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Hiroshi Fukurai

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Lay Judge and Victim Participation in Japan: Japan's *Saiban'in* Trial, the Prosecution Review Commission, and the Public Prosecution of White-Collar Crimes

HIROSHI FUKURAI*

Abstract

In September 2019, the University of California Hastings Law School hosted a symposium on Japan's newly instituted public and victim participation systems in the criminal process. This paper addresses themes raised by five scholars' presentations at the symposium, covering the effectiveness and impact of three different newly adopted systems of lay and victim participation in Japan: (1) the new 2009 law of the Prosecution Review Commission (PRC), a Japanese-style "civil grand jury" originally introduced in 1948, which gave the PRC the power to force the prosecution of formerly unindicted cases, thereby challenging and reversing the prosecutor's original non-prosecution decision; (2) a mixed tribunal called "Saiban'in Seido" introduced in 2009, a quasi-jury panel of three professional and six lay judges in the adjudication of violent and serious criminal offenses; and (3) the victim participation program implemented in 2008, in which crime victims and their proxies were allowed to express their opinions and grievances during the criminal justice process. This paper also explores alternative trial venues through which the adjudication of white-collar crime may possibly take place, including a new mixed tribunal, as well as the all-citizen, 12-member jury trial.¹ While Japan's Jury Law was suspended in 1943, its legal provision still exists as part of today's criminal law, and public efforts have been underway to "unsuspend" and bring back the Jury Law in Japan. Also discussed in this paper is the "revolutionary"

* Professor of Sociology and Legal Studies, University of California, Santa Cruz: hfukurai@ucsc.edu.

1. See generally, JAMES WILLIAM COLEMAN, *THE CRIMINAL ELITE: UNDERSTANDING WHITE-COLLAR CRIME* 11 (2005). According to Coleman, white-collar crimes include: (1) occupation crime and (2) organizational crime. The latter can be sub-divided into: (1) corporate crime, (2) state-corporate crime, and (3) state crime.

use of the all-citizen PRC in the prosecution of state crime, one of the most egregious of white-collar crimes committed by the government. Specifically explored is the PRC's role in challenging an "unequitable" bilateral treaty between the U.S. and Japanese governments and in extending Japanese jurisdiction over the adjudication of foreign military felons who victimize local residents.

I. Introduction

The University of California Hastings Law School's symposium commemorated the 10th year anniversary of Japan's introduction of the lay judge system called *Saiban'in Seido* (a quasi-Jury system) and the implementation of the new law governing the Prosecution Review Commission (PRC), another lay judge system which was originally introduced in 1948. The new system of victim participation was also instituted in 2008, enabling crime victims to participate in criminal proceedings, thereby radically transforming Japan's criminal justice system and criminal procedures. Under the leadership of U.C. Hastings Law Professor Setsuo Miyazawa, five prominent scholars specialized in the field of law and society in Japan offered engaging discussions on the newly-adopted Japanese legal systems that have allowed the active participation of ordinary citizens and crime victims in Japan's criminal justice process. Their presentations were followed by two legal commentators, whose discussions extended into the realm of possible public participation in the prosecution of serious and violent white-collar crimes, namely corporate crime, state-corporate crime, and state crime, in which the government and its agencies collaborate with large businesses and corporations in producing socially injurious consequences.²

Prior to the symposium, Professor Setsuo Miyazawa asked all participants, including commentators, to pay close attention to, and make comments on, the then on-going trial of three Tokyo Electric Power Company (TEPCO) CEOs who had been forcefully indicted in 2016 by the Prosecution Review Commission (PRC) in Tokyo, Japan. In issuing the

2. Coleman, *supra* note 1. See also, Raymond J. Michalowski & Ronald C. Kramer, *State-Corporate Crime and Criminological Inquiry*, in INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME (Henry N. Pontell & Gilbert Geis eds.), 200-220 (2007).

The corporate crime refers to crimes by a private corporation or its trusted personnel for their own financial gain or on behalf of the corporation. The state-corporate crime refers to criminal acts that occur when the institution of political governance pursues a goal in collaboration with private and commercial institutions. The state-corporate crime often produces serious social harms that result from the close interaction and collaboration of political and economic organizations. The state-corporate crime also results from inherently distorted relations of the government and policies and commercial practices of corporations.

“forced prosecution” (“*kyosei kiso*”) decision to TEPCO corporate executives, the PRC reasoned that the hydrogen explosion of TEPCO’s Fukushima No.1 Nuclear Power Plant and resultant nuclear contamination in 2011 had led to forty-four deaths and many injuries.³ Thanks to the implementation of the crime victim participation program in December 2008, Fukushima disaster victims were allowed to testify in the TEPCO trial. On September 19, 2019, one day prior to the date of the Hastings symposium, the collegial panel of three professional judges decided to acquit all three TEPCO corporate executives on charges of professional negligence relating to their role in the 2011 nuclear disaster at the Fukushima nuclear power plant.

University of Hawaii Professor David T. Johnson opened the symposium with a plenary presentation entitled, “The Limits of Change in Japanese Criminal Justice.” Professor Johnson’s presentation provided critical comments on Japan’s new public and victim participation programs, identifying many limitations, including the inability of the *Saiban’in* trial to adjudicate serious sex offenses and such white-collar crimes as those allegedly committed by TEPCO executives. Professor Johnson also critiqued the ineffectiveness of the PRC’s newly adopted indictment decision, as only a handful of PRC-forced prosecution cases have resulted in actual conviction. His talk was followed by Hakuoh University Professor Mari Hirayama’s presentation, “10 Years of the Lay Judge System; Now, Do We Have ‘Hope’ for Criminal Trials? Public and Victim Participation in the Criminal Justice System in Japan.” Professor Hirayama critiqued Japanese prosecutions and their incessant “obsession” with trying to obtain confessions from suspects in nearly all criminal cases. She argued that such an overzealous prosecutorial culture has led to the 99.9% conviction rate of all criminally indicted cases in Japan. University of British Columbia Professor Shigenori Matsui examined the 2008 victim participation system and its impact on criminal justice proceedings in his presentation, “Victim Participation in the Criminal Process in Japan.” Professor Matsui noted that crime victims and their families had long been placed outside of the Japanese criminal justice system and that the recent reform drastically improved the participatory status of the crime victims and their proxies during criminal justice proceedings. Professor Matsui also argued that the active participation of crime victims and their proxies in the criminal trial has begun to make criminal defense lawyering particularly difficult in recent years.

The presentation by Japanese attorney Megumi Wada explored “What the *Saiban’in* System Brought to the Japan’s Criminal Justice System: From

3. Ben Dooley, Eimi Yamamitsu, and Makiko Inoue, *Fukushima Nuclear Disaster Trial Ends with Acquittals of 3 Executives*, N.Y. TIMES, Sept. 19, 2019.

a Defense Attorney's View." She examined the efficacy of recent criminal justice reforms and identified the ongoing problems of the criminal justice system in Japan, including: (1) lengthy detention of criminal suspects prior to indictment; (2) prosecutors' overzealous tendency to extract confessional statements from criminal suspects under extreme mental and physical duress; and (3) extremely high conviction rates of criminal defendants in Japan, even after the introduction of the lay judge system. Lastly, Georgetown Professor Carl F. Goodman examined the history of the PRC, offering important suggestions to improve its function by allowing the participation of legal specialists in its deliberative process. Wilfrid Laurier University Law Professor Nikolai Kovalev followed the five presenters, providing critical comments on Japan's newly introduced lay and crime victim participation systems by comparing them to the lay participation systems of European countries. Professor Kovalev also provided valuable insights by comparing Japan's systems to those of post-Soviet republics, including Russia and Kazakhstan, who had also introduced the jury trial, in 1993 and 2007 respectively.⁴

Using the recent PRC-indicted TEPCO trial as one of the case studies, my comments on the presentations are structured as follows: The first section examines the socio-legal ramifications of the new PRC law implemented in 2009, including: (1) the effectiveness of PRC's power to force the prosecution of white-collar crime, i.e., criminal offenses committed by "entrusted" officials and high-ranking personnel in corporate and public sectors; and (2) the efficacy of the continued reliance on Japanese professional judges to prosecute white-collar criminals who had been forcefully-indicted by the PRC. This paper uses the definition given by former American Sociological Association (ASA) President Edwin H. Sutherland, who coined the neologism "white-collar crime" in his 1939 ASA presidential speech, defining it as "an illegal act, punishable by law, committed by an individual or organization in the course of a legitimate occupation wherein a public ... trust is violated."⁵ He also noted that a white-collar criminal is likely "a person of [public] respectability and high social status in the course of occupation."⁶

Past research has shown that Japanese public prosecutors and professional judges have been reluctant to prosecute white-collar criminals, including powerful politicians, corporate oligarchs, and governmental

4. Nikolai Kovalev & Gulnar Suleymenova, *New Kazakhstani Quasi-Jury System: Challenges, Trends and Reforms*, 38 INT'L J. OF LAW, CRIME, & JUSTICE 261 (2010).

5. EDWIN H. SUTHERLAND, *WHITE-COLLAR CRIME: THE UN-CUT VERSION* 7 (1983); GLENN D. WALTERS, *CRIMINAL BELIEF SYSTEMS: AN INTEGRATED INTERACTIVE THEORY OF LIFESTYLES* 129 (2002).

6. Sutherland, *id.* at 7.

elites.⁷ The special governmental provision of “*Shobun Seikun* (処分請訓),” which requires the public prosecutors to obtain a special instruction from government executives on the prosecution of prominent political and economic elites, has led to the dismissal of cases against many powerful political and economic elites.⁸ This special “secretive” directive was originally issued by the head of the Agency of Justice (a precursor to the Ministry of Justice) in 1948.⁹ One key, yet implicit, objective of the new 2009 PRC law was to overcome the inability of the Japanese professional prosecutors to prosecute alleged criminal offenses committed by white-collar criminals who had long been protected and shielded from prosecution by top government personnel in the Ministry of Justice.¹⁰ This paper argues that the culture of invulnerability shared among corporate executives and government officials, for example, has allowed them to commit major white-collar crimes with impunity, including TEPCO’s corporate and professional negligence which led to many deaths and injuries.

The second section explores the possibilities of lay judge adjudication of PRC-indicted cases, calling for the necessity to amend the law of the existing criminal justice systems in order to make possible the lay prosecution of white-collar crime. Specifically, the paper explores: (1) a PRC law to recommend that the PRC-indicted criminal case be adjudicated by a newly-introduced *Saiban’in* panel, i.e., three professional judges, as well as six lay judges selected from the community where the alleged crime occurred; (2) the possible resurrection of Japan’s suspended Jury Law, so that an American-style, all-citizen, 12-member jury would participate in the adjudication of PRC-indicted cases; and lastly (3) the possibility of amending *Saiban’in Seido* and Jury Law to extend their jurisdictions over white-collar crime. TEPCO executives were forcefully indicted by the PRC for the violation of Penal Code, Article 211, i.e., “Causing Death or Injury

7. Hiroshi Fukurai, *Japan’s Prosecutorial Review Commissions: Lay Oversight of the Government’s Discretion of Prosecution*, 6 U. PA. EAST ASIA L. REV., 1 (2011). For Japanese prosecutors’ reluctant to prosecute U.S. military personnel who victimized local residents in Japan, see Hiroshi Fukurai, *Okinawa’s Citizen Judge Panels vs. U.S. Military Hegemony: Wikileaks’ Secret U.S. Cable Document on the Lay Adjudication of American Soldier Criminal Cases in Japan’s Saiban’in Trials*, 4 INT’L J. OF OKINAWAN STUDIES, 2 (2014).

8. See KAREN VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWERS* 221-4 (1990); DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 131 (2001).

9. Secret Directive No.36, Agency of Justice, Prosecutors’ Office, 1948 (昭和二十三年法務庁検務局秘第三六号訓令). Detailed discussions on the origin of this secret, special directive by the Justice Agency in 1948 were discussed at the 176th Diet Budget Committee Session, Jan. 18, 2011, available at <http://kokkai.ndl.go.jp/SENTAKU/sangiin/176/0014/17611180014006a.html>.

10. Hiroshi Fukurai & Zhuoyu Wang, *People’s Grand Jury Panels and the State’s Inquisitorial Institutions: Prosecution Review Commissions in Japan and People’s Supervisors in China*, 37 FORDHAM INT’L L.J., 929 (2014).

through Negligence in the Pursuit of Social Activities.”¹¹ The current *Saiban'in* law and Japan's suspended Jury Law have not extended jurisdiction over criminal cases involving corporate and professional negligence. This section thus explores the possibility of extending the lay judge jurisdiction to white-collar crime committed by high-ranking corporate and government personnel.

The third section examines the political utility of PRC's forced indictment decision in the prosecution of another special kind of white-collar crime, i.e., “state crime” which specifically involves the extra-territorial protection from local prosecution of foreign nationals who have committed crimes against local populations. Given the PRC's unique power to instigate the forced prosecution of the unindicted criminal, the last section looks at the Okinawa PRC's decision to indict and prosecute a U.S. base employee for the death of an Okinawan youth, despite the fact the U.S. base personnel were shielded from prosecution under the bilateral treaty called the U.S.-Japan Status of Forces Agreement (SOFA).¹² Similar to the case of white-collar criminals, the protection of U.S. military personnel from local prosecution has historically created a culture of impunity in Okinawa and other regions with U.S. military bases, leading to the continuous victimization of local populations, especially women, at the hands of U.S. military-related personnel. The PRC-prosecution decision eventually forced both the U.S. and Japanese governments to create a special SOFA provision to allow the prosecution of U.S. military employees in Japanese courts.

II. PRC's Effectiveness in Prosecuting White-Collar Crime

One day prior to the date of symposium, three Tokyo Electric Power Company (TEPCO) CEOs were acquitted by the collegial panel of three professional judges on the charges of criminal negligence resulting in deaths and injuries relating to the 2011 explosion and nuclear disaster at the Fukushima No.1 Nuclear Electric Power Plant.¹³ The Fukushima nuclear power plant had been owned and operated by TEPCO since 1971. While the Japanese public had demanded the prosecution of TEPCO personnel, including top corporate executives, Japanese prosecutors had repeatedly

11. Penal Code 211. English translation *available at* <http://www.japaneselawtranslation.go.jp/law/detail/?id=1960>.

12. Hiroshi Fukurai, *A Step in the Right Direction for Japan's Judicial Reform: Impact of the Justice System Reform Council Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation*, 36 HASTINGS INT'L & COMP. L. REV., 517 (2013).

13. Mari Yamaguchi, *TEPCO Executives Found Not Guilty of Negligence in 2011 Fukushima Meltdown*, HUFFINGTON POST, Sept. 19, 2019.

decided not to prosecute them.¹⁴ The civic complaint filed with the PRC led to the review of the prosecutors' non-indictment decision. Three TEPCO CEOs were finally indicted for prosecution when the Tokyo PRC decided to reverse the public prosecutors' non-indictment for the second time in 2015.¹⁵ The court quickly moved to appoint special prosecutors from the ranks of attorneys in order to prosecute the CEOs, setting the date for the trial to start in July 2017. For nearly two years, since the beginning of the trial, the three judge panel had heard testimony on the causes of the explosions at the Fukushima nuclear power plant, TEPCO's failure to properly plan for the possibility of nuclear accident, as well as the effect of nuclear contamination of a large proportion of Northern Japan, including the southern region of Miyagi Prefecture and eastern and central regions of Fukushima Prefecture, among other adjacent regions.¹⁶ The Japanese judges had also listened to the aggrieved voices of disaster victims who were subjected to government-forced evacuation from their hospitals, homes, businesses, and farming and fishing communities.¹⁷

A. The Effectiveness of PRC's Power to Indict White-Collar Criminals

Professor Johnson's presentation covered Japan's lay participation systems, including the *Saiban'in Seido*, Prosecution Review Commissions (PRCs), the victim participation system, penal institution visiting committees, psychiatrists, social workers, scientists, including forensic experts, volunteer probation officers, and citizen volunteers in crime prevention.¹⁸ His presentation also examined the efficacy of the PRC and its power to issue the forced indictment decision after the implementation of the new PRC law in 2009.¹⁹ Professor Johnson stated that the PRC had

14. Osamu Tsukimori, *Prosecutors Won't Indict Former TEPCO Execs Over Fukushima*, REUTERS, Jan. 22, 2015.

15. Jonathan Soble, *3 Former Executives to be Prosecuted in Fukushima Nuclear Disaster*, N.Y. TIMES, Aug. 1, 2015.

16. Justin McCurry, *Fukushima Nuclear Disaster: Former TEPCO Executives Go on Trial*, GUARDIAN, June 30, 2017. For serious contamination of Fukushima and Miyagi Prefectures, see Teppei J. Yasunari, Andreas Stohl, Ryugo S. Hayano, John F. Burkhart, Sabine Eckhardt, & Tetsuzon Yasunari, *Cesium-137 Deposition and Contamination of Japanese Soils Due to the Fukushima Nuclear Accident*, Proceedings of the National Academy of Sciences of the United States of America (PNAS), Dec. 6, 2011, available at <https://www.pnas.org/content/108/49/19530>.

17. Tsukimori, *supra* note 14.

18. David T. Johnson & Dimitri Vanoverbeke, *The Limit of Change in Japanese Criminal Justice*, on file with the author (a PPT file shared by Professor David T. Johnson with the presenters at U.C. Hastings College of the Law on September 20th, 2019).

19. See also, David T. Johnson and Mari Hirayama, *Japan's Reformed Prosecution Review Commission: Changes, Challenges, and Lessons*, 14 ASIAN JOURNAL OF CRIMINOLOGY 77 (2019).

challenged and successfully overturned prosecutors' non-indictment decisions in nine cases. He also indicated that one possible weakness of the PRC was the ineffectiveness of its indictment recommendation,²⁰ for only two out of thirteen defendants in nine PRC forced-indicted cases were convicted, i.e., a 15% conviction rate. Considering the fact that nearly all criminal cases indicted by Japanese professional prosecutors have resulted in conviction (i.e., 99.9%), the 15% conviction rate of PRC-indicted criminal cases seemed extremely low. Professor Johnson also examined two other highly publicized PRC reviews and their deliberations: (1) the PRC decision that "non-indictment was improper" in the Moritomo Gakuen scandal in Osaka; and (2) the PRC decision that "non-indictment was proper" in the rape allegation against Noriyuki Yamaguchi, one of the closest Japanese journalists and "personalized friends" of Prime Minister Shinzo Abe. Yamaguchi had been accused of rape by a prominent female journalist, Shiori Itoh.

The Morimoto Gakuen case involved the sweetheart land deal, in which government-owned land was sold in 2016, significantly under market value, to an Osaka-based school operator who has been closely linked to Prime Minister Shinzo Abe's wife. After public prosecutors made a decision not to indict government bureaucrats involved in the land deal, the Osaka PRC, which received a civic complaint regarding the prosecutors' non-prosecution decision, returned the "non-indictment was improper" decision on ten of 36 government bureaucrats on March 29, 2019.²¹ The public prosecutors reinvestigated the case and issued yet another non-indictment decision on August 9, 2019.²² Since the PRC failed to issue a legally binding "indictment was proper" decision, the public prosecutors' second non-indictment decision officially terminated the effort to prosecute the government bureaucrats suspected of having made an illegal land deal with the school.

Another PRC case involved renowned journalist Shiori Itoh and Noriyuki Yamaguchi, a Washington bureau chief for the Tokyo Broadcasting System, who had invited her to dinner to discuss a possible job opportunity in 2015, and was accused by Itoh of raping her when she was intoxicated and had lost consciousness.²³ Yamaguchi has been said to have close ties to Prime Minister Shinzo Abe and other key members of his

20. *Id.*

21. Chinami Tajika & Takuji Hosomi, *Morimoto Mondai: Sagawashi ra 10-nin Futatabi Fukiso: Tokusobu Sosa-Shuketsu [Morimoto Problem: Non-indictment Against Mr. Sagawa and 10 Others: Special Investigation Concluded]*, ASAHI SHIMBUN, Aug. 9, 2019.

22. *Id.*

23. *Shiori Ito: Japanese Journalist Awarded \$30,000 in Damages in Rape Case*, BBC NEWS, Dec. 18, 2019, available at <https://www.bbc.com/news/world-asia-50832524>.

administration.²⁴ The public prosecutors decided not to indict Yamaguchi in 2015 because of insufficient evidence. After the public complaint was filed, the Tokyo PRC deliberated on the case and ruled that no indictment was called for.²⁵ The group called “Open the Black Box” was created in April 2019 by supporters of Itoh, to bring much-needed transparency into the secretive and “closed” nature of the investigation of rape and other sex crimes, because no detailed accounts of the investigations were shared with crime victims.²⁶ Professor Johnson made the critical observation that there are two specific types of criminal cases that the newly-implemented *Saiban’in* trial has failed to adjudicate, despite their important societal ramifications: (1) serious sex offenses; and (2) white-collar crime and corporate crime.²⁷

As Professor Johnson noted in his presentation on the nine PRC-forced prosecution cases, it is important to realize that five of these cases (56 %) and nine of thirteen defendants (69%) involved the allegation of white-collar crime committed by highly privileged governmental, political, and economic elites. Specifically, these cases involved: (1) professional negligence by the Deputy Chief of the Akashi Police Department in the Akashi Pedestrian Bridge incident; (2) professional negligence by three railway company presidents in the JR West Amagasaki Rail Crash case; (3) insider trading by a company president in the Okinawa Unlisted Stock Fraud case; (4) political funding violations by Democratic Party of Japan (DPJ) leader Ichiro Ozawa in the Rikuzankai case; and (5) corporate and professional negligence by three top corporate executives in the TEPCO Nuclear Disaster case.²⁸ All of these crimes are alleged to have been committed by white-collar criminals.

The devastating societal and human consequences of white-collar crime are well-known, including harmful impacts on human health, damage to a community’s moral climate, serious financial costs and economic losses, human rights violations, as well as the destruction of nature, the environment and ecosystems.²⁹ Critical studies of white-collar crime have led to multiple classifications of a number of immoral corporate practices, unethical

24. See generally, SHANNA VAN SLYKE, MICHAEL L. BENSON, & FRANCIS T. CULLEN, *THE OXFORD HANDBOOK OF WHITE-COLLAR CRIME* (2016) [hereinafter *Oxford Handbook*].

25. Azusa Mishima, *Journalist Shiori Ito Gets Help With Fight For Damages Over Alleged Rape*, ASAHI SHIMBUN, Apr. 12, 2019.

26. *Open the Black Box, Itoh Shiori-san no Minji Saiban o Sasaeru-Kai [Group to Support Shiori Itoh’s Civil Trial]*, last accessed on Jan. 1, 2020, available at <https://www.opentheblackbox.jp/?lang=en>.

27. Johnson, *supra* note at 16 (slide # 10, on file with the author).

28. For the case background information of PRC-forced criminal cases, see Johnson & Hirayama (2019).

29. See generally, R. F. Meier & J. F. Short, *Consequences of White-Collar Crime*, in *WHITE COLLAR CRIME: CLASSIC AND CONTEMPORARY VIEWS* (G. Geis, R. F. Meier & L. M. Salinger eds.), 80-104 (1985).

government policies and programs, as well as egregious state-corporate collaborative activities.³⁰ Today white-collar crime is seen to include: (1) corporate crime consisting of illegal actions committed by corporations, business entities, and/or personnel who represent privately owned collectivist entities; (2) state crime committed by states and governments in order to “further a variety of domestic and foreign policies [and objectives]”;³¹ and (3) state-corporate crime resulting from the close collaboration between the policies of the state, on one hand, and the policies and practices of privately owned enterprises to maximize profit, on the other.³² Past studies have also shown that human costs and economic and financial losses resulting from white-collar crime have far exceeded those resulting from street crime, including more injuries and deaths due to dangerous working environments, long-term diseases associated with employment in certain industries, environmental pollution, and dangerous consumer goods, among many others. In the U.S., for instance, the FBI estimates that the annual cost of white-collar crime is nearly one trillion dollars, compared with \$15 billion for street crime.³³

The dangerous impact of Japan’s white-collar crime on the general population, the environment, the nature, and ecosystems follow this pattern. Among the nine PRC-indicted cases, three of five white-collar crimes had resulted in multiple deaths and injuries, including: (1) the Akashi Pedestrian Bridge stampede incident in 2001, that led to 247 injuries and 11 deaths, including nine children, ranging in age from five months to nine years, who had been crushed to death at the pedestrian bridge;³⁴ (2) the JR West Fukuchiyama derailment accident in 2005, in which 107 passengers were killed and 562 were injured;³⁵ and (3) the 2011 nuclear accident and explosion at TEPCO’s nuclear power plant in Fukushima, leading to the

30. Oxford Handbook, *supra* note 24.

31. See EUGENE MCLAUGHLIN AND JOHN MUNCIE, THE SAGE DICTIONARY OF CRIMINOLOGY 417 (2006). State crime includes: (1) criminal offenses committed by security and police forces, such as genocide, torture, imprisonment without trial, and forced disappearance of political dissenters; (2) political crimes committed by the government, such as corruption, illegal surveillance, and censorship; (3) economic crimes violating health and safety laws; and (4) socio-cultural crimes, including institutional racism and cultural vandalism.

32. See generally, Raymond J. Michalowski & Ronald C. Kramer, *State-Corporate Crime and Criminological Inquiry*, in INTERNATIONAL HANDBOOK OF WHITE-COLLAR AND CORPORATE CRIME (Henry N. Pontell & Gilbert Geis eds.), 200-220 (2007).

33. Scott A. Bonn, *Why Elite White-Collar Criminals are Rarely Punished*, PSYCHOLOGY TODAY, Apr. 9, 2017, available at <https://www.psychologytoday.com/us/blog/wicked-deeds/201704/why-elite-white-collar-criminals-are-rarely-punished>.

34. See generally, Hiroshi Fukurai, *Japan’s Prosecutorial Review Commissions: Lay Oversight of the Government’s Discretion of Prosecution*, 6 EAST ASIAN LAW REVIEW 1 (2011).

35. *Id.*

death of 44 patients and injuries of 13.³⁶ The radiation fallout also contaminated many areas and regions beyond the confine of the Fukushima Prefecture, forcing hundreds of thousands of residents to flee from their residence and communities.³⁷ All three cases involved defendants who were high-ranking: a Deputy Chief of Police in the Akashi Police Department, three former JR West presidents, and an ex-Chairman and two former vice presidents of TEPCO.

In the case of the Akashi Stampede incident, the Akashi Police Department, its city government, and a security firm had been forewarned of the risk of another likely stampede in 2001, because in December 2000, during a millennium fireworks celebration, nearly 3,000 people had surged onto the same bridge, creating a similarly chaotic scene.³⁸ In the Fukuchiyama derailment incident, the investigation revealed the egregious practice of corporate punishment and penalties assessed against train drivers for their failure to operate their train punctually.³⁹ The train driver who caused the derailment incident was trying to make up for lost time by speeding the train up to 120-km per hour, far exceeding the safety speed limit.⁴⁰ Furthermore, the investigation revealed that JR West had decided not to install the Automatic Train Stop (ATP) system to warn and stop the high-speeding train because of cost-cutting measures.⁴¹ The investigative report concluded that “there was a corporate culture that prioritized protection of the company’s [financial] interests over those of the accident victims as well as the public sentiments.”⁴²

In examining the causes of the nuclear disaster in Fukushima, the Fukushima Nuclear Accident Independent Investigation Commission (FNAIIC) concluded that the Fukushima nuclear disasters, including reactor meltdown, were man-made disasters caused by poor regulation and collusion among the government, the TEPCO operator, and the industry’s watchdog agency.⁴³ The FNAIIC report also indicated that the magnitude-9 earthquake which preceded the tidal wave that hit the Fukushima No.1 Nuclear Power

36. Magdalena Osumi, *Former TEPCO Executives Found Not Guilty of Criminal Negligence in Fukushima Nuclear Disaster*, JAPAN TIMES, Sept. 19, 2019.

37. *See generally*, JEFFREY KINGSTON, TSUNAMI: JAPAN’S POST-FUKUSHIMA FUTURE (2011).

38. Kazuhiko, Nagase, *Fukuchiyama-sen Dassenjiko no Mondai o Kataru [Discussing the Problems of the Fukuchiyama Line Derailment]*, 39 TETSUDO JANARU [RAILWAY JOURNAL] 68-73 (2005).

39. Yoko Inoue & Ken Iguchi, *Report Slams JR West’s Corporate Culture*, DAILY YOMIURI, Nov. 30, 2009, at 3.

40. *Id.*

41. *Id.*

42. *Id.*

43. Justin McCurry, *Fukushima Reactor Meltdown Was a Man-Made Disaster, Says Official Report*, GUARDIAN, July 5, 2012.

Plant could not be ruled out as a cause of the accident. Further, FNAIIC Chair Kiyoshi Kurokawa concluded that the Fukushima disaster was “a disaster ‘Made in Japan.’ Its fundamental causes are to be found in the ingrained conventions of ... our reflexive obedience; our reluctance to question [the] authority; our devotion to ‘sticking with the programme’; our groupism; and our insularity.”⁴⁴ In each of these three catastrophes, Japanese public prosecutors repeatedly refused to issue the indictment against a government bureaucrat and corporate executives. Only civic complaints from victims and their proxies, which were submitted to the prefectural PRCs, led to the eventual indictment and trial of the high-ranking professional elites.⁴⁵

In addition to the above three instances, the PRC also examined another white-collar crime that led to multiple deaths and injuries. In December 2012, a tunnel ceiling collapsed and crushed three vehicles in the Sasago Chuo Expressway Tunnel in Yamanashi Prefecture, leading to the deaths of nine people and injuries of three passengers. The prosecutors examined the causes of the incident, and after the investigation, announced the decision not to prosecute ten people accused of professional negligence, including the former president of Central Nippon Expressway Company (NEXCO-Central), which was the operator of the Sasago Chuo Expressway Tunnel, and maintenance supervisors at NEXCO-Central and its subsidiary.⁴⁶ In August, 2018, victims’ families and a group of scientists who had also examined the causes of incident decided to file a petition to the local PRC to challenge the propriety of the prosecutors’ non-indictment decision.⁴⁷ One year later, in August 2019, the PRC announced that the prosecutors’ original non-indictment decision regarding two inspectors of both NEXCO-Central and its subsidiary was not proper, forcing the public prosecutors to reinvestigate the case. The PRC decision was not “indictment was proper,” and thus did not carry the legally binding mandate for the prosecutors to reverse their initial non-prosecution decision.⁴⁸ Nonetheless, their “non-indictment was improper” decision forced the prosecutors to reconsider their original non-indictment decision. As of today, the local prosecutors have yet to make any announcement regarding whether or not they will reverse their initial non-indictment decision or will re-issue the non-prosecution decision.

In order to respond to the aggrieved voices of crime victims and their

44. *Id.*

45. The trial of the deputy chief of police did not occur because the statute of limitation had expired.

46. *No Indictments over 2012 Fatal Tunnel Collapse in Japan*, JAPAN TIMES, Mar. 24, 2018.

47. *Id.*

48. Sasago Jiko, *Fukisofuto no Gigetsu [At Sasago Tunnel Accident, PRC Resolution of “Non-Indictment” as Improper]*, ASAHI NEWSPAPER, Aug. 2, 2019.

families in Japan,⁴⁹ the PRC has seemed to function as a civic oversight to question and challenge the culture of impunity shared among corporate executives and government elites, knowing that they would not be prosecuted for professional negligence regardless of the human consequences of their organizational decisions and business practices. Similarly, the PRC's examination of the propriety of non-indictment decision on white-collar crime also seems to have questioned the culture of public prosecutors' blind subservience to the special instruction from top governmental bureaucrats in relation to the prosecution of professional elites. Further, the PRC's legally binding power to initiate the forced prosecution of white-collar crime has challenged the corporate and governmental policies that have continued to prioritize their interests over the rights and safety of people, communities, and society at large.

B. The Possibility of the Lay Adjudication of PRC-Indicted Criminal Cases

There are other perspectives that need to be incorporated into the interpretation of the "failure" of the PRC's forced indictments to result in the conviction of white-collar defendants. This failure may not be due to the structural problem or policy defect inherent in the lay institution of PRC itself, but to the existing structure of government policies and prosecutorial practices. As stated earlier, the institutional directive called "*shobun seikun*" in the Ministry of Justice tends to prioritize the rights of government interests and the rights of well-connected political and economic elites over the rights and the interests of people, crime victims, and general communities. The PRC became the prime lay institution to respond to civic grievances and has been responsible for the reversal of prosecutors' non-indictment decisions regarding white-collar crime. Without the PRC-forced prosecution, the trial of white-collar criminals would never have taken place.

Another reason that the PRC-indicted cases did not result in the conviction of white-collar defendants is that the key decision-makers in these PRC-forced trials have been the Japanese professional judges. These trials of white-collar criminals were conducted without involvement of lay judges drawn from the community where alleged crimes occurred. Past research has indicated that Japanese professional judges have repeatedly shown their refusal to convict powerful elites and professionals, including government officials, corporate elites, prominent politicians, and high-ranking criminal

49. See generally, KEN SHIROISHI, KIGYOHANZAI, FUSHOJI NO JOSEISAKU [CORPORATE CRIME AND SCANDALS: LEGAL STRATEGIES] (2007).

justice personnel.⁵⁰ Given this history, the court's acquittal of all white-crime defendants in PRC-indicted trials, including three TEPCO CEOs, was not surprising. Some critical observers of the Japanese court had long predicted the acquittal of TEPCO corporate executives before the court's acquittal announcement in September 2019.⁵¹

The dedicated subservience of Japanese professional judges to the interests of renowned politicians, powerful government elites, and corporate executives has long been well-known. Even in their rulings in politically controversial cases, such as the constitutionality of the Self-Defense Force despite public questions and criticisms, the construction of U.S. military bases against strong oppositions by nearby residents, and the operation of nuclear power plants throughout Japan, and even after the 2011 nuclear disaster in Fukushima, the Japanese judges have continued to rule in favor of the government's policies and programs, despite public outcry, mass demonstrations, civil disobedience, street marches, and petition campaigns.⁵² Past research has shown that many Japanese judges have sided with powerful politicians and the dominant political party in rendering decisions supporting their views and interpretations of the constitution, political perspectives, and governmental policies and programs. Those judges who failed to conform to the dominant political current and ideologies were often punished, if not pushed out of the judiciary all together. In examining the behaviors of Japan's judges, Ramseyer and Rasmusen concluded that "judicial independence in Japan has real limits. In politically sensitive cases, judges seem to indulge their political preferences at their peril."⁵³ Given the professional judges' refusal to advance the interests and rights of people, communities and the environment over the interests of the government and corporate sectors, the following section explores the possible public prosecution of PRC-indicted cases beyond the bench trial system, including a newly-adopted *Saiban'in* system, as well as an American-style, 12-member jury trial, which Japan had operated for the fifteen years from 1928 to 1943.

50. See generally, Takashi Maruta, BAISHIN SAIBAN O KANGAERU: HOTEINI MIRU NICHIBEI BUNKA HIKAKU [THE CONSIDERATION OF JURY SYSTEM: JAPAN-U.S. CROSS-NATIONAL ANALYSIS IN THE COURTROOM] (1990). See also, J. Mark Ramseyer & Eric B. Rasmusen, *Why Are Japanese Judges so Conservative in Politically Charged Cases?* (1999), available at http://www.law.harvard.edu/programs/olin_center/papers/pdf/268.pdf.

51. Colin P.A. Jones, *The TEPCO Verdict is Predictable But Not Insignificant*, JAPAN TIMES, Sept. 19, 2019. See also, Richard Wilcox, *Democracy in Japan: Derailed by the Nuclear Mafia*, DiaNuke.Org, Sept. 14, 2012 (with respect to similar liability cases of radiation sickness cases in the past, stating that "Unsurprisingly, the Japanese justice system ... plays an integral role in siding with the Nuclear Mafia").

52. Ramseyer & Rasmusen, *supra* note 50.

53. *Id.*

C. The PRC Amendment to Adjudicate PRC-Indicted Cases in Lay Judge Trials

The PRC is a unique lay institution in Japan's criminal justice system, in which the members are solely composed of citizens randomly selected from the local community. The reason that the institution has been often called an American-style, "civil grand jury" is that its mission is to examine and inspect local public offices, including the prosecutor's office, the police department, local jails, and other public offices to ensure that they function legally and properly.⁵⁴ For example, California's state law requires that all 58 counties must impanel a civil grand jury for each fiscal year in order to scrutinize the conduct of public business by city and county governments and issue a report with findings and recommendations, followed by presentations to the Board of Supervisors and the media.⁵⁵ Any civic complaint of possible white-collar crime committed by public officials triggers an investigation by the civil grand jury, as Section 925 of the California Penal Code specifically indicates that the civil grand jury shall investigate "operations, accounts and registers of the officers, departments, or functions of the county,"⁵⁶ prison conditions and management, any willful or corrupt conduct on the part of public officers within the county, as well as report on the offices, accounts and records of the officials or entities of the county, including any special or legislative district.⁵⁷

The civic oversight function of government officials has been carried out by the grand jury in other U.S. states as well. For example, in November 2008, the Texas grand jury indicted then-U.S. Vice President Dick Cheney for a conflict of interest pertaining to his private investment in a corporation that runs federal prisons.⁵⁸ The conflict of interest stemmed from Cheney's political influence over federal contracts awarded to private corporations in the construction and institutional management of federal prisons. The South Texas grand jury also indicted then-Attorney General Alberto Gonzalez for obstruction of justice, as America's top prosecutor under the Bush Administration tried to stop the investigation of Cheney's collusion with prison industries.⁵⁹ Texas State Senator Eddie Lucio, Jr. was also indicted,

54. See generally, Hiroshi Fukurai, *Proposal to Establish the System of the Federal Civil Grand Jury in America: Effective Civil Oversight of Federal Agencies and Government Personnel*, 3 J. CIVIL LEGAL SCI. 112 (2014).

55. *Id.*

56. CA Penal Code Section 925.

57. Fukurai, *supra* note 54.

58. *Grand Jury Indicts US Vice President*, NORTHERN TERRITORY NEWS (Australia), Nov. 20, 2008, at 13.

59. *Id.*

as he allegedly accepted bribes from private prison firms.⁶⁰ This was a great victory for the office of county prosecutors who investigated the case and brought indictments against prominent U.S. politicians. Nonetheless, in December, a politically motivated county judge made an unprecedented decision to dismiss the indictments.⁶¹ While these venues of indictment occurred in different national jurisdictions, this offers another instance in which a professional judge tried to shield powerful political elites from the prosecution of white-collar crime. The grand jury indictments in Texas also demonstrated that there would not be absolute political immunity for powerful politicians when an equitable judgment on indictment was made by a select group of fair-minded citizens based on prosecutorial evidence concerning the allegation of white-collar crime.

What happens to white-collar crime if alleged perpetrators are indicted and tried in court? In the U.S., white-collar criminals have the option of choosing a bench trial or a jury trial. Research has shown that such defendants have tended to opt for a jury trial, because the jury was more likely to place blame on corporations and business entities than on individual executives.⁶² White-collar defendants tried to convince the jury that their personal role was trivial and not worthy of blame, by distancing themselves from corporate and institutional culpability.⁶³ Other research has shown that white-collar defendants also preferred a jury trial because a single juror could derail a jury from reaching a unanimous verdict, thereby resulting in a hung jury.⁶⁴ In highly specialized and technically sophisticated cases, however, white-collar defendants tend to prefer the professional bench trial.⁶⁵

1. Attorney Megumi Wada's Presentation: From a Defense Attorney's Perspective

Under the current legal system, Japanese professional judges remain as sole adjudicators of white-collar crime. As examined earlier, Japanese professional judges and public prosecutors have been reluctant to prosecute highly-positioned governmental officials and renowned political and

60. *Id.*

61. *Indictment Against Cheney, Gonzales Dismissed*, Associated Press State & Local Wire, Dec. 2, 2008.

62. Valerie Hans, *The Jury's Response to Business and Corporate Wrongdoing*, 52 LAW AND CONTEMPORARY PROBLEMS 177 (1989).

63. KENNETH MANN, *DEFENDING WHITE-COLLAR CRIME: A PORTRAIT OF ATTORNEYS AT WORK* (1985); STANTON WHEELER, KENNETH MANN, & AUSTIN SARAT, *SITTING IN JUDGMENT: THE SENTENCING OF WHITE-COLLAR CRIMINALS* (1988).

64. DAVID. O. FRIEDRICH, *TRUSTED CRIMINALS: WHITE COLLAR CRIME IN CONTEMPORARY SOCIETY* 328 (2010).

65. *Id.*

economic elites. In the post-2009 era, the majority of PRC's legally binding indictments were issued against perpetrators of white-collar crime, i.e., 5 out of 9 cases (55.5%), with the majority of suspects also white-collar criminals, i.e., 9 out of 13 (69.2%). Furthermore, the professional judges returned convictions in none of these cases. However, there has been an exception in the prosecution of white-collar criminal in recent years, as Attorney Megumi Wada elaborated in her presentation.

Attorney Wada indicated that there was a bifurcated, discriminatory system of prosecuting white-collar criminals based on their nationality. For instance, former Nissan President Carlos Ghosn has been detained for months and has thus far resisted providing a "confession" of his wrongdoing.⁶⁶ Nissan is one of the six largest automakers in the world, and in 2014, became the largest car manufacturer in North America.⁶⁷ Ghosn was arrested in November 2018 by Tokyo public prosecutors soon after his arrival from Lebanon on his private jet, over the allegation of false accounting, and was detained for the next 108 days on three other charges of financial misconduct and aggravated breach of trust.⁶⁸ He was granted bail in early March and was again detained for an additional 10 days of further investigation and interrogation.⁶⁹ His harsh treatment by Japan's professional prosecutors represents a stark contrast to that of TEPCO CEOs or other governmental and political elites, as none of the PRC-indicted white-collar defendants had been detained or subjected to harsh police detention and prosecutorial interrogation. Attorney Wada indicated that Carlos Ghosn, who was a Brazilian-born French businessman of Lebanese ancestry, has been subjected to lengthy detention prior to indictment, and the court has repeatedly rejected a bail request from Ghosn, stating that he was a flight risk.⁷⁰ His investigation has been prompted by a whistleblower who insisted that Ghosn had been misrepresenting his salary and using company assets for personal purposes.⁷¹

Attorney Wada criticized the continued reliance by the Japanese public prosecutors on so-called "hostage justice systems" in order to secure detention and interrogation, so as to extract confessional statements and

66. Edo Naito, *Examining Carlos Ghosn and Japan's System of 'Hostage Justice*, JAPAN TIMES, Apr. 17, 2019.

67. Bertel Schmitt, *Who Makes the Most Cars in North America? Who Has the Largest Auto Factory in the U.S.? Don't Be Embarrassed, Few Get It Right*, DAILY KANBAN, Feb. 27, 2015.

68. Justin McCurry, *Carlos Ghosn to Fight to 'Bitter End' As Ex-Nissan Chairman Detained for 10 Days*, GUARDIAN, Apr. 5, 2019.

69. *Id.*

70. Megumi Wada, *What Saiban'in System Brought to the Japan's Criminal Justice System*, Sept. 20, 2019 (Attorney Wada's PowerPoint on file with the author).

71. Amy Tsang, *Who is Carlos Ghosn and Why is He in Trouble?*, N.Y. TIMES, Nov. 21, 2018.

thus maintain an “extremely high conviction rate.”⁷² Attorney Wada added that Japanese prosecutors have also indicted Ghosn with additional charges of breach of trust, with his alleged misconduct expanding outside Japan.⁷³ Given Japanese professional prosecutors’ overzealous legal maneuvers and creative protocols employed to maximize the likelihood of his conviction, it may be likely that Japan’s professional judges will rule against Carlos Ghosn when his crimes are adjudicated in the professional bench trial. Given the threat and danger of “unfair” prosecution and likely conviction, Ghosn fled Japan on December 30th and went to Lebanon, breaking his bail condition. He issued a public statement that he “will no longer be held hostage by a rigged Japanese justice system where guilt is presumed, discrimination is rampant and basic human rights are denied.”⁷⁴ Ghosn added that “I have not fled justice [but] I have escaped injustice and political persecution.”⁷⁵

If the Japanese criminal law were modified to allow the lay adjudication of white-collar crimes, including those allegedly committed by Carlos Ghosn and TEPCO corporate executives, among others, would the trial outcome be different from that of the bench trial? Under the current Japanese criminal justice system, none of the white-collar crimes, including PRC-indicted cases, are adjudicated in a lay judge trial, but rather in the professional bench trial. If Japan’s public prosecutors and professional judges are unable to detach themselves from powerful political influence and bureaucratic customs and obligations, would it be reasonable to assume that the lay judge trial may offer a viable and fair alternative to the adjudication of white-collar crime? Will Ghosn return to Japan if he will not be held hostage “by a rigged Japanese Justice system where guilt is presumed [by public prosecutors and professional judges]”?

The following section explores the possibility of amending the new 2009 PRC law in order to allow the lay adjudication of white-collar crime in Japan, including PRC-indicted cases, considering two possible venues: (1) the *Saiban’in* trial that was adopted in 2009; and (2) the American-style, 12-member all-citizen jury trial, which Japan once operated.

72. *Id.*

73. *Id.* See also, *Ex-Nissan Chairman Carlos Ghosn Indicted on Additional Charges in Japan*, USA TODAY, Apr. 22, 2019.

74. *Ghosn Confirms in Statement that He Is in Lebanon*, NHK WORLD-JAPAN, Dec. 31, 2019.

75. *Id.*

D. The Lay Adjudication of PRC-Indicted Cases in *Saiban'in* Trials

It is important to reiterate that the classification of triable offenses under the *Saiban'in* law does not include white-collar crime. As a result, none of the PRC-indicted white-collar defendants were tried in the mixed tribunal. The *Saiban'in* system introduced in 2009 was originally designed to adjudicate serious and violent crimes involving the death penalty or infinite imprisonment with or without hard labor, as well as crimes that caused the victim's death by intentional criminal actions. The class of specific criminal offenses under the *Saiban'in* law thus included arson, infringement, capsizing of trains, water poisoning, currency counterfeiting and its use, official document counterfeiting, burglary with bodily harm, indecent assault, murder, kidnapping for ransom, criminal insurrection, and instigation and assistance of foreign aggression.⁷⁶

Research has shown that the general public has complained about and challenged the public prosecutors' refusal to indict and prosecute white-collar criminals in the past. For instance, among 113,427 cases reviewed by the PRC for the more than half century from 1949 to 2015, the majority were crimes committed by highly privileged white-collar professionals (51.0%). The largest proportion of non-indictment cases reviewed by the PRC were professional negligence cases that often led to death and/or injury in the pursuit of social and economic activities.⁷⁷ Professional negligence cases alone accounted for a total of 18,133 reviews (16.0%), suggesting that one of every seven PRC-reviewed cases was a white-collar crime, similar to the ones committed by TEPCO and JR West executives. These negligent cases were followed by other white-collar crimes, such as fraud (11.6%), document counterfeit (11.3%),⁷⁸ the abuse of authority by special public officers (8.4%), and embezzlement in the pursuit of social activities (3.7%).⁷⁹ While the counterfeiting of documents fell within the class of crime categories adjudicated in the *Saiban'in* trial, crimes of professional and corporate negligence resulting in death and injury did not, which meant that, technically speaking, no matter how many deaths and injuries resulted from the neglect of legal obligations and responsibilities by powerful private enterprises and/or governmental institutions, lay judges had no jurisdiction to examine the causes and culprits of such socially impacted crimes. Thus far, the

76. MASAHIRO FUJITA, JAPANESE SOCIETY AND LAY PARTICIPATION IN CRIMINAL JUSTICE: SOCIAL ATTITUDES, TRUST, AND MASS MEDIA 17 (2017).

77. Johnson & Hirayama, *supra* note 18, at 82.

78. *Id.* at 82, Table 1.

79. *Id.* These cases of white-collar crime amounted to 51.0% of all PRC reviewed cases from 1949 to 2015.

adjudication of white-collar crime has been effectively placed outside the reach of the lay judge system.

1. Professor Mari Hirayama and the Ten Year Anniversary of *Saiban'in* Trials

Hakuoh Law Professor Mari Hirayama offered critical observations of the *Saiban'in* trial and its operation for the last ten years, arguing that the introduction of the lay judge system has helped transform Japanese criminal justice from a dossier-centered trial to an oral argument-centered trial.⁸⁰ She also observed that the indictment rate has decreased dramatically, suggesting that professional prosecutors have become more careful about indictment decisions, exercising more discretion in decisions not to indict the alleged criminal suspect.⁸¹ At the same time, the “positive” aspect of introducing the lay judge system has also appeared, including the significant impact on Japanese legislation that has resulted from lay judge trials in sex crime cases. The Japanese government has long neglected to incorporate the rights of women, including those of sexual crime victims, into the criminal justice system. Finally, on July 13, 2017, Japanese legislation included a major provision regarding sex crime, for the first time in 110 years of its history. The changes included: (1) the “crime of rape” was changed into “crime of coerced intercourse”; (2) males were included as possible victims of “coerced intercourse”; (3) “crime of coerced intercourse” became punishable with imprisonment of no less than five years, while three years or less were imposed on rape offenders; (4) complaint by victims was no longer mandatory to indict sex crime cases by prosecutors; and (5) new crime of “intercourse by custodian” and “indecent behaviors by custodian” against children under 18 was introduced, and the evidence of “assault or threats” was no longer required for these crimes to be established.⁸²

Another positive aspect of introducing the lay judge system, according to Professor Hirayama, has involved the establishment of a legal education curriculum for school children. The Japanese government amended the government instructional guideline (“*gakushu shido yoko*”) in 2008 to include information on the lay judge systems, such as *Saiban'in* trials and PRCs, and the importance of citizen participation in the justice system, in the elementary school curriculum from 2011. The legal education curriculum including the mock jury trial, was also introduced at junior high schools in 2012 and at high schools in 2013.⁸³ The discussion in schools of Japan’s

80. Mari Hirayama, 10 Years of the Lay Judge System: Now, Do We Have “Hope” for Criminal Trials? Sept. 20, 2019 (Professor Hirayama’s PowerPoint on file with the author).

81. *Id.*

82. *Id.*

83. *Id.* See also, Yasuhiro Hashimoto, *Ho-kyoiku no Genjo to Kadai: Kan to Min no Torikumi*

popular lay judge systems may have brought about greater awareness of the societal significance of civic participation in the administration of justice. As many residents of Fukushima and adjacent areas have been affected by the nuclear disaster, it may not be long before the students may begin to engage in honest discussion on the possible adjudication of white-collar crime in the *Saiban'in* trial. Further, the participation in mock trials at schools in Fukushima may extend the discussion of possible lay adjudication into the realm of civil disputes on the compensation and monetary restitution to the victims of white-collar crime, such as disaster refugees and Fukushima's babies and children who continue to suffer from radiation-related illnesses, including leukemia, thyroid cancers, and infant congenital heart diseases.⁸⁴

2. Professor Shigenori Matsui's Analysis of Victim Participation in Japan

Another important change that the lay judge system has brought is the establishment of the rights of crime victims in Japanese criminal justice and the creation of their support systems.⁸⁵ Professor Shigenori Matsui's research has demonstrated the long history in Japan of disrespecting the voices and the rights of crime victims and their families by marginalizing their involvement in the criminal justice process.⁸⁶ Today, the victims can attend the trial and express in the courtroom their opinions on the impact of the crimes. Some victims are now allowed to sit together with the professional prosecutors, ask questions of witnesses and defendants, and express their grievances and opinions before the conclusion of the trial. Crime victims can also ask for a damage order against the defendant during

ni Chakumoku Shite [Reality of Legal Education and Issues: Focusing on Public-Private Initiatives], last visited Dec. 25, 2019, available at https://www.npa.go.jp/english/kyuuyo1/Police_Support_for_Crime_Victims.pdf, https://www.houterasu.or.jp/houterasu_gaiyou/kouhou/kankoubutsu/sougouhouritsushien.files/100524747.pdf.

84. Lucy Craft, *Study Links Fukushima Disaster to Spike in Infant Heart Surgeries*, CBS NEWS, Mar. 14, 2019. For the prevalence of thyroid cancers, see Akira Ohtsuru, Sanae Midorikawa, & Tetsuya Ohira, *Incidence of Thyroid Cancer Among Children and Young Adults in Fukushima, Japan, Screened With 2 Rounds of Ultrasonography Within 5 Years of the 2011 Fukushima Daiichi Nuclear Power Station Accident*, 145 JAMA OTOLARYNGOL HEAD NECK SURG. 4 (2019).

85. National Police Agency Office for Crime Victims, *Police Support for Crime Victims*, accessed on Dec. 25, 2019, available at https://www.npa.go.jp/english/kyuuyo1/Police_Support_for_Crime_Victims.pdf.

86. Shigenori Matsui, *Justice for the Accused or Justice for Victims? The Protection of Victims' Rights in Japan*, 13 ASIAN-PACIFIC LAW & POLICY JOURNAL 54 (2011).

the trial.⁸⁷ In order to protect the victim's privacy, the court can also decide whether or not to reveal the name of victim while reading a writ of prosecution.⁸⁸ Professor Matsui also indicated that various protective measures have been instituted to ensure the rights and privacy of victims, including the presence of support persons, physical fences to shield victims from the defendant and the general public, as well as the use of a video link. If the victim does not have financial resources to hire a legal proxy, the court-appointed attorney is also made available.⁸⁹

These extra measures to protect the anonymity and privacy of crime victims in court, however, have not always been welcomed by legal professionals. For instance, Attorney Megumi Wada criticized the newly adopted victim participation system because it tends to provide excessive uses of measures to protect the victims, including often "obtrusive" physical shields used in a small courtroom, and a video device for witnesses to testify in a remote place where the judges and attorneys were physically not present.⁹⁰ Furthermore, crime victims could be present and allowed to express their opinions at trial despite the fact that the defendant continued to claim innocence.⁹¹

III. The Resurrection of Japan's Jury Law and the Lay Adjudication of PRC-Indicted Cases

Another avenue through which PRC-indicted cases, including white-collar crime, could be tried by lay judges would be through Japan's jury system. The American-style, all-citizen, 12-member criminal jury trial that operated in Japan from 1928 to 1943 was abruptly suspended when the Second World War began. The Japanese government said that it would bring back the lay judge system once the war was over.⁹² The 1943 Jury Trial Suspension Act (*Baishin Ho no Teishi ni Kansuru Horitsu*) stipulated that "the jury system will be re-activated when the War is over."⁹³ However, after the war, the Japanese government refused to honor its promise to

87. Shigenori Matsui, Victim Participation into the Criminal Process in Japan, Sept. 19, 2019 (Professor Matsui's PowerPoint on file with the author).

88. *Id.*

89. *Id.*

90. Wada, *supra* note 70.

91. Matsui, *supra* note 86.

92. *See generally*, Takashi Maruta, *The Criminal Jury System in Imperial Japan and the Contemporary Argument for Its Reintroduction*, 72 INTERNATIONAL REVIEW OF PENAL LAW 215 (2001/1-2).

93. *See also*, LESTER W. KISS, REVIVING THE CRIMINAL JURY IN JAPAN, 62 LAW AND CONTEMPORARY PROBLEMS 261 (1999). The original Suspension Act in 1943 is available at <https://web.archive.org/web/20170928154731/http://law.e-gov.go.jp/htmldata/S18/S18HO088.html>.

reinstigate the criminal jury into the Japanese criminal justice system. The General Headquarters of the Supreme Commander of Allied Powers (SCAP) also made numerous efforts to reinstate the jury system. However, high-ranking Japanese bureaucrats and government personnel strongly opposed the efforts. Their arguments and official rationales included the ideas that the Japanese might not be mature enough to operate the jury system, and that the Imperial jury system in Japan had been a failure.⁹⁴

Regardless of these rationalizations, it is important to recognize that the Jury Act of 1928 has never been abolished, and the system of criminal jury trial has not been eradicated from Japanese criminal law. Japan's jury law has literally been "put on sleep" by the Japanese government, which is still refusing to act, despite its own Jury Trial Suspension Act in 1943 mandated its return following the war. Thus, one way of reinstating a criminal jury trial in Japan is to "awaken" the dormant Jury Law and firmly reinstate it in the Japanese criminal justice system.

The criminal jury trial had played a prominent socio-political role in Japanese society until its suspension in 1943. For fifteen years, Japan held nearly five hundred criminal jury trials (n=484). Each trial required the selection of a 12-member jury and alternates, suggesting that more than six thousand Japanese citizens had directly participated in the criminal jury trial. Jury research has shown that the popular jury frequently acquitted defendants (17%), i.e., in nearly one of every six criminal cases.⁹⁵ This high acquittal rate is remarkable because the greatest number of jury trials took place during the era of Japanese fascism in the 1930s and early 1940s, when imperial prosecutors held near absolute authority and power over criminal justice prosecution. Japanese prosecutors had arrested and prosecuted political dissidents, labor activists, left-wing academicians and scholars, journalists, prominent socialists, communists, and anarchists, many of whom were interrogated, tortured, and prosecuted in Japan's autocratic criminal justice system.⁹⁶ Yet, the lay judges had still rendered an acquittal verdict in 17% of all criminal jury trials. Similarly, the conviction rate of 83% in jury trials from 1928 to 1943 is significantly lower than the 99.9% conviction rate of all Japanese bench trials in the post-WWII era, as well as the 97% conviction rate of the new mixed tribunal since its introduction in 2009.⁹⁷

94. Maruta, *supra* note 92, at 219.

95. *See generally*, CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [THE RESURRECTION OF JURY TRIALS] (1997).

96. *See generally*, RAYMOND LAMONT-BROWN, KEMPEITAI: JAPAN'S DREADED MILITARY POLICE (1998). *See also*, John Crump, *Anarchist Opposition to Japanese Militarism, 1926-1937*, 4 JAPAN FORUM 73 (1992).

97. *Saiban'in Seido 10-Nen Jitairitsu 68%, Nen-nen Josho Seihanzai, Genbatsuka Susumu [10 Years of Saiban'in System: Annually Increasing Summons Decline of 68%, Severer Sentencing Patterns on Sex-Related Crimes]*, TOKYO SHIMBUN, May 16, 2019.

Ever since the Japanese government decided not to revive the Jury Law, various civic groups and organizations have been exploring the reinstatement of the jury into Japan's criminal justice system. The public interest in the lay judge system was especially strong in the early 1960s, when the U.S. Civil Administration of the Ryukyu Islands (USCAR) decided to introduce three systems of lay participation in the justice system in the Island of Okinawa, which is Japan's most-southern major island. In 1963 and 1964, the USCAR introduced jury trials in criminal and civil matters, respectively.⁹⁸ The government also introduced the American-style, criminal grand jury system.⁹⁹ Any person who stayed on the island for three months or more became eligible to serve on a jury, regardless of nationality, national origin, race, gender, religion, creed, or any other socio-cognitive barriers or identities.¹⁰⁰ Since the jury trial was introduced and commenced during the Vietnam War, many military personnel and their dependents also served on the criminal and civil trials, along with Okinawan residents, Japanese civil contractors, Filipino workers at U.S. military bases, academicians, business owners, homemakers, and even trading merchants from the Middle East, among many others.¹⁰¹

Chihiro Isa, one of the Okinawan jurors who served on a criminal jury trial in 1964, developed a strong interest in the democratic role that the jury played in Okinawa, and wrote a book on his jury experience, explaining the criminal trial in which he served, and sharing his personal views and evaluation of criminal court proceedings from the perspective of an Okinawan resident. His book "*Gyakuten: Amerika Shihaiika, Okinawa no Baishin Saiban* [Reversal: Okinawa's Jury Trial Under the U.S. Occupation]" was published in 1977 and received the prestigious *Oya Soichi* Non-Fiction Prize. Isa had participated in the criminal jury trial of four Okinawan youths who had been accused of killing a drunken American soldier. The youths were acquitted of murder in the trial in which Isa had served as a juror.¹⁰²

His advocacy for the reintroduction of jury trial in Japan attracted wide-ranging support from many civic activists and legal practitioners, as well as journalists, legal scholars, high school teachers, college professors, and

98. See generally, MATTHEW J. WILSON, HIROSHI FUKURAI, & TAKASHI MARUTA, JAPAN AND CIVIL JURY TRIALS: THE CONVERGENCE OF FORCES (2015).

99. *Id.*

100. *Id.*

101. Wilson et al., *supra* note 98.

102. *Id.* See also, Colin Jones, *Still Dreaming of a Japan with Juries: And Without U.S. Bases*, JAPAN TIMES, June 18, 2014.

political organizers, among many others.¹⁰³ Their collaboration and political advocacy for the introduction of lay adjudication in Japan soon led to the creation of two powerful grassroots organizations: “*Baishin Saiban o Kangaerukai*” [Research Group on Jury Trial or RGJT] in Tokyo, and “*Baishin Seido o Fukkatsusuru-Kai*” [the Organization to Bring Back the Jury System or OBBJS] in Osaka, Japan.¹⁰⁴ The RGJT was first established in 1982 in order to foster and sustain “on the ground” civic discussions on the jury trial and the possibilities for broader public participation in the criminal justice process. The RGJT also held discussions to reduce the wrongful conviction cases, due largely to the professional judges’ uncritical attention to the authenticity of confessions. As mentioned earlier, the Japanese professional judges paid little attention to whether or not confessions were forcefully extracted from criminal suspects under extreme physical and mental duress. The first RGJT meeting took place on April 2, 1982, in Hitotsubashi, Tokyo and was attended by legal scholars, practicing lawyers, a journalist, a novelist, a former judge, young students, and other civic activists who expressed grave concern about the integrity of the Japanese criminal justice system.¹⁰⁵ The RGJT decided to hold a monthly study session and share the idea that the introduction of active civic participation in the judge-monopolized, criminal trial process would insert a much-needed transparency into the Japanese trial and help reduce, if not eliminate, egregious wrongful conviction cases.¹⁰⁶ The RGJT activity also led to the creation of the *Toban-Bengoshi Seido* [the Rotating Public Defender System] in 1993, an effort led by one of the RGJT founders, Attorney and Professor Hideo Niwayama.¹⁰⁷ This system was later transformed into the *Ho-terasu* [Japan’s first Public Defender System] in 2006. Attorney Megumi Wada spoke of its socio-political significance in providing vital legal assistance to the indigent people and communities in Japan, including those who live in rural and remote areas.

The RGJT members also began to establish branch offices outside the Tokyo metropolitan area, including the *Kyushu Baishin Saiban o Kangaerukai* [The Kyushu Research Group on Jury Trial] in Kumamoto Prefecture in Kyushu Island, Japan’s third largest island, and *Niigata Baishin Tomono Kai* [The Niigata Friends of Jury Research Group] in Niigata

103. Hiroshi Fukurai, *The Rebirth of Japan’s Petit Quasi-Jury and Grand Jury Systems: A Cross-national Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.* 40 CORNELL INT’L L.J. 316-317-318 (2007).

104. *Id.* See also, “*Baishin Seido o Fukkatsusuru-Kai*” [“The Organization to Bring Back the Jury System or OBBJS”] (hereinafter OBBJS) (last visited Nov. 25, 2019), available at <http://baishin.blog.fc2.com/>.

105. Fukurai, *supra* note at 103.

106. *Id.*

107. *Id.*, at 318.

Prefecture in Central Japan.¹⁰⁸ The key RGJT organizers also helped launch another civic grassroots organization in 2002, *Shimin no Saiban-in Seido Tsukuro-kai* [Citizens Committee for the Creation of the *Saiban'in* System or CCCSS] in order to educate the public about the importance of civic participation in the administration of justice.¹⁰⁹ When the CCCSS was created, the final architectural design for the specific numbers of professional and lay judges in the *Saiban'in* panel was still to be determined. The RGJT and CCCSS had sent numerous proposals to the *Saiban'in Seido Keiji Kento-Kai* [the *Saiban'in* System/Penal Matter Investigation Committee or SPMIC] for what they considered to be the ideal composition of the mixed tribunal in order to maximize the lay judge deliberation, including the proposal of one presiding professional judge and eleven lay judges chosen randomly from the community.¹¹⁰ SPMIC member Satoru Shinomiya, who was also a key RGJT and CCCSS member, led the discussion on the ideal composition of *Saiban'in* panel at the 24th meeting, on September 11, 2004.¹¹¹ Shinomiya suggested the introduction of the *de facto* structure of a criminal jury panel, i.e., the possibility of eleven lay judges under the supervision of one presiding judge.¹¹² While his proposal was not adopted in the final design of *Saiban'in Seido*, RGJT members' continuous efforts to influence the deliberation of public hearing, by petition submission and direct participation, helped sustain important discussions on the idealized design of the *Saiban'in* panel in order to maximize the democratic role of civic participation in Japan's criminal trial.

Another civic grassroots organization, "*Baishin Seido o Fukkatsusuru-Kai*" [the Organization to Bring Back the Jury System or OBBJS], was created in 1995 as a popular advocacy group to reinstate Japan's once-suspended criminal jury law. Chihiro Isa also played a pivotal role in the creation of this civic organization in Osaka, which has maintained its own radio program every Sunday morning, called "*Donatteruno? Saiban Seido* [What's Happening to the Trial System?] at *Rajio Osaka* [the Radio Osaka Station]. They have continued to educate the public about the importance of public transparency in criminal proceedings and popular participation in the criminal trial. The civic organization has also become a strong advocacy group for reinstating Japan's jury law and reestablishing the all-citizen criminal jury trial in Japan, insisting that the Japanese government's own law

108. *Id.*

109. *Id.*

110. For the *Saiban'in Seido, Keiji Kento-Kai*, see 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).

111. *Saiban'in Seido, Keiji Kento-Kai Meeting*, Sept. 11, 2004, available at <https://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai24/24gaiyou.html>.

112. *Id.*

in 1943 had mandated its return after the war.¹¹³ The organization has also been critical of the newly-adopted *Saiban'in Seido*, which allowed the participation of professional judges in the deliberation process.¹¹⁴

The civic grassroots organizations in Tokyo, Osaka, and elsewhere have been supported by a group of academic scholars, legal practitioners, civic activists, political groups, crime victims, victims of wrongful convictions and their families, among many other progressive sectors of civil society. They have continued to invigorate public aspirations for the inclusion of lay participation in the justice system and to promote the progressive democratic ideals of direct participation and self-governance in Japanese society.¹¹⁵ Further, these organizations have continued to publish books and articles and to hold successful symposia and seminars in order to sustain citizen-led discussions on the importance of reintroducing the criminal jury system in Japan.¹¹⁶

A. Jury Trials' Lower Conviction Rate and Why It Matters

Several presenters at the UC Hastings Law School Symposium made critical observations concerning Japan's high conviction rates in criminal cases. Many civic grassroots organizations in Japan believe that the introduction of the all-citizen jury trial would help to significantly reduce, if not eliminate, wrongful conviction cases, thereby lowering the conviction rate from today's near 100% to a much lower percentage, perhaps near 83%, which was the conviction rate in criminal trials during the period from 1928 to 1943, when Japan operated an American-style, all-citizen jury trial. The expectation of a lower conviction rate resulting from introducing the jury trial in Japan is not unreasonable, especially given the high acquittal rate in the criminal jury trials that took place in Okinawa from 1963 to 1971.

Although the number of jury trials in Okinawa was relatively small, the analysis of the background of jury trials, the profile of defendants, attorneys involved in trials, jury eligibility and selection, gender and cultural diversity of jurors chosen, and verdict patterns all reveal the rich and significant history of the jury trial. Jury verdicts have had important sociopolitical

113. OBBJS, *supra* note 104.

114. CHIHIRO ISA, SAIBAN'IN SEIDO WA KEIJI-JIKEN O KAERUKA: BAISHIN SAIBAN O MOTOMERU RIYU [CAN THE SAIBAN'IN SYSTEM CHANGE THE CRIMINAL TRIAL? REASONS TO DESIRE JURY TRIALS] (2006).

115. To understand the origin of these civic organizations, see CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [THE RESURRECTION OF JURY TRIALS] (1996); CHIHIRO ISA, BAISHIN NO FUKKATSU [REINSTATEMENT OF JURY TRIALS] (1996).

116. Hiroshi Fukurai & Valerie Hans, *Special Feature: The Future of Lay Adjudication in Korea and Japan*, 3 YONSEI LAW JOURNAL 25 27 (2012). See also, Fukurai, *supra* note 103, at 319.

ramifications in Okinawan society. A total of nine jury trials—five criminal and four civil jury proceedings—took place in Okinawa in the 1960s and early 1970s prior to Okinawa's ultimate reversion to Japan on May 15, 1972. Jury research has revealed that Okinawa's diverse juries returned an acquittal verdict on a large number of indicted charges. The only exception is the first criminal jury trial that took place in 1963, in which Japanese American Bennett N. (Ken) Ikeda was accused of real estate fraud in Okinawa. Okinawa's first grand jury had indicted Ikeda on eleven counts of criminal offense.¹¹⁷ He was found guilty on all counts by the criminal jury that included both American and Okinawan residents serving as jurors.¹¹⁸

In the second criminal jury trial, *U.S. v. Eiko Uehara Rose* in 1963, the defendant was indicted on seven criminal offenses, including various charges of tax evasion. Eiko Uehara Rose, an Okinawa-born American and the wife of an American army civilian on Okinawa, was also the owner of the renowned restaurant, Teahouse of the August Moon (*Hachigatsu Jugoya no Chaya*). The restaurant had been made famous by the 1956 Hollywood movie under the same title, starring Marlon Brando, Glenn Ford, as well as the prominent Japanese actress Machiko Kyo, who played the character of Ms. Rose. At the jury trial, Ms. Rose was represented by an American attorney who practiced law in the Philippines but had come to Okinawa to represent her. She was cleared of six of seven indicted charges by the criminal jury that included both American and Okinawan residents.¹¹⁹ In the third criminal jury trial, *U.S. v. Chosin Kishaba and Yoshifumi Arashiro*, two Okinawan men were charged with attempted murder, but the diverse jury, which included American and Okinawan residents and a Philippine national, acquitted both defendants of attempted murder. Arashiro was found guilty of a lesser charge of assault and sentenced to thirty months in jail.¹²⁰ The fourth criminal jury trial, in 1964, *U.S. v. Megumi, et al.*, involved four Okinawan youths were accused of killing a drunken U.S. soldier. The diverse jury, which included Chihiro Isa as one of three Okinawan jurors, returned a verdict of not guilty on the murder charge for all four defendants. In the last criminal jury trial, eighteen-year-old Michael Dickens was accused of four drug-related offenses in 1971. He was found guilty on one account of possessing marijuana, but received not guilty verdicts on three other charges.¹²¹

A review of the indicted offenses that had been charged by the grand

117. *U.S. v. Bennett Ken Ikeda*, Grand Jury No.1, Reported & Filed Apr. 3, 1963 (the indictment document on file with the author).

118. *Id.*

119. Wilson, et al., *supra* note 98.

120. *Id.*

121. *Id.*

jury against criminal suspects in Okinawa reveals that the majority of them had been cleared by the criminal juries that, again, included a wide spectrum of the residential population in Okinawa, on the basis of race, ethnicity, gender, citizenship, occupation, and national backgrounds.¹²² As stated earlier, the jury qualification in Okinawa was extremely broad, for any person who stayed on the island of Okinawa for three months was eligible to serve. These so-called “indiscriminate,” “international,” or “multi-gendered” jury panels in Okinawa acquitted a large proportion of indicted criminal defendants, among them Okinawans and an Okinawan-born American. The rate of acquittals was much higher than that of Japan’s previous criminal jury trials. The political background and cultural milieu of Okinawa were quite different, of course, from those of the fascist and right-wing ideologies during Japan’s pre-war and WWII periods.¹²³ Nonetheless, it is not difficult to speculate that the reintroduction of the once-suspended jury trial in today’s criminal justice system in Japan could lead to a much higher acquittal rate than that of the bench trial or the *Saiban’in* trial.

If the suspended Jury Law were to be reenacted in today’s Japanese society, however, it would have to be effectively modernized to function as a democratic participatory system similar to the one previously adopted and operated in the Island of Okinawa. For instance, the prewar jury had only allowed the participation of male citizens who paid the annual tax of 3 yen or more, and only 3% of the Japanese population was eligible to serve on the jury.¹²⁴ Japan’s Jury Law thus must be modernized to extend civic participation to a broad spectrum of the population across lines of gender, class, ethnicity, race, sexuality, and other social identities and categories.

The civic participation of women jurors in the justice system may be particularly important, as jury research has substantiated that the addition of women in jury trials has had a significant impact on conviction rates when victims or defendants were women, in addition to bringing a multiplicity of perspectives and life experiences into deliberative processes, thereby enhancing the overall quality of jury deliberation.¹²⁵ Women’s active participation in jury trials in Okinawa might also have affected the trial outcome, as they often dominated the jury panel and deliberation. For example, in the third Okinawan criminal jury that tried Okinawan defendants of Kishaba and Arashiro, women dominated the jury panel (7 of 12 jurors,

122. *Id.*

123. Saeki, *supra* note 115.

124. For the qualification of jury service, see Maruta, *supra* note 92.

125. See generally, Nancy S. Marder, *Gender Dynamics and Jury Deliberations*, 96 YALE L.J. 593 (1987). For the impact of English women in jury trial, see Shamena Anwar, Patrick Bayer, and Randi Hjalmarsson, *A Jury of Her Peers: The Impact of the First Female Jurors on Criminal Convictions*, 129 THE ECONOMIC JOURNAL 603 (2019).

i.e., 58%). The women-majority jury tossed out two Okinawan defendants' attempted murder charge, while Arashiro was only found guilty of minor assault. The jury's international diversity was also significant in this trial, including two Okinawan jurors; one was a married Okinawan woman, as well as a Philippine national who was chosen as one of two alternates.¹²⁶ The jury diversity and active participation of women might also have had significant influences upon the outcome of civil jury trials in Okinawa. A total of four civil jury trials took place, and the plaintiffs in four civil jury cases were all women, who were either a single mother or widow or both. All of them filed civil lawsuits against powerful corporations, including U.S. transnational corporations that operated their business in Okinawa, as well as a local electric power company that was founded by Seiho Matsuoka, a powerful Okinawan businessman and politician who later became the Chief Executive Officer of the Government of the Ryukyu.¹²⁷ In four civil jury trials, Okinawa's gender-diverse juries all ruled in favor of women plaintiffs, awarding them hundreds of thousands of dollars in compensations.¹²⁸ In the last civil jury trial in 1972, the civil jury awarded the single mother more than one hundred thousand dollars of compensatory damages.¹²⁹

It is important to recognize that both civil and criminal jury trials in Okinawa were characterized by jury diversity in gender, race, ethnicity, social class, and national origin. On the other hand, jury service in the U.S. mainland in the same period had not been hospitable to women, people of color, indigenous people, the poor, and other marginalized and underrepresented populations.¹³⁰ It is remarkable that these same marginalized populations from the U.S. had been encouraged to participate in both civil and criminal jury trials in Okinawa. The active participation of women jurors in Okinawa, in particular, shows a real contrast to women's participation in today's *Saiban'in* trial. Although the most recent Japanese census indicated that the majority of Japanese citizens were women, the majority of *Saiban'in* participants have been men (55.1%).¹³¹

The analysis of the history of criminal jury trials in Japan in the 1930s and 1940s, as well as both criminal and civil jury trials in Okinawa in the 1960s and 1970s, has shown that direct citizen participation in the

126. *Make Legal History: Ryukyuan Face Twelve-Man Jury*, STARS & STRIPES, Oct. 22, 1963.

127. Wilson, et al., *supra* note 98.

128. *Id.*

129. *Id.*

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

131. Only 43.4% of *Saiban'in* participants were women. *See Saiban'in Seido 10-Nen no Sokatsu Hokokusho, Zuhyo 8: Saiban'in no Kosei (Seibetu)* [Summary Report of Saiban'in System for 10 Year Period], Chart 8: Saiban'in Composition: Gender] 34 (2019), available at http://www.saibanin.courts.go.jp/vcms_lf/r1_diagram.pdf.

administration of justice had powerful and significant impact on the trial proceedings and the outcome of both criminal and civil trials. If Japan's criminal jury law were to be "awakened" today, Okinawa's lessons show that it is important to include the broadest possible societal participation in the jury trial, including historically underrepresented and marginalized populations, such as women, ethnic minorities, and those from working and lower social classes.

IV. The Political Utility of PRC-Forced Indictment against Foreign Soldiers

The final section of the paper focuses on the potential utility of the PRC-forced prosecution of "state crime," which is one of the most serious white-collar crimes committed by the state and/or its actors in pursuant of the state government's orders and objectives. The last section also responds to Professor Goodman's suggestions to include legal professionals and political advisors in the PRC's adjudication of non-prosecution cases. While the state or the national government typically serves as the agency of deterrence with the tacit use of threat or effective deployment of punishment against criminal offenders, the state and its agents are also capable of engaging in criminal activities.¹³² Under international law, for instance, state crime may include genocide, war crime, crimes against humanity, and crimes of aggression.¹³³

Under national law, state crime is defined as the state's activity or failure to act that breaks the state's own criminal law.¹³⁴ Similar to the case of white-collar criminals, where the secret ministerial directive and governmental rules have prevented Japanese prosecutors from prosecuting highly-privileged corporate executives, prominent politicians, and government elites, there have also been groups of foreign nationals in Japan who routinely victimize local residents and are not prosecuted. The law adopted by the Japanese government has prevented public prosecutors from prosecuting foreign nationals, even though their prosecution is mandated by its own criminal law. As a result, the rights of crime victims and their families have been systematically violated by the state government.

One specific legal mechanism that provides special "immunity" to

132. PENNY GREEN & TONY WARD, *STATE CRIME* (2000); *see also*, PENNY GREEN & TONY WARD, *STATE CRIME AND CIVIL ACTIVISM: ON THE DIALECTICS OF REPRESSION AND RESISTANCE* (2019).

133. *See generally*, CHARLES CHERNOR JALLOH & ILIAS BANTEKAS, *INTERNATIONAL CRIMINAL COURT AND AFRICA* (2017).

134. DAWN ROTHE & CHRISTOPHER W. MULLINS, *SYMBOLIC GESTURES AND THE GENERATION OF GLOBAL SOCIAL CONTROL: THE INTERNATIONAL CRIMINAL COURT 2* (2006) (the authors cited the work by Kramer & Michalowski (2005)).

criminals is called the Status of Forces of Agreement (SOFA).¹³⁵ Whether or not the state's granting of SOFA and the establishment of immunity for foreign nationals who commit crimes, thereby fostering the culture of impunity, should be considered as state crime is up for further debate and discussions under state and international laws. Nonetheless, it is important to recognize that the SOFA was originally designed to violate the sovereignty of the state and its jurisdictional authority to punish foreign nationals who commit crimes on foreign soils.¹³⁶ Historically, the SOFA has been used by powerful states and international organizations to shield from foreign prosecution the criminal actions of their own personnel. By forcing a foreign state to sign the SOFA, powerful international actors such as the U.N. and the U.S. have routinely violated customary provisions of international law and the sovereignty of the state by insulating the crimes committed by their personnel from prosecution under local criminal law. The SOFA also undermines the rights of crime victims and keeps their grievances from being incorporated in the adjudication process. In 2017, for instance, more than two thousand allegations of sexual abuse and exploitation of children, women, and disabled or incapacitated civilians by U.N. peacekeepers have been reported around the world.¹³⁷ These personnel were not prosecuted because the U.N. SOFA that governs U.N. missions insulated their peacekeepers from criminal jurisdiction of the host country.¹³⁸ On a similar note, in 2015, more than fifty Colombian girls had been sexually abused by U.S. soldiers and civilian contractors, but they have never been charged or prosecuted due to the SOFA immunity granted to U.S. military personnel in Colombia.¹³⁹

The concept of creating special "extraterritorial jurisdiction" was developed along with the powerful state's efforts to expand imperial jurisdiction and colonies. For instance, the concept of SOFA and provision of "extraterritorial rights" to U.S. soldiers overseas was advanced by U.S. War Secretary Elihu Root who began to witness the sprawl of U.S. military bases across the globe at the end of the nineteenth century. The U.S. invaded Cuba, Puerto Rico, Hawaii, and the Philippines in 1898 and began to establish U.S. military ports and base facilities in the North Atlantic and the

135. See generally, Hiroshi Fukurai, *Lay Prosecution of U.S. Military Crimes in Japan by Prosecutorial Review Commissions and the Saiban-in Trial*, in *JAPANESE LEGAL SYSTEM: AN ERA OF TRANSITION*, (Harry N. Scheiber & Tom Ginsburg eds.) (2012).

136. *Id.*

137. Nimmi Gowrinathan & Kate Cronin-Furman, *Rapists in Blue Helmets: The Crimes of UN Peacekeepers*, ENVIRONMENTALISTS AGAINST WAR, May 2, 2017, <http://www.envirosagainstar.org/2017/05/02/rapists-in-blue-helmets-the-crimes-of-un-peacekeepers/>.

138. *Id.*

139. Sibylla Brodzinsky, *US Army Investigates Reports That Soldiers Raped Dozens in Colombia*, GUARDIAN, Apr. 7, 2015.

Pacific Basins.¹⁴⁰ Under Root's leadership, the U.S. government also began to develop the legal framework of bilateral and multilateral military agreements in protecting U.S. armed forces from prosecution under domestic and international laws while stationed in a foreign state. At present, the U.S. government has signed more than one hundred Status of Forces Agreement (SOFA) and successfully placed military personnel in more than one hundred and fifty countries across the globe.¹⁴¹

The U.S.-Japan SOFA signed in 1960 provided U.S. military personnel "extraterritorial" immunity from prosecution under Japanese jurisdiction. In Okinawa, where three-quarters of all the U.S. military bases in Japan are stationed, for example, the failure of local government to punish criminals had long created a culture of impunity among military personnel, dependents, and civic employees, thereby fermenting the false liberty of criminality that led to further victimization of local residents and communities. From 1972 to 2015, military personnel have committed a total of 574 serious and violent crimes against local residents, including 394 robbery cases (n=548 robbers), 129 rapes (n=147), 26 murders (n=34), and 25 arson cases (n=12) in Okinawa.¹⁴² For the five year period from 1964 to 1968 alone, U.S. military personnel and their dependents committed a total of 5,376 crimes, including 504 serious and violent crimes in Okinawa.¹⁴³ Okinawa has suffered from the continued victimization of local residents and their communities, as a strong sense of impunity has been shared among military personnel for many decades.

A. The PRC-Forced Prosecution of Military Personnel: The Death of Yogi Koki

While the SOFA effectively prevents the prosecution of U.S. soldiers under Japanese law, an exception occurred in Okinawa when the all-citizen PRC decided to prosecute U.S. military personnel, reversing the Naha public prosecutors' non-indictment decision. Similar to the PRC decisions of forced prosecution against white-collar criminals who had been long

140. For the historical background on the U.S. development of extraterritorial rights, see Chalmers Johnson, *Sorrows of Empire: Militarism, Secrecy, and the End of the Republic* (2004).

141. R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized 2* (2015) ("The United States is currently party to more than 100 agreements that may be considered as SOFAs"). See also, Defense Manpower Data Center, *Number of Military and DoD Appropriated Fund (APF) Civilian Personnel Permanently Assigned by Duty Location and Service/Component* (2019).

142. *Fukkigo 574-Ken, Oinawa Beigunjin, Gunzoku Kyoaku Hanzai* [*Since the 1972 Reversion to Japan, 574 Criminal Cases by U.S. Military Personnel and Their Dependents*], RYUKYU SHIMPO, May 20, 2016.

143. *Id.*

protected by Japanese prosecutors and professional judges, PRC's forced prosecution decision in Okinawa punctured a huge hole in the culture of impunity long enjoyed by U.S. armed forces personnel, dependents, and civilian contractors.

In January 2011, a twenty-three-year-old military civic employee Rufus James Ramsey III, who had consumed alcohol at the base party and was driving back to his apartment, veered into an opposing lane and crashed into a compact car driven by a nineteen-year-old Okinawan youth Yogi Koko, killing him instantly.¹⁴⁴ Ramsey was taken to U.S. Naval Hospital Okinawa on Camp Lester and soon released. In March, the Naha public prosecutors announced that they decided not to indict the civic employee, since the traffic collision took place, according to the U.S. military, while he was on official duty, citing SOFA's Article 17, in which the American military exercises primary jurisdiction over all accidents or crimes committed while on official duty.¹⁴⁵ The driver soon had his driving privilege suspended for the next 5 years.¹⁴⁶ He was not tried in the military tribunal, as he was not a member of U.S. armed forces.¹⁴⁷ In Okinawa, DUI-related auto-accidents caused by U.S. base personnel have not been uncommon. Between 1981 and 2016, a total of 3,613 drunk-driving accidents were caused by U.S. military personnel, resulting in 82 deaths and 4,024 injuries. Yet, the punishment against drivers was almost nonexistent.¹⁴⁸

This time, Yogi's mother, friends, and concerned community members had discussions with prominent Okinawan attorney Toshio Ikemiyagi, who suggested that the mother and supporters might petition the Naha PRC to review the non-indictment decision rendered by the Naha prosecutors' office. Upon their request, Attorney Ikemiyagi then filed a petition on behalf of the mother asking the Naha PRC to review the non-indictment decision. In May 2011, the Naha PRC deliberated on the case and announced that the indictment should have been issued in the first instance, reversing the

144. *Japanese Man Died after Vehicle Collision with AAFES Employee on Okinawa*, STARS & STRIPES, Jan. 13, 2011 (hereinafter AAFES). See also, *Beiheihanzai Fukiso ni Kogi [Protest against Non-Prosecutorial Decision]*, AKAHATA SHIMBUN, Apr. 19, 2011. *Drinking at USF 'Official Event' is Regarded as Party of 'Official Duty'*, JAPAN PRESS WEEKLY, Apr. 24 & 26, 2011.

145. AAFES, *supra* note 144.

146. Beigunzoku, *Kisosoto Chiikyotei ga Hikokusekini ["Indictment is Proper" for Military Employee: SOFA is on Defendant's Seat]*, OKINAWA TIMES, May 29, 2011 (hereinafter Beigunzoku).

147. *Id.*

148. Nihon Heiwa Inkaï [Japanese Peace Commission], Okinawa deno Beikaiheitain ni yoru Inshuunten Shibojiko ni Kogisi, Beigunkichi no Tekkyo o Motomeru [The Elimination of U.S. Military Bases in Okinawa Due to Drunk-Driving Accidents Resulting in Deaths and Injuries by U.S. Marine Soldiers], Nov. 20, 2017, available at http://j-peace.org/2011/statement/pdf/insyu_jiko_kougi171120.pdf.

prosecutors' non-indictment decision.¹⁴⁹

According to the new 2009 PRC law, after the PRC issued the indictment decision, the local prosecutor's office was required to respond to the PRC's decision within a three-month window. An unexpected event took place in this case. First, the local prosecutors did not make an announcement of the results of the reinvestigation of the case, as mandated by the new PRC law. Second, in November 2011, the U.S.-Japan Joint committee, not the Naha prosecutor's office, made a sudden announcement on this case. The U.S.-Japan Joint Committee is the bilateral panel charged with administering the SOFA, largely in secret. Third, there was an unprecedented decision that, in a period of peacetime, the military employee would not be protected by the SOFA provision.¹⁵⁰

Specifically, the U.S.-Japan Joint Committee announced that if a member of the armed forces or a military-linked civilian is caught by Japanese police while driving drunk, they would lose their "extraterritorial" status under SOFA and Japan would have the right to exercise primary jurisdiction, whether they were on or off duty. Secondly, since civilian workers were not subject to the U.S. Uniform Code of Military Justice (UCMJ), they could not be tried in a U.S. military court. They must then be tried in a civilian court and could be taken to the U.S. to be tried in a civil court. Thirdly, if U.S. authorities determine the transfer to the U.S. to be logistically impossible, the U.S. may decline to prosecute them. At that point, Japan can formally request to try the case, and the U.S. is supposed to grant a "sympathetic consideration" in handing the suspect to the Japanese prosecutors.¹⁵¹ Lastly, the Japanese government would be allowed to exercise the primary jurisdiction over such a case. Two days after the U.S.-Japan Joint Committee's announcement, the Naha prosecutors' office issued the indictment against the military employee, who was then arrested, prosecuted, convicted in the Naha district court, and sent to Japanese prison for 18 months for vehicular manslaughter.¹⁵²

This PRC's forced prosecution decision was significant and effective in puncturing an unprecedented hole in the SOFA's immunity provision for military-related personnel. It is equally important to recognize the importance of the PRC petition filed by the veteran Okinawan attorney on behalf of the mother of the auto accident victim. In the petition submitted to the PRC, Attorney Toshio Ikemiyagi had enlisted key legal decisions and

149. *Id.*

150. *Okinawa Presec Indict U.S. Base Employee*, HOUSE OF JAPAN, Nov. 25, 2011. *See also, U.S. Civilian Worker in Okinawa Indicted for Fatality*, ASAHI SHIMBUN, Nov. 25, 2011.

151. Eric Johnston, *SOFA A Source of Sovereign Conflicts*, JAPAN TIMES, July 31, 2012.

152. Travis J. Tritten & Chiyomi Sumida, *American on Okinawa Gets 18 Months in Prison for Vehicle Manslaughter*, STARS & STRIPES, Feb. 22, 2012.

justifications in arguing that the military employee should be indicted and prosecuted in Japan.¹⁵³ First, he indicated that the U.S. Supreme Court in 1960 handed down the decision that during a time of peace, the SOFA protection of military personnel would not be extended to civilian employees of American military bases overseas. Specifically, the ruling in *McElroy v. Guagliardo* in 1960 determined that during peacetime, the Uniform Code of Military Justice (UCMJ) could not be applied to civilian employees of U.S. Armed Forces overseas in non-capital offenses. The ruling thus recognized that different jurisdictional applications existed between U.S. Armed Forces service members and civilian components of military personnel.¹⁵⁴ Another U.S. Supreme Court ruling, in *Grisham v. Hagan* in 1960, similarly determined that, even in capital cases, different jurisdictional principles could be applied to civilian employees overseas.¹⁵⁵ Ikemiyagi's PRC petition had influenced the PRC deliberation, as the PRC's Principal Statement (*giketsu no shushi*) issued by the Naha PRC in May 27, 2011, reversing the Naha prosecutors' non-indictment decision, also cited these two U.S. Supreme Court decisions.¹⁵⁶

Second, the PRC Principal Statement had also cited other exclusionary provisions of civil employees at U.S. military bases overseas. The PRC statement cited that under the North Atlantic Treaty Organization (NATO) SOFA provision, civic employees and dependent families of military personnel were not considered to be protected under the NATO SOFA that had been signed with multiple European countries.¹⁵⁷ Third, the PRC Principal Statement indicated that the Supreme Court of Korea had made a similar decision on the limited coverage of jurisdiction over the civilians employed in the U.S. military base in South Korea, in which the U.S. military had no right to exercise its jurisdiction over civilian workers of American military bases in South Korea during peacetime, as related to the 1960 U.S. Supreme Court rulings.¹⁵⁸

Lastly, as Ikemiyagi indicated in his PRC petition, which was re-cited in the PRC Principal Statement, civilian employees at the military bases are not members of U.S. military personnel, and their crimes were therefore not subjected to adjudication by the U.S. Court Marshal, since the Uniform Code of Military Procedure (UCMP) has jurisdiction over U.S. military personnel, not civilian employees. The PRC then suggested that civic employees should

153. Personal interview of Attorney conducted by the author on Nov. 30, 2016, at his law office in Naha, Okinawa.

154. *McElroy v. United States ex rel Guagliardo*, 361 U.S. 281 (1960).

155. *Grisham v. Hagan*, 361 U.S. 278 (1960).

156. The PRC Resolution Statement, May 27, 2011 (on file with the author).

157. Beigunzoku, *supra* note 146. *See also*, Petition to Naha Prosecution Review Commission, Apr. 25, 2011, filed by Attorney Toshio Ikemiyagi (on file with the author).

158. Beigunzoku, *supra* note 146.

be properly subjected to the U.S.-Japan SOFA Article 17, section (1) (b), which states that “the authorities of Japan shall have jurisdiction over the members of USAF, the civilian component, and their dependents, with respect to offenses committed within the territory of Japan and punishable by the law of Japan.”¹⁵⁹ The PRC Principal Statement thus concluded that Ramsey, a civilian employee at a U.S. base, should be properly indicted and tried in Japanese court. This whole process of turnaround from the Okinawan youth’s death to the PRC’s prosecution decision took place quickly, suggesting that the PRC had acted on the review of the petition expediently and enthusiastically. The PRC’s pro-indictment decision was prompt and decisive: the Okinawan youth’s death occurred on January 12, 2011; the petition to the Naha PRC was filed on April 25, 2011; and the PRC decision that supported the indictment of a civilian employee was announced on May 27, 2011.

B. The PRC’s Failure of Prosecution: The Death of Yoshio Onda

The PRC decision on the death of Yogi Koki due to the culpability of civilian personnel and the prosecution in Japanese court stands in contrast to another case of civilian death caused by a civic military employee that took place in Yamaguchi Prefecture. In September 2010, 66-year-old Yoshio Onda was killed by a car driven by civilian employee Jamie M. Wallace, who worked at U.S. Marine Corps Air Station Iwakuni in Yamaguchi Prefecture. The Marine airfield military base is located at the southwestern tip of Japan’s largest island, Honshu. Onda had been the president of a neighborhood association and a key member of “Atagoyama o Mamoru Kai [The Protection Group of Mt. Atago or PGMA],” who had been protesting the construction of a 1,060-unit housing project on Mt. Atago for U.S. military personnel next to the Marine airfield. The investigation of the auto accident near the military base revealed that Onda’s body flew nearly sixty feet, killing him instantly. The incident also took place without any sign or trace of brake marks by the colliding automobile driven by Wallace.¹⁶⁰ Soon after the accident, nearby residents and witnesses of the accident surrounded Wallace and her vehicle so that she would not escape into the base.¹⁶¹

159. U.S.-Japan Status of Forces Agreement, *available at* https://www.nichibenren.or.jp/library/en/document/data/140220_2_opinion.pdf (last visited Nov. 29, 2019).

160. *No to US Military Beef-Up in Post-Disaster Mess*, JAPAN PRESS WEEKLY, May 17 & 18, 2011, *available at* <http://www.japan-press.co.jp/modules/news/index.php?id=1854>.

161. *Iwakuni: Beigunzoku ga Jumin o Hanekorosu: Senryosha-Ishiki de Zochou-suru Beigun* [*Iwakuni: Military-Related Personnel Killed Local Resident: Occupier-Minded U.S. Military*], JINMIN NO HOSHI [PEOPLES STAR], Vol. 5513, (2010), *available at* <http://peoplestar.web.fc2.com/list/data/5513-1.html>.

Onda's life had been largely influenced by his war experience. Onda's father was killed in the Philippines during the Second World War, when he was one year old, and one of his sisters and some cousins were killed by the nuclear blast in Hiroshima in 1945. His mother had to take care of her family by working at a nearby U.S. military base, and died when she was only 51 years of age.¹⁶² After the incident, the Yamaguchi prosecutors issued the non-indictment decision because the accident took place while Wallace was on official duty, and the administrative punishment was soon handed down to Wallace, as her driving privileges were suspended for four months for causing the deadly accident.¹⁶³

After Onda's death, his remaining family filed a complaint to the Yamaguchi PRC to review the prosecutors' non-indictment decision against Wallace. The Yamaguchi PRC decided in March 2011 that the prosecutors' original non-indictment was proper, stating "the accident took place while on-duty. As indicated in the U.S.-Japan SOFA, the duty status properly gives the U.S. government the primary right to exercise jurisdiction over the accident, [thereby the non-indictment by the Japanese prosecutors was proper]."¹⁶⁴

There are a number of similarities between the deaths of Yogi Koki and Yoshio Onda and the surrounding circumstances. First, their whole lives had been deeply affected by the legacy of U.S. military bases that had been built near their homes. Yogi Koki, who was originally born in Okinawa, had left his family to work in Aichi Prefecture in the Island of Honshu, Japan's largest main island. He returned to his hometown in Okinawa to celebrate his 20th birthday, which was considered the entry into adulthood according to the local culture.¹⁶⁵ Onda's entire life had also been affected by his relation to the legacy of U.S. military, including his father's death, the U.S. dropping of atomic bomb in Hiroshima, and his mother's livelihood that depended on jobs at a nearby U.S. military base. Second, they were both killed by military civil employees, not U.S. Armed Forces service personnel. Third, their deaths were not caused by their own actions or inaction, but were externally imposed by drivers who were either under the influence of alcohol, or perhaps, in the death of Yoshio Onda, driving carelessly, if not recklessly. Fourth, in both cases, the U.S. military had held the primary jurisdiction over both incidents and decided that civic employees were in the

162. Beigun Hanzai: Beigungunzokujiko Fukiso Izoku Kenshin Moshitate-e [Military Crimes: Victim's Family Filed Complaint to PRC], D-Navi, Apr. 10, 2011.

163. Tsutomu Niigaki, Yamachuchi-ken Iwakuni Deno Doshu Jijitsu [The Same Incident in Iwakuni, Yamaguchi], Nichibei Chiikyotei-Kaisei o Jitsugensuru NGO [NGO for the Revision of the U.S.-Japan SOFA], June 13, 2011, available at <https://kaiteingo.ti-da.net/e3594968.html>.

164. *Id.*

165. *Japanese Man Dies after Vehicle Collision with AAFES Employee on Okinawa*, STARS & STRIPES, Jan. 13, 2011.

furtherance of their own official duty when the deadly incidents occurred. Fifth, in both instances, Japanese professional prosecutors issued the non-indictment decision, citing the U.S.-Japan SOFA provision and primacy of U.S. jurisdiction over the incidents. Lastly, victimized families and their proxies had filed complaints to local PRCs to review the propriety of the prosecutors' non-indictment decisions.

There are also significant differences in the outcome of PRC deliberations in Okinawa and Yamaguchi prefectures. The Okinawa's PRC petition was prepared by an experienced lawyer who had been well-versed in the "colonial" history of Okinawa which, according to Okinawan specialists, has been made into a "sacrifice zone" by both U.S. and Japanese governments.¹⁶⁶ For instance, Attorney Toshio Ikemiyagi has represented many families whose members have been victimized by U.S. military personnel, including the late Koki Yogi and his grieving mother. He also acted as a leader of many lawsuits filed by Okinawan residents against the Japanese government and its U.S.-related polices in Okinawa. He is currently the leader of the U.S. Kadena Air Base anti-noise pollution litigation, representing approximately 22,000 Okinawan residents who live near the base.¹⁶⁷

The PRC petition on behalf of Yoshio Onda in Yamaguchi Prefecture was filed by his remaining family members and their supporters who had little legal background on the SOFA provision and little knowledge of important legal decisions regarding the status of military-related personnel. Similarly, the residents in Yamaguchi Prefecture have not faced the same degree of exploitation and "forced victimization" of residents, communities, environment, and ecosystems. Article 4 of SOFA stipulates, for example, that U.S. government is not obliged to return the base and adjacent area to "the condition in which they were at the time they became available to the USAF, or to compensate Japan in lieu of such restoration."¹⁶⁸ Such a legal provision has resulted in the contamination and destruction of the environment and ecosystems of Okinawan villages and towns. The town of Takaye, where Osprey helipad stations were recently constructed despite strong opposition by the residents, had been used as a quasi-camouflaged Vietnamese village during the Vietnam War. The residents were forced to act as Vietnamese villagers during the military exercise simulation and had the defoliant Agent Orange sprayed over them as well as food crops, so as to

166. *See generally*, ROGER GOODMAN & KURSTEN REFSING, IDEOLOGY AND PRACTICE IN MODERN JAPAN 30 (1992) (Okinawans "see themselves made into a sacrificial lamb which the emperor offered to the Allied Occupation to save the rest of Japan from prolonged occupation.").

167. *22,000 File Suit Over Kadena Night Flights*, JAPAN TIMES, Apr. 29, 2011.

168. SOFA, art 4, 1, available at https://www.nichibenren.or.jp/library/en/document/data/140220_2_opinion.pdf.

investigate the impact of the herbicides.¹⁶⁹ The villagers were never compensated for the contamination of their farmlands or the health effects stemming from their participation in the military simulation exercise.¹⁷⁰

The Japanese government's treatment of the deaths of both Yogi Koki and Yoshio Onda demonstrated that the existing legal system has been designed to elevate the interests of U.S. and Japanese governments and their geo-strategic objectives over the rights and welfare of people, the nature, and ecosystems in Okinawa and elsewhere. When Okinawan residents have been victimized by military personnel, the decisions of the Japanese government, including the prosecutors' offices, have failed to ensure the safety and security of local residents and their communities, while "ignoring" their duty to punish the offenders. The reluctance of Japanese public prosecutors to issue the indictment against civilian components of U.S. military reflected the overall bureaucratic culture of the Japanese government, thereby disregarding and marginalizing the rights of crime victims and their families. In addition to the provision of the 1954 secret directive of *shobun seikun*, it was also revealed that, in an attempt to prosecute U.S. military personnel, Japan's public prosecutors were required to follow the special instruction from top ministerial officers, namely the Director of Public Prosecutors (*Kenjicho*), Attorney General (*Kenji Socho*), and Justice Minister (*Ho-sho*).¹⁷¹ The directive thus led to the wholesale dismissal of criminal cases that victimized local residents and communities in Okinawa and beyond. The PRC then became an important legal vehicle with which to challenge the culture of impunity and complicity.

C. Professor Carl F. Goodman's Suggestion to Include "Mature Adults" in PRC Deliberations

Georgetown Law Professor Carl F. Goodman offered an important suggestion that, in order to engage in equitable and fair PRC deliberations, it is important to invite legal specialists with politico-legal knowledge and international expertise so that the PRC's deliberations should be reflective of, and incorporated into, a more consensual decision-making to comply with the overall interests of the government and the general public. Professor

169. Lisa Torio, *Can Indigenous Okinawans Protect Their Land and Water from the US Military? As Construction Finishes on Six New Helipads, Demonstrations to Remove the Military are Reaching a Fever Pitch*, NATION, Dec. 20, 2016, available at <https://www.thenation.com/article/can-indigenous-okinawans-protect-their-land-and-water-from-the-us-military/>.

170. *Id.*

171. *Beihei-Kiso wa 'Hoso-Shiki' to Kitei: Homusho no 54-nen Naiki de [Requirement of U.S. Soldiers' Indictment Under Justice Minister's Instruction: 1954 Internal Document of the Ministry of Justice]*, SAGA SHIMBUN, Jan. 28, 2019.

Goodman provides a number of compelling reasons that sociopolitical experts should be included, in addition to lay participants, in PRC's decision-making in the post-2009 era. For example, he warned that, without political and legal experts, there might be a potential for partisan political abuse of the PRC law, such as in the instance of what was most likely a politically motivated request to review the non-indictment decision on DPJ Secretary General Ichiro Ozawa.¹⁷² Professor Goodman suspected that the PRC-forced indictment might have possibly cost Ozawa the Prime Minister post.¹⁷³

Other reasons included the potential harm to national security when the PRC-forced indictment led to the prosecution of foreign nationals. For instance, the PRC-forced indictment of a Chinese ship captain could have damaged the economic relationship with China, though he was quickly released by the Japanese government.¹⁷⁴ Another indictment of U.S. military personnel had led to the violation of the jurisdictional authority of the U.S.-Japan SOFA provision. According to Professor Goodman, "[M]andatory indictment [of U.S. military-related personnel] could create an international incident between Japan and its single most important military partner."¹⁷⁵ Other reasons he enlisted included the potential danger of damaging innocent persons caught in the PRC investigation process¹⁷⁶ and the tremendous stress that the PRC process has placed on the rule of law, such as the indictment of a former police deputy chief, when the statute of limitation had already expired.¹⁷⁷

Thus, Professor Goodman suggests the following changes in the PRC law: (1) the training of PRC members with sample instructions prepared by the Japanese Supreme Court's Secretariat to explain the PRC's need to consider various issues, including the public interest and the rights of the target of their investigation; (2) the more active involvement of public prosecutors in providing the PRC exculpatory evidence involving the target of their investigation; and (3) in PRC reviews that possibly touch upon national security issues, the greater involvement of retired jurists of the Japanese Supreme Court, a former head of the Japan Federation of Bar Association, a retired Prosecutor General, a former Ministry of Foreign Affairs, and retired presidents of Japan's national and private universities, among others.¹⁷⁸

172. See generally, Carl F. Goodman, *Prosecution Review Commissions, the Public Interest, and the Right of the Accused: The Need for a "Grown Up" in the Room*, 22 PACIFIC RIM LAW & POLICY JOURNAL 1 31, 32 (2013).

173. *Id.*

174. *Id.* at 33.

175. *Id.* at 35.

176. *Id.* at 33.

177. *Id.* at 33-34.

178. *Id.* at 42-43.

These are important issues and agendas raised in order to improve the deliberative performance and quality of the PRC decision-making. Nonetheless, given the important civic oversight function of the PRC and its current independent deliberative process, the possible inclusion of multiple “mature adults” and their expert input in the deliberation may retard, if not totally eliminate, the possibility of reflecting civic views, popular voices, and citizens’ concerns related to the rights and interests of crime victims, families, and general communities. As noted earlier, Japan’s overall criminal justice system has demonstrated that judge-led trials have elevated the rights and interests of the government, political authority, powerful corporate entities, and foreign nationals above and beyond the rights and interests of ordinary citizens, crime victims, their families and, overall, civil society at large. In order to counter this long-standing situation, it thus seems that the composition of the PRC should remain as an exclusive civic institution, preserving its deliberative process without the participation of government officials and legal experts, including public prosecutors, professional judges, highly-placed government bureaucrats, and political and academic experts.

IV. Conclusions

This paper has provided critical comments on the five invited scholars’ research presentations on the three new systems of popular and victim participation in Japan’s criminal justice process, including: (1) the PRC’s new legally binding power to issue an indictment; (2) a mixed tribunal called *Saiban’in Seido* with three professional and six lay judges as an adjudicable body, and (3) a victim participation program that allowed crime victims, families, and their proxies to express their grievances in the criminal justice process.

This paper also incorporated the TEPCO case into the discussion of the effectiveness of Japan’s new public and victim participation systems, and explored the possibility of public adjudication of white-collar criminals, i.e., those in entrusted positions whose professional and corporate negligence led to deaths and injuries. The ministerial secretive directive called *shobun seikun* has long protected white-collar criminals and U.S. military personnel from prosecution in Japanese court. Due to the government’s systemic refusal to indict and prosecute them, a culture of impunity has been fostered, leading to the continued victimization of ordinary citizens and communities.

The PRC, which was first created in 1948 to review the propriety of non-indictment decisions rendered by public prosecutors, became one of the rare civic institutions in Japan whose membership was solely composed of ordinary citizens randomly selected from the local community. Its

deliberation was also conducted without the participation of government elites and legal experts. The 2009 PRC law gave it the authority to issue a legally-binding indictment decision. Among all PRC-forced indictment cases since 2009, white-collar crimes have constituted the majority, with five of nine cases (56%) and nine of thirteen defendants (69%). In the trials, however, professional judges failed to convict a single PRC-indicted white-collar defendant (0.0%).

This paper also explored alternative trial venues in which to try white-collar crime, including PRC-indicted cases, such as a *Saiban'in* tribunal and an American-style all-citizen, twelve-member jury, which Japan had once operated from 1928 to 1943. This paper also examined the PRC-indictment case in Okinawa, which led to the decision by the U.S.-Japan Joint Committee to create the administrative exception in the SOFA's "immunity" provision, and ultimately allowed the prosecution of the civilian component of U.S. military personnel in Japanese court. The PRC deliberation in Okinawa was compared to another PRC decision in Yamaguchi Prefecture, regarding the death of civilians at the hands of U.S. base personnel. The creative use of the PRC decision and deliberation was explored in relation to state crime, i.e., the state's refusal to prosecute criminals, even when the prosecution was mandated by its own national law. It is our hope that the creative use of PRC and its legally binding indictment decision will ultimately elevate the interests and rights of people, community, and civil society at large over the rights and interests of government bureaucrats, military personnel, corporate executives, political elites, and other potential white-collar criminals.
