP but because the Opposition has been found by the public to lack the ability or capacity to effectively govern. I doubt that charge could be laid at Ozawa's doorstep as it was at the door steps of Prime Minister Yukio Hatoyama, Naoto Kan and Yoshihiko Nada—all Democratic Party of Japan Prime Ministers (over a period of just over 3 years).

It would turn out that while corruption lay at the heart of the Ozawa prosecution it was not corruption by Ozawa but corruption in (but not condoned by) the Prosecutor's Office. Testimony given before the PRC by a member of the Prosecutor's Office was inaccurate and the inaccuracy related to the critical question of Ozawa's knowledge of certain events. The inaccuracy was easily provable—but not provable until the trial on the PRC mandated charges was in full swing; thus not provable until after the election. Ozawa's Secretary had been interviewed by the Prosecutor Service when it was considering whether to bring charges. The Secretary secretly recorded his interview with the prosecutors and the tape told the story of the inaccuracy. The Secretary had not said that Ozawa knew of the wrong doing). Tape or no tape once the PRC had twice voted that the prosecutor service should have charged Ozawa the case needed to be tried. Ozawa was out of the political fray. The LDP triumphed in the election; the fairness of the election itself suffered from the indictment and trial as Ozawa, Japan's Kingmaker and "shadow shogun" was forced to remain on the sidelines.

Once the tape was presented to the trial court the case was on route to a not guilty verdict—but not before the harm to the electoral process had been done. The Secretary who blew the case against Ozawa out of the water had been indicted by the professional prosecutors for his activities (which Ozawa did not know about). He was convicted.

Not only does the Ozawa case disclose the harm to the democratic system that PRC Mandatory Prosecution can cause but it also shows that the PRC system can be corrupted to benefit the Prosecutor's Office. Ozawa was in the Prosecutor's cross hairs for years. Whether because he had not done

anything wrong or because he was too careful and too smart to leave a trail that could ensnare him is not important for our purposes. What is important is that the Prosecutor's Office could not, on its own, bring a prosecution against Ozawa—much as it likely wanted to. Instead a political group opposing Ozawa brought a PRC complaint. This caused the Prosecutors to look at the case again and the Mandatory Prosecution process caused the Prosecutor's Office to give testimony to the PRC. That testimony, which misstated the interrogation session with Ozawa's Secretary, was likely critical to the PRC's determination (a second time) to require prosecution.

I do not mean to suggest that the Prosecutor's Office choreographed the misstatement of the Secretary's interview. Indeed, considering the professionalism of the Prosecutor Service it is difficult to believe that the Office was involved in the misstatements. But, the misstatements did result in Ozawa's prosecution—something the Office wanted but could not achieve. What this shows is that the PRC system can be manipulated and used to get indictments that the Prosecutors Office wants but does not want to be held responsible for obtaining. If so manipulated, the Prosecutors can exert substantial influence over elections at a National and/or Prefectural and even Mayoralty level. The purpose of the PRC process was to limit what the Occupation saw as too much power in the hands of the Public Prosecutor's Office. The Ozawa case shows that the potential exists to use the PRC process to expand the Prosecutor's power.

Not only the Public Prosecutor's Office but private citizens or groups can use the PRC process to seek to embarrass private or public figure parties. Prime Minister Kan, whose forceful actions in going to Tohoku and taking charge of events at the time of the Fukushima Nuclear Disaster (to the consternation of Japan's powerful Bureaucracy) was the subject of a PRC complaint which of course drew headlines some of which highlighted questions concerning his actions. He likely lost some of the political power needed to govern and needed for a Party opposing the LDP to remain in office. It had been predicted that the amendment to the PRC law allowing Mandatory Prosecution could be used for political purposes.²⁰

I believe that what I said in 2017 remains true today:

The PRC prosecution of a Chinese ship captain whose case was eventually dismissed caused strong anti-Japanese feelings in China and reprisal cutting off Japanese access to rare earth materials important to Japanese industry. The PRC indictment of former LDP Secretary General and leading member of the

20. Jonathan David Marshall, *Democratizing the Law in Japan*, in *ROUTLEDGE HANDBOOK OF JAPANESE POLITICS* 92, 98, 100 (Alisa Gaunder ed. 2011).

DPJ government, Ichiro Ozawa who was acquitted (upheld by the High Court and not further appealed) but not before throwing Japanese politics into confusion. Facing indictment Ozawa could not become DPJ President (hence Prime Minister, as the consent of the Prime Minister is required to proceed criminally against a cabinet member—including the Prime Minister). Ozawa's trial highlighted prosecutor misconduct. The action of eleven lay persons caused a tidal wave of problems for the then ruling DPJ. Prime Minister Kan was the subject of PRC review arguing his actions as Prime Minister were responsible for the Fukushima Nuclear Disaster—the PRC refused to indict.²¹

If anything good came out of the Ozawa trial it was that the secretly taped interrogation session when compared to the testimony given to the PRC gave a boost to the use of full recording of Prosecutor interrogation sessions in Japan.

3. The Need for a Grown-up in the Room

The PRC places the criminal Justice system on auto pilot once the PRC twice decides that an indictment should issue and charges should be brought. As shown above placing the criminal Justice system on auto pilot after a PRC Mandatory Prosecution determination has had consequences that affected charged parties, the public interest and perhaps even the fairness of a national election. That need not be the case. There can still be citizen participation in the prosecution decision without placing ultimate authority in the hands of ordinary citizens who may not be familiar with the legal consequences of their acts or who may not have considered (indeed under the PRC process are not charged with considering) whether the Prosecutors in deciding not to prosecute acted arbitrarily, capriciously or unreasonably (the standard for examining administrative action under the United States Administrative Procedure Act).

I previously suggested a body to review the determination of the PRC that there should be mandatory prosecution to see if that decision conforms to the national interest and properly take into account the defendant's rights—a "grown-up in the room." I remain convinced that such a reform would serve the public interest. Such body need not, indeed should not, be staffed by political figures or government employees. Surely there are

21. CARL F. GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 383 (Kluwer Law Int'l, 4th rev. ed. 2017) (footnotes omitted).

former governmental officials removed from policy who, together with nongovernmental officials, would garner public support for their position to set aside a PRC determination in favor of Mandatory Prosecution in a particular case. And such a body would give greater credence to the PRC's determination that prosecution should be brought when (and if) they accept such determination. A body that is balanced in view surely could be found. Without saying that the below suggestion for such a body is the only viable alternative I throw it out as an example of what might be appropriate.

A group composed of a retired Justice (perhaps a retired Chief Justice) of the Supreme Court, an official of the local (where the indictment if issued would be handed down and the case tried) Bengoshi kai (Bar Association) and a figure from a leading University Faculty that deals with the subject of the indictment. For example, a Professor of International Affairs to review the Chinese ship Captain case or a leading Law Professor familiar with Statute of Limitations issues to deal with the Vice Chief of Police case, could bring the international complications out in the open in the former and the time blocking effect of the Limitations law in the later, for the other two members of the group. A majority decision of the three to overrule the mandatory prosecution determination would be required. Amongst other things this group could consider the likelihood of success of prosecution as well as whether the Prosecutor Services decision reflects a reasonable, or at least a not unreasonable, exercise of prosecutorial discretion. The group would consider both the victim's interest in prosecution and the potential defendant's interest in not prosecuting. It would not review PRC rejection of Mandatory Prosecution.

4. The Need for Citizen Participation to Check the Power of the Professional Prosecutors.

In the case of the Saiban'in trial citizen participation can check the professional Judge's decision to convict and can affect the sentence rendered in the case; likewise the professional Judge participation can check the instincts of the citizen Judges. Public participation in the indictment process through the PRC is more limited—it can only lead to indictment not to refusal to indict. It cannot affect the decisions of the Prosecutors Office to prosecute. But it is at the all-important indictment stage (in a system with over a 95% conviction rate) that a check on the prosecutor is most important. Unlike the American Federal Grand Jury which can reject the prosecutor's Bill of Indictment the PRC plays no role in the decision to indict. And unlike the federal United States Attorney, whose signature is required for a federal

indictment and who may refuse to sign an indictment²² neither the Japanese Prosecutor nor anyone else can sidetrack a PRC's second decision to compel prosecution. But as the *Cox* case shows there may be situations where an indictment is inappropriate and where the rights of the person subject to indictment should be taken into account. Who is there who can perform that function in the PRC context of modern Japan? No one.

I suggested in 2014 that this void needs to be reevaluated. The rights of the accused or potentially to be accused need to be taken into consideration by the Criminal Justice system. I believe that the primary function of the U.S. Grand Jury—the function of private citizens having the power to check the desire of the Federal Prosecutor to indict and try a suspect—should also be performed by private citizens in Japan. This role of private citizens allows the professional prosecutors to continue their oft times enlightened view of Rehabilitative Justice while checking the ability of the prosecutor service to indict in situations where indictment may not be seen by the public to be appropriate.

In many Civil Law systems Prosecutors are themselves judicial officials (perhaps equivalent to something like the Magistrate in the United States Federal System). They are in charge of investigations and make the ultimate decision whether or not to seek indictment. But they are subject to professional review by other Magistrate Judges and such review may temper their prosecution decisions. In other systems the Police and Prosecutors are subject to supervision by a Magistrate Judge who oversees and either confirms or approves lines of inquiry and actions of the investigators. This Judicial official makes the ultimate indict or not indict decision. Such system does not exist in Japan.²³ But, the existence of such systems indicates that a Civil Law Judicial System can provide protections against excessive prosecution.

Decisions of Japanese Prosecutors are subject to review in the prosecutor's office by peers and supervisors but this internal review does not provide the kind of "outside" review that the prosecution decision deserves. It is possible that a group of ordinary citizens will view a confession obtained after 23 days (or more) of continuous questioning by prosecutors in the confines of a police jail with the suspect's lawyer not allowed to be present and with prosecutors in control of breaks, exercise, etc. as subject to question

22. *United States v. Cox*, 342 F.2d 167, 189-90 (5th Cir. 1965).

23. I do not suggest such a system for Japan. Placing judicial officials in the position of approving indictment leads to the trial of the criminal case appearing to be (if not in fact being) a trial of whether the judicial official's decision to indict was correct. The presumption of innocence which should accompany all criminal cases might be lost by such a system as a judicial official (the indicting Magistrate) has already approved indictment meaning has made a decision that there is evidence that the accused committed the crime.

as to its voluntariness and thus require that the Prosecutor have more in the way of objective evidence to make out a prima facie case; or that such group of ordinary citizens will wish to hear the audio tapes of the interrogation sessions (and more sessions are being fully recorded since the Ozawa case) before accepting the confession as voluntary. Having to justify their interrogation and/or investigative techniques to ordinary citizens may result in an improvement in such techniques much as the Supreme Court's decision in the Miranda case²⁴ requiring that suspects be given warnings regarding their right to remain silent and have the assistance of counsel before answering police or prosecutor interrogations resulted in better interrogation techniques and increased the level of police professionalism in the United States.²⁵ This has likely resulted in fewer false confessions than was the case prior to Miranda and might help relieve the false confession problems that currently exist in Japan today and might serve to speed up trials in criminal cases in Japan. Importantly, requiring prosecutors to support their indictments before a group of ordinary citizens reduces the ability of the State to use the criminal law system to achieve the State's own ends to the disadvantage to its citizens.

Citizen participation in trials in some cases in Japan has had spin off benefits to the criminal justice process. It has ushered in (first in Saiban'in cases but extending to some other cases as well) "pretrial procedures" that have enabled defendants to gain access to some information in the hands of prosecutors which could help the Saiban'in Panel reach a more reasoned and just decision than if such information remained in the bottom of the prosecutor's file cabinets. It has provided for a more objective trial and has provided the public with a better understanding of the processes of the criminal Justice system. It has allowed prosecutors and political leaders to get feedback from citizen judges regarding such important subjects of criminal justice as capital punishment and confessions. Few of these benefits were considered or even imagined when the Saiban'in System was adopted. There is reason to believe that spin off benefits would also accrue to the criminal justice system by requiring that prosecutors convince a group of ordinary citizens that the government has sufficient evidence to make out a

24. *Miranda v. Arizona*, 384 U.S. 436 (1966).

25. Richard A Leo, *The Impact of Miranda Revisited*, 86 J. CRIM. L. & CRIMINOLOGY 621, 669-670, 672. "Miranda has increased the level of professionalism among police officers and detectives. By laying down a formal rule that establishes regular procedures for interrogations, Miranda has created objective and written standards of accountability for custodial police behavior. ... Miranda has increased police professionalism by rendering interrogation practices more visible to and thus more subject to supervision and control by other actors within the criminal justice system—especially police managers, prosecutors, and judges. In short, in the last thirty years Miranda has exerted a civilizing effect on police behavior and in so doing has professionalized the interrogation process in America"

prima facie case that the defendant who is about to be indicted actually committed the crime.

Conclusion

Looking at public participation in the charging process through the lens of the PRC Mandatory Indictment process is, it is submitted, looking at the problem through the wrong lens of the telescope. Public participation is needed in the far more numerous instances where the Public Prosecutor's Office determines to indict. An amendment to the PRC law to give the public a role in the indictment decision would, I suggest, be in the interest of the Japanese Public, would modify Prosecutor conduct in a way that better the Criminal Justice System, would serve to better protect the rights of the accused and would shine a needed light on Prosecutorial actions.

Moreover the handful of PRC Mandatory Prosecution cases tried and decided since the amendment of the PRC law allowing citizen mandated Prosecution has resulted in damage to Japanese citizens, has rendered 7 not guilty verdicts out of a total of only 9 cases and in the 2 conviction cases one defendant was fined the equivalent of \$90 USD. And the other received a suspended sentence. No one has gone to jail as a consequence of the PRC's actions. Nor has there been a single conviction of a public figure for corruption or corrupting activities. On the other hand, PRC Mandatory Prosecution has created complications for Japanese foreign relations and Japanese industry and has had affected Japan's democracy and electoral system. This need not be; a reputable, professional, knowledgeable and acceptable to the public body that reviews the handful of PRC twice recommended for prosecution cases to determine whether there is a reasonable expectation of success if prosecution is brought and whether prosecution is in the public interest should resolve many of the problems that the PRC Mandatory Prosecutions to date have highlighted.