

**KOREA’S TWO KEY LEGAL REFORMS OF LAY ADJUDICATION:  
THE POSSIBLE INTRODUCTION OF THE GRAND JURY (JAPAN’S  
PROSECUTORIAL REVIEW COMMISSION) SYSTEM AND THE ELIMINATION OF  
CONSENT REQUIREMENT TO ALLOW LAY ADJUDICATION OF AMERICAN  
MILITARY FELONS IN SOUTH KOREA**

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**TABLE OF CONTENTS**

I .	INTRODUCTION .....	68
II .	PEOPLE’S INDICTMENT OF GOVERNMENT OFFICIALS –THE STATE ATTORNEY GENERAL, U.S. VICE PRESIDENT, JAPAN’S POLICE CHIEF, AND A SECRETARY OF JAPAN’S RULING PARTY .....	70
	<i>A. THE AMERICAN GRAND JURY PROCESS</i> .....	70
	<i>B. JAPANESE PROSECUTION REVIEW COMMISSIONS (PRC)</i> .....	72
	<i>C. WORK IN TANDEM: JAPAN’S QUASI-PETIT JURY TRIAL OF AMERICAN MILITARY CRIMES</i> .....	74
	<i>D. THE PRC AND AMERICAN MILITARY CRIMES</i> .....	76
III .	THE EVOLUTION OF THE PRC AND ITS OVERSIGHT OF GOVERNMENTAL PROSECUTION .....	78
	<i>A. THE ORIGINAL CONCEPTION OF THE PRC AND ITS CREATION</i> .....	79
	<i>B. THE SAIBAN-IN (QUASI-PETIT JURY) SYSTEM</i> .....	81
IV .	KOREA’S JURY TRIALS AND MILITARY CRIMES: HOW TO ADJUDICATE THEM? .....	83
	<i>A. COLLEGE STUDENT SURVEY AND INTERVIEW</i> .....	87
	1. “SHOULD THE PROSECUTION REVIEW COMMISSION (PRC) BE INTRODUCED IN KOREA?” .....	87
	2. “SHOULD THE KOREAN PROSECUTION HAVE THE RIGHT TO EXERCISE JURISDICTION OVER ON-DUTY ACCIDENTS OR CRIMES?” .....	88
	3. WHO IS WORSE - KOREAN SOLDIERS OR AMERICAN MILITARY PERSONNEL? .....	89
	<i>B. AMERICAN MILITARY CRIMES IN EAST ASIA</i> .....	91
V .	CONCLUSION .....	92

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## ABSTRACT

*This article examines two specific proposals to adopt citizen panels for prosecutorial review. We first analyze and contrast two different systems of lay participation suggested for possible adoption in South Korea, i.e., an American-style criminal grand jury system and Japan's new Prosecution Review Commission (PRC, or Japan's grand jury – Kensatsu Shinsakai) system. In examining oversight abilities of these two systems, we recommend that South Korea may adopt a system modeled on Japan's new PRC, rather than the American grand jury system, as the former is better equipped with a superior ability to assess and examine the governmental abuse of power, such as unethical or illegal conduct of police personnel, public prosecutors, and even powerful politicians and bureaucrats in the government. A second part of this article contemplates the way to restore Korea's rights and path to prosecute and try American military personnel committing crimes in Korea. We propose the elimination of an American defendant's consent requirements for a Korean jury trial, particularly when a defendant is accused of committing serious and violent crimes. The elimination of the defendant's consent embodied in the current Jury Law will allow the direct adjudication of American military crimes committed against Korean residents. The final section of this paper examines opinion survey results of Koreans with respect to the possible adoption of Japan's grand jury system and direct lay adjudication of military crimes in Korean jury courts.*

## I. INTRODUCTION

On June 18, 2010, in a nationwide videoconference with 1,700 Korean prosecutors, then Prosecutor General Kim Joon-gyu proposed the introduction of all-citizen panel commissions to maintain the credibility of the prosecution office and evaluate the activity of Korean prosecutors.<sup>1</sup> In South Korea, government prosecutors hold exclusive power to make a decision to indict.<sup>2</sup>

Following a series of sex and bribery scandals involving nearly 100 active and retired government prosecutors in 2010 in Busan, Kim suggested the time has come to create an oversight review panel, which would consist of lay citizens, similar to the U.S.-style criminal grand jury system or Japan's Prosecution Review Commission (PRC, or Japan's grand jury)

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<sup>1</sup> Son Southerton, *South Korea Ponders Move Towards U.S.-Style Grand Jury System*, June 20, 2011, <http://www.koreaexpertwitness.com/blog/news/south-korea-moves-towards-u-s-style-grand-jury-system/>.

<sup>2</sup> Ser Myo-ja, *Top Prosecutor Against Tough Reform*, JOONGANG DAILY (Korea), May 13, 2010, <http://joongangdaily.joins.com/article/view.asp?aid=2920403>.

system.<sup>3</sup> Kim insisted that such a review panel should be different from an investigative bureau, which would consist exclusively of senior public servants or non-judicial government bureaucrats.<sup>4</sup> The new independent and non-governmental panel of lay citizens would function as an important oversight of Korea's prosecutors.

Before all-citizen grand juries could be introduced, however, Kim believed that the use of jury trials, introduced in 2008, must first become more accepted in South Korean courts, suggesting that it would take another two to three years before formally introducing the review system.<sup>5</sup> The National Assembly already had been considering legislation to formalize the introduction of all-citizen grand juries, for which the power to indict individuals would be primarily in the hands of Korean citizens chosen from local communities.<sup>6</sup>

The first part of this article examines the proposal to adopt citizen panels for prosecutorial review. It first describes and contrasts two different systems of lay participation suggested for adoption in South Korea. Those are: (1) an American-style criminal grand jury system; and (2) Japan's Prosecution Review Commission (PRC, or Japan's grand jury – Kensatsu Shinsakai) system.

Comparing the two systems, our recommendation is that South Korea adopt a system modeled on Japan's new Prosecution Review Commission (PRC), rather than the American grand jury system, as the former is better equipped with a superior ability to examine the governmental abuse of power, such as unethical or illegal conduct of police personnel, public prosecutors, and even powerful politicians and bureaucrats in the government.

Both American and Japanese institutions are composed of groups of residents selected at random from local communities. The difference lies in the task of deliberation assigned to the civic panel. Under the American grand jury system, the civic panel is asked to make a decision about whether or not to indict the accused. Under Japan's PRC system, a people's panel is asked to examine and review the appropriateness of the prosecutor's failure to bring an indictment against the accused. In other words, Japan's PRC is better positioned with an

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<sup>3</sup> *Id.* See also Hiroshi Fukurai, *Japan's Prosecution Review Commissions: Lay Oversight of the Government's Discretion of Prosecution*, 6 EAST ASIA L.R. 1, 15 (2011) (reviewing the unique function of Japan's new grand jury system introduced in 2009).

<sup>4</sup> *Id.*

<sup>5</sup> Evan Ramstad, *The Slow Road to Grand Juries*, WALL ST. J., June 15, 2011, <http://blogs.wsj.com/korearealtime/2011/06/15/the-slow-road-to-grand-juries/>.

<sup>6</sup> Interview with Dr. Kwangbai Park, Assistant Dean of Law School, Chungbuk University, at the Judicial Research and Training Institute (JRTI) in Seoul, Korea (Sept. 28, 2011). He stated that the Korean government recently introduced the review panel empanelled by non-judicial government officers. An all-citizen grand jury system, whether it is modeled after America's criminal grand jury system or Japan's PRC, has not been introduced in Korea at the time of the interview.

ability to critically evaluate the decision-making process in the prosecutor's office.

A second part of this article contemplates the way to restore Korea's rights and path to prosecute and try American military personnel committing crimes in Korea. This paper proposes the elimination of an American defendant's consent requirements for a Korean jury trial, especially when a defendant is accused of committing serious and violent crimes. The elimination of the defendant's consent embodied in the current Jury Law will allow the direct adjudication of American military crimes committed against Korean residents.<sup>7</sup> The final section of this paper examines opinion survey results of Koreans with respect to the possible introduction of Japan's grand jury system in Korea and direct lay adjudication of military crimes in Korean jury courts.

## **II. PEOPLE'S INDICTMENT OF GOVERNMENT OFFICIALS—THE STATE ATTORNEY GENERAL, U.S. VICE PRESIDENT, JAPAN'S POLICE CHIEF, AND A SECRETARY OF JAPAN'S RULING PARTY**

### *A. THE AMERICAN GRAND JURY PROCESS*

Nearly four years ago in November 2008, a panel of randomly chosen citizens making up a grand jury of South Texas accomplished something that many American politicians and civil rights organizations failed to do. This South Texas grand jury indicted U.S. Vice President Dick Cheney for a conflict of interest pertaining to his investment in a private firm that runs federal prisons.<sup>8</sup> This direct conflict of interest cast a great shadow over Cheney's political influence over federal contracts awarded to the prison industrial complex in America. The same grand jury also indicted Attorney General Alberto Gonzalez, America's top prosecutor, for obstruction of justice, based on what were alleged to be his efforts to stop the investigation of Cheney's collusion with prison industries.<sup>9</sup> The grand jury's actions

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<sup>7</sup> Gukminui Hyeongsajaepan Chamyeo-e Gwanhan Beopyul [Act for Civil Participation in Criminal Trials], Law No. 8495, June 1, 2007, art. 36, para. 1 (S. Kor.) [hereinafter Jury Act] ("when a defendant manifests that he/she desires a participatory trial, [a presiding judge shall] commence preparatory proceedings"), translated in [http://people.ucsc.edu/~hfukurai/documents/ACT\\_ON\\_CITIZEN\\_PARTICIPATION\\_IN\\_CRIMINAL\\_TRIALS1\\_000.pdf](http://people.ucsc.edu/~hfukurai/documents/ACT_ON_CITIZEN_PARTICIPATION_IN_CRIMINAL_TRIALS1_000.pdf).

<sup>8</sup> 'With Great Sadness', *Texas Grand Jury Indicts Cheney, Gonzales for Organized Criminal Activity*, PR NEWSWIRE, Nov. 19, 2008.

<sup>9</sup> *Grand Jury Indicts US Vice President*, NORTHERN TERRITORY NEWS (Australia), Nov. 20, 2008, at 13 (included in the indictment are then Vice-President Dick Cheney, former U.S. Attorney General Alberto Gonzalez, and Texas State Senator Eddie Lucio, Jr. who allegedly accepted bribes from private prison companies).

followed years in which the Justice Department and Congress failed to bring criminal charges in the matter, despite considerable debate.

Like in Korea, American prosecutors hold enormous power in the administration of justice, presiding over not only criminal but also civil investigations. Nonetheless, in many states and in the federal system, the power to bring a prosecutorial decision rests upon the civic panel of a grand jury, whose members have been selected at random from local communities. Even America's top prosecutor or vice president cannot escape the civic investigation of their alleged illegal activities. Historically speaking, the indictment has been considered a tremendous triumph for concerned citizens in the U.S. in general, and in Texas in particular, where people have been outraged by high-powered politicians who have egregiously pursued their own economic interest and financial gain, regardless of questionable criminal, ethical or moral implications.<sup>10</sup>

In December 2008, however, under enormous political pressure from the White House, a politically-motivated county judge dismissed the indictments returned by the grand jury.<sup>11</sup> The judge of the county in which a grand jury is empanelled holds the ultimate power to proceed with the grand jury indictment. In this case, if the judge acted with equitable professionalism, the prosecution of these two high-ranking politicians might have been possible.<sup>12</sup> The criminal investigation and subsequent indictment, nonetheless, demonstrated that there is no political immunity from prosecution when it comes to equitable judgment made by a select group of fair-minded citizens.

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<sup>10</sup> *Id.* The indictment indicates that Dick Cheney invested \$85 million in the Vanguard Group that also owned the GEO Group, the second largest private prison operator which runs federal prisons in Texas. The widespread abuse of inmates in GEO owned private prisons has been reported. See Rania Khalek, *How Private Prisons Game the System*, SALON, Dec. 1, 2011 ("One of the most egregious examples ... took place at the West Texas juvenile prison run by GEO Group where inmates were found living in filth." The ACLU report also pointed out "private companies, including GEO Group ... have extracted more than \$100 million in revenue from the facility's operation"). See also Niaz Kasravi, *Private Prisons Profit Off Race Prejudice*, RED, BLACK & BLUE, Nov. 15, 2010 ("When NPR broke a story revealing the link between the private prison companies and SB 1070 [Arizona's anti-immigration bill], many expressed outrage at how the prison industry is working to profit off of immigrant communities").

<sup>11</sup> *Indictment against Cheney, Gonzales Dismissed*, ASSOCIATED PRESS STATE & LOCAL WIRE, Dec. 2, 2008.

<sup>12</sup> *Willacy County Charges Dismissed Against Cheney, Gonzales, Others*, MONITOR, Dec. 2, 2008 ("District Judge Manuel Banales dismissed the indictment ... on the basis that two alternative jurors who participated in the grand jury had been improperly seated and the indictments were therefore defective"); see also Matt Clark, *Cheney and Gonzales Indicted in Connection with Private Prison in Texas*, PRISON LEGAL NEWS, Apr. 30, 2012 (citing that [Prosecutor] Guerra who brought the indictment "tried to have Judge Banales recused due to his close relationship with Senator Lucio [who was also indicted]. Instead, on December 10, [Judge] Banalez removed Guerra from any further cases related to the defendants charged in the indictments and ordered him to turn over his files to another prosecutor").

### ***B. JAPANESE PROSECUTION REVIEW COMMISSIONS (PRC)***

Japan experienced a similar so-called Mogadishu moment of civic insurrection two years ago. In January 2010, a former deputy chief of police became the first person in Japanese modern history to be formally indicted by Japan's grand jury panel, called the Prosecution Review Commission (PRC).<sup>13</sup> In this criminal negligence case, which resulted in the death of 11 people and 247 people injured in a human stampede over a partially enclosed pedestrian overpass leading to Akashi Train Station after a fireworks show, the Japanese prosecution made numerous decisions not to indict the police officer, despite public calls and civic demands for his prosecution.<sup>14</sup> The PRC recommendation was its second public demand for his prosecution after the implementation of a new Prosecution Review Commission Law (PRC Law) which took effect in May 2009, making the second PRC indictment decision legally binding.

According to the new PRC Law, the second PRC recommendation for prosecution carries legally-binding authority, thereby requiring the criminal prosecution of a suspect or defendant, whom the Japanese prosecutors previously decided not to indict.<sup>15</sup> In other words, the PRC has emerged as a popular legal institution in Japan with the authority to critically challenge the propriety of a prosecutor's indictment decision and to possibly reverse the previous governmental judgment in criminal matters. This is quite significant, because throughout the Japanese modern history, government prosecutors long held the exclusive legal authority to make an indictment decision.

Next, Ichiro Ozawa, Japan's political powerhouse equivalent of Vice President Dick Cheney, was indicted in October 2010 by the PRC over falsified reports issued by his political organization.<sup>16</sup> The indictment decision was the essence of the PRC's second recommendation to prosecute the most prominent Japanese political powerbroker in the post-

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<sup>13</sup> *Ex-Police Officer to be Charged over Stampede in Line with New System* [hereinafter *Ex-Police Officer*], JAPAN ECONOMIC NEWSWIRE, Jan. 27, 2010; 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).

<sup>14</sup> *Editorial: 'Forced Indictment' a Heavy Responsibility*, DAILY YOMIURI (Tokyo), Jan. 29, 2010, at 2; see also Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L. L. J. 315, 345-47 (2007) (examining causes of a deadly human stampede that occurred on July 21, 2001 in Akashi, Hyogo Prefecture, Japan, eventually killing 11 people and injuring 247 others).

<sup>15</sup> *Keiji Soshōhōto no Ichibu o Kaiseisuru Hōritsu*, Law no. 62 of 2004, art. 41, para. 6 [hereinafter PRC Act], available at <http://law.e-gov.go.jp/htmlldata/S23/S23HO147.html>.

<sup>16</sup> Alex Martin & Setsuko Kamiya, *Ozawa in Quest Panel Rules for Indictment: DPJ Don Can't Duck Charges for '04-05' Funds Report*, JAPAN TIMES, Oct. 5, 2010.



war era. The judge in the Tokyo District Court then appointed three attorneys to act in the role of public prosecutors to begin the formal prosecution against Mr. Ozawa.<sup>17</sup> Ozawa was ultimately acquitted, but nonetheless the fact that he stood trial showed the potential power of the citizenry in holding those in power accountable, and the prosecutor's decision to appeal his acquittal further hampered his ability to return to the political scene.<sup>18</sup>

After WWII, the Allied forces led by the U.S. government occupied war-torn Japan and tried to initiate judicial reforms.<sup>19</sup> One of the significant initiatives was to weaken the prosecutors' dominant role and authority in the criminal investigative and adjudicatory process by introducing a citizen's panel to review government decisions in prosecutorial matters.<sup>20</sup> If the public prosecutor decided not to indict a suspect in a criminal case, the victim of the crime or the victim's families or proxy was empowered to demand a hearing regarding the prosecutorial decision.<sup>21</sup> Today this hearing is conducted by a people's panel, called the PRC, which is composed of eleven citizens chosen at random from local registered voting rolls. If the PRC decides that the indictment is proper in the given case, it delivers a written recommendation to the prosecutor's office.<sup>22</sup>

Before the implementation of the new PRC Law in 2009, the Japanese prosecutors held the exclusive authority to make an indictment decision, and the PRC recommendation had been regarded as merely advisory rather than legally binding. The prosecutors consistently failed to follow the PRC's indictment recommendations, especially in cases involving government bureaucrats, prominent politicians, and economic elites as likely defendants.<sup>23</sup> The refusal of the government to facilitate the rightful prosecution of privileged elites has been well-documented throughout Japanese modern history.<sup>24</sup>

Even today, there are instances of unethical conduct and illegal activities by high-ranking government officers that have not been subject to prosecutorial scrutiny, indictment, or trial. Similarly, police officers and prosecutors have not been properly prosecuted for the lengthy detention of innocent civilians and the use of physical and psychological torture

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<sup>17</sup> *Ozawa Appeals Rejection by High Court*, JAPAN TIMES, Oct. 28, 2010, <http://www.japantimes.co.jp/text/nn20101028a7.html>. Ozawa was eventually acquitted on April 26, 2012. See Hiroko Tabuchi, *Japan Power Broker Acquitted in Scandal*, N.Y. TIMES, Apr. 26, 2012, at 11.

<sup>18</sup> Tabuchi, *supra* note 17.

<sup>19</sup> Hiroshi Fukurai, *People's Panel vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. POL'Y J. 95, 102-04 (2010).

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 324.

<sup>23</sup> See generally Fukurai, *supra* note 3.

<sup>24</sup> *Id.* at 30.

during interrogation, all of which has plagued the equitable disposition of criminal cases in Japan.<sup>25</sup>

### *C. WORK IN TANDEM: JAPAN'S QUASI-PETIT JURY TRIAL OF AMERICAN MILITARY CRIMES*

Despite the inability of the prosecution to bring an indictment of individuals in power, the implementation of the new PRC Law in 2009 has transformed the Japanese legal landscape. Even before Ichiro Ozawa was indicted by the Tokyo PRC, the Kobe PRC reached a decision in 2009 about recommend indictment for the three past presidents of the railway company JR West for their actions relating to a JR West train derailment in 2005 that killed 107 passengers and injured 555 others.<sup>26</sup> After the Kobe prosecutors decided not to indict the presidents, victims' families filed another complaint to the PRC to review the prosecutors' refusal to indict them. In March 2010, the Kobe PRC decided to reverse the decision, and the three JR West presidents were formally indicted for professional negligence resulting in injury and death, thereby making the indictment decision legally binding.<sup>27</sup>

Even illegal activities committed by officers or employees of a foreign government are no exception. For example, Japanese prosecutors' decisions not to prosecute American soldiers stationed in Japan for alleged crimes have been critically evaluated and, in some cases, reversed by the PRC. Furthermore, another system of civic legal participation introduced in 2009 allows the direct adjudication in Japanese courts of military crimes committed by American military personnel.

This system is called the *Saiban-in Seido* (the quasi-petit jury system); and the first ever civic trial of an American soldier in Japan took place in May 2010. A 19-year-old soldier from Philadelphia, Pennsylvania was originally assigned as a "keeper" at a military warehouse of the base camp in Okinawa.<sup>28</sup> He sought to advance his military career by being

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<sup>25</sup> *Tapes Show Route to Confession: Recordings of Sugaya Interrogation Reveal Prosecutor's Tactics*, DAILY YOMIURI, Oct. 10, 2009, at 2 (being placed under tremendous psychological stress and torture, Toshikazu Sugawa who was later found to be innocent said: "I can't forgive that prosecutor. I want him to apologize."); see also Hiroko Tabuchi, *Retrial Clears Japanese Wrongly Convicted of Child Killing: Defendant Jailed 17 Years was Bullied to Confess, Judge Says in Acquittal*, INT'L HERALD TRIB., Mar. 27, 2010, at 3.

<sup>26</sup> *Crash Inquest Panel: Indict Ex-JR West Heads*, JAPAN TIMES, Oct. 23, 2009.

<sup>27</sup> *Fukuchiyama-sen Jike: JR Nishi Rekidai 3 Shacho no Kisogiketsu: Kobe Daiichi Kensatsu [Fukuchiyama-Line Derailment Incident: Kobe PRC Decides on Indictment against Three JR-West Presidents]*, MAINICHI SHIMBUN, Mar. 26, 2010.

<sup>28</sup> HANKETSU YOSHI [JUDGMENT SUMMARIES] [hereinafter Judgment Summaries], issued by Naha District Court Judge Hideyuki Suzuki, May 29, 2010 (on file with the author); See also David Allen & Chiyomi Sumida, *Kinser Marine Gets Jail Time for Robbing Cabbie*, STARS & STRIPES, May 29, 2010, <http://www.stripes.com/news/kinser-marine-gets-jail-time-for-robbing-cabbie-1.104603>.



assigned to the Marine Corps Special Operations duties.<sup>29</sup> In order to expedite his effort to join the special operation team, he trained rigorously; he got up early every morning and went through rigorous physical exercises and practiced special forces training routines before reporting to the warehouse.<sup>30</sup> He expressed his future military aspirations to his superiors and asked them for special operation duties in his future assignments.<sup>31</sup>

In August 2009 in downtown Naha, he decided to try out the military training of scare and intimidation tactics in order to prove his ability and impress his superiors.<sup>32</sup> In this exercise of forced coercion and submission, he targeted and abused an Okinawan 58-year-old taxi driver.<sup>33</sup> But the Okinawan driver physically resisted and fought back.<sup>34</sup> After a verbal and physical fight, the soldier ended up injuring the cab driver with a knife and ran away with a bag of money.<sup>35</sup>

He was soon arrested, detained in Camp Hansen, and confessed the details of his motives and actions.<sup>36</sup> The Japanese prosecutor soon indicted him, and he was handed over to the Japanese authority.<sup>37</sup> The prosecution called for his trial, and pre-trial conferences were held to determine appropriate evidential materials, testimonial schedules, and procedural plans for court hearings by a *Saiban-in* trial.<sup>38</sup>

Despite the long history of lay adjudication in Japan, American military personnel had never been tried in a Japanese lay court.<sup>39</sup> Japan had once held all-citizen jury trials from

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<sup>29</sup> Allen & Sumida, *supra* note 28.

<sup>30</sup> Interview with Ryota Ishikawa, Legal Reporter at Okinawa Times [hereinafter Ishikawa], July 10, 2010. The interview information also includes his emailed responses to our questions on February 22 and March 12, 2010 (responses and interview notes on file with the first author). Reporter Ishikawa closely followed the Jonathan Kim case from the pretrial conference procedure to the completion of the quasi-petit jury trial and published numerous articles on the case in the Okinawa Times, Okinawa's main daily newspaper.

<sup>31</sup> Allen & Sumida, *supra* note 28.

<sup>32</sup> *Id.*

<sup>33</sup> Judgment Summaries, *supra* note 28, at p.1.

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

<sup>35</sup> Allen & Sumida, *supra* note 28.

<sup>36</sup> *Takushigoto de Beihei o Shoruisoken: Beigunjin-hikoku de Kennaihatsu no Saibanin Saiban mo [Taxi Robbery and Committing an American Soldier to Trial: First American Soldier Defendant for the Quasi-Jury Trial in the Prefecture]*, RYUKYU SHIMPO, Aug. 25, 2009, <http://ryukyushimpo.jp/news/storyid-148935-storytopic-1.html>.

<sup>37</sup> *Zenkokuhatsu Beihei o Kiso Saibanin Saibanjiken Takushi goto Chisho [First Ever Indictment Against American Soldier for Saiban-in Trial: Robberies of Taxi Driver]*, RYUKYU SHIMPO, Oct. 21, 2009, <http://ryukyushimpo.jp/news/storyid-151575-storytopic-1.html>.

<sup>38</sup> Ishikawa, *supra* note 30.

<sup>39</sup> After the U.S. built the military bases in Japan in 1945, Okinawa became the only place where all-citizen jury trials were held from early 1960s to 1972. Research indicates that no American soldiers were ever tried by the lay judge panel. See generally Anna Dobrovolskaia, *An All-Laymen Jury System Instead of the Lay Assessor (Saiban'in) System for Japan? Anglo-American Style Jury Trials*

1928 to 1943, but the war-time military government decided to suspend it in the midst of WWII.<sup>40</sup> Other American-style jury tribunals were also introduced in U.S.-occupied Okinawa between the early 1960s and 1972.<sup>41</sup> Under American rule, Okinawan residents were allowed to participate in both petit and grand juries.<sup>42</sup> A mixed panel of American citizens, Okinawans, Japanese citizens, Koreans, Filipinos, and other Asian residents in the island participated in jury trials in Okinawa.<sup>43</sup> This system of lay adjudication continued until 1972, when the Japanese government finally reclaimed its sovereignty over Okinawa.<sup>44</sup> During these periods under the U.S. military occupation, no American soldiers were ever tried in a lay court in the Island of Okinawa.<sup>45</sup> This is despite the fact that there was substantial evidence of crimes committed by the military on the island.

#### ***D. THE PRC AND AMERICAN MILITARY CRIMES***

In addition to the introduction of the new *Saiban-in* trial which allowed citizen participation to try American military personnel, the new PRC also began to play a prominent role in the prosecution of alleged military crimes for which Japanese prosecutors refused to bring charges. The first PRC decision to indict American military personnel was rendered in Okinawa in May 2011.<sup>46</sup>

In January 2011, a vehicle driven by a 23-year-old American military employee Rufus J. Ramsey III from an Army and Air Force Exchange Service (AAFES) in Okinawa swerved into oncoming traffic, striking a compact car and killing the 19-year-old driver Koki Yogi who just returned to his hometown to attend the official adulthood ceremony of his twentieth birthday organized by the local municipal government.<sup>47</sup> Ramsey was on the way home after

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*in Okinawa under the U.S. Occupation*, 12 J. JAPANESE L. 57 (2007), [http://law.anu.edu.au/anjel/documents/ZJapanR/ZJapanR24/ZJapanR24\\_09\\_Dobrovolskaia.pdf](http://law.anu.edu.au/anjel/documents/ZJapanR/ZJapanR24/ZJapanR24_09_Dobrovolskaia.pdf).

<sup>40</sup> Mamoru Urabe, *A Study on Trial by Jury in Japan*, in *THE JAPANESE LEGAL SYSTEM* 483-491 (Hideo Tanaka ed., 1976).

<sup>41</sup> Dobrovolskaia, *supra* note 39.

<sup>42</sup> *Id.* at 67-68.

<sup>43</sup> *Id.* at 68-69.

<sup>44</sup> *Id.* at 66.

<sup>45</sup> See generally Japanese Federation of Trial Lawyers Association, *OKINAWA NO BAISHIN SAIBAN [JURY TRIALS IN OKINAWA]* (1992).

<sup>46</sup> *Beigunzoku, Kisosoto Chiikyotei ga Hikokusekini* [‘Indictment is Proper’ for Military Employee: SOFA is on Defendant’s Seat], *OKINAWA TIMES*, May 29, 2011.

<sup>47</sup> Travis J. Tritten & Chiyomi Sumida, *AAFES Employee Indicted in Fatal Collision*, *STARS & STRIPES*, Nov. 25, 2011, <http://www.stripes.com/news/aafes-employee-indicted-in-fatal-collision-1.161616>.

he consumed alcohol at an official party at the military base prior to the accident.<sup>48</sup> The U.S. military decided to punish Ramsey by revoking his driving privileges for five years.<sup>49</sup>

But, the Okinawa prosecutors decided not to indict Ramsey because the accident occurred while he was on official duty, citing that Article 17 of the US-Japan Status of Forces Agreement (SOFA) gave the American military the primary right to exercise jurisdiction over all accidents or crimes committed while on official duty.<sup>50</sup> Yogi's mother soon filed a complaint with the Naha PRC in order to review the prosecutors' non-indictment decision.<sup>51</sup> In May, the Naha PRC reversed the Japanese prosecutors' refusal to indict Ramsey, determining that the indictment was proper for the given case. The PRC cited the 1960 U.S. Supreme Court decision that excluded the civilian employees and contractors of U.S. military bases and dependents of military service members from military rules and regulations governed by the Uniform Code of Military Justice (UCMJ), thereby excluding Ramsey from the privileges granted under the SOFA provision.<sup>52</sup> The PRC also reasoned that the NATO SOFA signed with European countries similarly extends no right for the U.S. military to exercise its jurisdiction over civilian military employees during peacetime.<sup>53</sup>

In November 2011, the Japanese and U.S. governments then reached a new agreement that allowed Japanese courts to try civilian military employees even if they were on official duty at a time of crime or accident.<sup>54</sup> Specifically, the new agreement first allows American authorities to determine whether or not they will bring criminal prosecution over a case and notify the Japanese side of their decision. If U.S. authorities decide not to prosecute their personnel, the Japanese authorities can then request a trial within thirty days after the U.S. notification.<sup>55</sup> Two days after the new agreement was reached, the Naha prosecutors' office indicted Ramsey who worked at a supermarket inside Camp Foster.<sup>56</sup> On February 2012, the

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<sup>48</sup> *Drinking at USF 'Official Event' is Regarded as Party of 'Official Duty*, JAPAN PRESS WEEKLY, Apr. 24 & 26, 2011, <http://www.japan-press.co.jp/modules/news/index.php?id=1784>.

<sup>49</sup> *Id.*

<sup>50</sup> The term, SOFA (or U.S.-Japan SOFA in this article), refers to the Agreement under Article VI of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan.

<sup>51</sup> *Beigunzoku Fukiso Izoku, Kenshin ni Fufuku Mositate [Victim's Family File Complaint to the PRC Against the Non-Indictment of American Military Employee]*, RYUKYU SHIMPO, Apr. 25, 2011, <http://ryukyushimpo.jp/news/storyid-176467-storytopic-111.html>.

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

<sup>53</sup> *Id.*

<sup>54</sup> *Okinawa Prosec Indict U.S. Base Employee*, HOUSE OF JAPAN, Nov. 25, 2011, <http://www.houseofjapan.com/local/okinawa-prosec-indict-us-base-employee>.

<sup>55</sup> *U.S. Civilian Worker in Okinawa Indicted for Fatality*, ASAHI SHIMBUN, Nov. 25, 2011, [http://ajw.asahi.com/article/behind\\_news/politics/AJ201111250057](http://ajw.asahi.com/article/behind_news/politics/AJ201111250057).

<sup>56</sup> *Id.*

Okinawa court sentenced Ramsey to eighteen months in prison for vehicular manslaughter.<sup>57</sup>

### III. THE EVOLUTION OF THE PRC AND ITS OVERSIGHT OF GOVERNMENTAL PROSECUTION

Japan's lay participation systems have been created in governmental response to external political pressures mounted by many civic activists and grassroots organizations. The original Jury Law was passed by the Japanese government in 1923 in the midst of Taisho democracy, a time of idealism for the Japanese petty bourgeoisie and working classes. They found themselves increasingly capable of participating in national governmental policy discourse.<sup>58</sup> After five years of a preparatory period, all-citizen petit jury trials were finally introduced in 1928, and the jury system lasted until 1943 when the centralized Japanese military government decided to suspend its operation.<sup>59</sup> Japan's first grand jury system (i.e., prosecutorial review commissions (PRC) or *Kensatsu Shinsakai*) was also created as the Japanese government's response to the external pressure imposed by the Supreme Allied Command forces immediately after WWII.<sup>60</sup>

Today in Korea, similar exterior pressure from the citizenry and/or foreign governments may be necessary in order for the Korean people and the government to establish its initial grand jury system and make it not only function and able to perform and provide effective civic oversight of the government, but also institute a strong deterrent against future illegal conduct and unethical activities of foreign troops stationed on Korean soil. As an example that might be followed, Korea might follow Japan's path explained by a brief historical background of Japan's initial establishment of the grand jury (PRC) and *Saiban-in* (a petit-quasi jury) systems.

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<sup>57</sup> Travis J. Tritten & Chiyomi Sumida, *American on Okinawa Gets 18 Months in Prison for Vehicular Manslaughter*, STARS & STRIPES, Feb. 22, 2012.

<sup>58</sup> Han Jung Sun, *Envisioning a Liberal Empire in East Asia: Yoshino Sakuzo in Taisho Japan*, 33 J. JAPANESE STUD. 357 (2007) (discussing the adoption of a parliamentary system known as "Taisho Democracy," which also featured the introduction of all-citizen jury trials).

<sup>59</sup> See generally Chihiro Saeki, *BAISHIN SAIBAN NO FUKKATSU* [The Resurrection of Jury Trials] (1996).

<sup>60</sup> Fukurai, *supra* note 13, at 806-08.

### A. THE ORIGINAL CONCEPTION OF THE PRC AND ITS CREATION

Soon after WWII, the PRC was proposed in Japan following joint collaborative work between the Japanese government and the Supreme Commander of Allied Powers (SCAP) led by the U.S. government. The SCAP was concerned about the tremendous power and authority vested in the Japanese government's prosecution authorities before the end of WWII.<sup>61</sup> SCAP officers believed that prewar prosecutors had misused their authority by trampling human rights and pursuing political objectives in promoting Japan's imperial policies both at home and abroad.

The SCAP reformers thus aimed to increase the prosecutors' responsiveness to become more transparent and democratically accountable. Japan's grand jury system was then proposed as a hybrid of America's criminal and civil grand jury systems. The former performs the function of deciding whether or not to issue an indictment on the basis of investigative materials, evidence, and witness testimony from the prosecution. The latter performs the civic function of oversight of the government institutions and public officers who work in these offices. The institutional framework for the grand jury was first suggested by American lawyer Thomas Blakemore who was appointed as a chief of the Civil Affairs and Civil Liberties Branch under the SCAP.<sup>62</sup> Similar to the civil grand jury, the PRC was designed to examine and inspect the proper functioning of local government offices, including the prosecutors' office, and their decision-making process. Like America's criminal grand jury, the PRC would also retain the power to make a decision to indict. Finally, like America's grand jury, Blakemore also proposed the use of a randomized design to help select a pool of potential grand jurors.<sup>63</sup>

In 1947, the SCAP then helped draft Article 14 of the Public Prosecutor's Office Law, which gave the minister of justice (i.e., an elected politician, not a government bureaucrat) the authority to direct the Prosecutor General in the investigation and disposition of individual criminal cases, thereby creating an institutional structure that left prosecution decisions open to outside community influence.<sup>64</sup> The civilian review commission (i.e., the PRC) was then proposed and established by the passage of the PRC Law in 1948;<sup>65</sup> and a

<sup>61</sup> Fukurai, *supra* note 13, at 806.

<sup>62</sup> *Id.* at 807.

<sup>63</sup> *Id.* at 807-08.

<sup>64</sup> Frank Jacob Schwartz & Susan J. Pharr, THE STATE OF CIVIL SOCIETY IN JAPAN 261 (2003).

<sup>65</sup> *Kensatsu Shinsakai Hō*, Law No. 147 of 1948 [hereinafter PRC Law]. See also Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 688 (1992) ("Occupation radically altered Japan's judicial system and created

total of 201 commissions were created, with at least one in each of Japan's fifty district court jurisdictions.<sup>66</sup>

Eleven members of the commission are selected at random from voter rolls and asked to serve for six months, reviewing the prosecutors' discretionary powers not to prosecute.<sup>67</sup> A case comes to the PRC when a victim, his or her proxy, or a commission itself brings a complaint against the prosecutors' failure to issue an indictment to pursue the prosecution of an alleged offense.<sup>68</sup> The PRC then reviews the case and issues one of three recommendations: (1) the non-indictment is proper, supporting the prosecutor's decision; (2) the non-indictment is improper, questioning the prosecutor's decision; and (3) an indictment is proper, reversing the prosecutor's non-indictment decision. Prior to 2009, the commission's recommendations for the initiation of formal prosecution were often ignored because they were regarded as merely advisory. Nonetheless, the new PRC Act implemented in 2009 changed the adjudicatory power of the PRC decision by making the second PRC prosecutorial decision legally binding.<sup>69</sup>

Prior to the implementation of the new PRC law, Japanese citizens had absolutely no influence on the prosecutorial process. The controversial "Shobun Seikun" (special requests for instructions on prosecutorial steps to be taken within the office of Japanese prosecution) has led to many political cases being dismissed or ignored from further investigation. Karel von Wolferen, who wrote *the Enigma of Japanese Powers*, once stated, "Individual prosecutors ... are expected, before taking [any] action against influential officials, ministers, Diet members or local government leaders, to write preliminary reports for their supervisors all the way up to the ministry of justice, and to wait for their consent [and further instructions]."<sup>70</sup>

These inter-connected networks of the decision-making process often resulted in the outright dismissal of the criminal charges against powerful politicians, high-ranking governmental bureaucrats, and economic elites. The implementation of the new PRC law has

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the modern structure that still functions today ... [including] The Constitution and the Criminal Procedure Code, [that were] authorized by U.S. reformers under the leadership of General MacArthur").

<sup>66</sup> PRC Law, art. 1.

<sup>67</sup> PRC Law, arts. 4, 14, 21.

<sup>68</sup> PRC Law, art. 30.

<sup>69</sup> PRC Act, art. 41, para. 6. If the PRC initially recommends the indictment and the prosecutors still decide not to prosecute or fail to indict within three months, the prosecutors will be invited to explain their inaction to the commission. The PRC's first indictment decision is yet to be legally binding. The PRC will re-evaluate the case and then can make a legally-binding decision in favor of indictment.

<sup>70</sup> KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWERS* 221 (1990).



thus effectively established powerful civic oversight of the Japanese prosecutors and their decision-making process.

Still today, given the fact that nearly 100% of indictments issued by Japanese prosecutors result in conviction,<sup>71</sup> the PRC's examination of non-prosecution decisions is crucial in checking the prosecutorial abuse of power. The potential abuse of prosecutorial power lies in their discretion in decisions not to prosecute potential suspects or criminals. The prosecutor's refusal to issue indictments may be influenced by politicians, governmental leaders, or other power elites in political organizations. The PRC's role to review and challenge the prosecutor's non-indictment decision became a potent tool of the citizenry to ensure the proper functioning of the local government.

### ***B. THE SAIBAN-IN (QUASI-PETIT JURY) SYSTEM***

The *Saiban-in* trial, another institution of lay adjudication, was implemented in 2009, along with the new PRC. Unlike Korea's all-citizen jury trial, however, the *Saiban-in* is a hybrid panel composed of three professional judges and six lay citizens.<sup>72</sup>

Beginning in the late 1980s, significant political pressure to change the existing legal system began to emerge due to prominent Supreme Court decisions involving wrongful conviction cases, in which four death row inmates were ultimately exonerated by the Japanese Supreme Court, after the defendants spent a total of 130 years in prison before being released.<sup>73</sup> The media and the public began to examine the causes of wrongful convictions. Professional judges' uncritical acceptance of confessionary evidence extracted under physical and psychological torture while in police or prosecutors' custody emerged as a likely cause.<sup>74</sup>

In 1999, the late Prime Minister Obuchi established the Justice System Reform Council (JSRC).<sup>75</sup> The reform council's final report came out in 2001, recommending that the *Saiban-in* trial examine all applicable cases, regardless of whether the defendant admits or

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<sup>71</sup> J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate so High?*, 30 J. LEGAL STUD. 53, 53 (2001) ("Conviction rates in Japan exceed 99 percent").

<sup>72</sup> *Saiban-in no Sanka Suru Keiji Saiban ni Kansuru Horitsu* [hereinafter *Quasi-Jury Act*], Law No. 63 of 2004, art. 2, para. 3.

<sup>73</sup> They included the Menda, Zaidagawa, Matsuyama, and Shimada cases. See CHIHIRO ISA, BAISHIN NO FUKKATSU [REINSTATEMENT OF JURY TRIAL] 155-56 (1996).

<sup>74</sup> Takashi Maruta, SAIBAN-IN SEIDO 11-14 (2004).

<sup>75</sup> Kent Anderson & Mark Nolan, *Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 VAND. J. TRANSNAT'L L. 935 (2004).

denies the charges.<sup>76</sup> Similarly, it agreed that defendants should have no right to refuse the *Saiban-in* trial.<sup>77</sup>

From May 2009 to October 2010, there were more than 1,200 *Saiban-in* trials, and three-quarters of the trials ended in 4 days or less (76.8%).<sup>78</sup> This is in stark contrast to Korean jury trials; nearly all of them are concluded in a single day. In the same period, out of more than 1,300 defendants, only five defendants received outright acquittal by the *Saiban-in* panel (i.e., 99.98% conviction rate).<sup>79</sup> The first full acquittal was issued in June 2010 in a drug-related case. Since December 2010, there have been a total of 4 full acquittals, in which two defendants were acquitted of murder and the other two of drug-related charges. Despite the introduction of *Saiban-in* trials, the conviction rate remained nearly identical to that of the bench trial system.<sup>80</sup> Out of five acquittal verdicts, the Japanese prosecution appealed four of those non-guilty verdicts.<sup>81</sup>

The less than 0.1% acquittal rate in Japan stands in contrast to Korea's 8.4% acquittal rate in the first four years of jury operation.<sup>82</sup> During the fifteen years of jury operation from 1928 to 1943, Japan's all-citizen jury acquitted defendants in eighty-one out of four-hundred-eighty-four cases (i.e., 17.1% acquittal rate).<sup>83</sup> The significant polarity of verdict patterns also suggests that, regardless of historical or geo-political differences, the absence of professional judges in the deliberative process is likely to benefit the defendant, while professional judges' deliberative participation and joint collaboration with citizen judges are likely to go against the interest of the defendant. Citizen participation in the administration of justice thus may protect against certain tendencies in a professional judiciary and excessive judicial formalism in procedure and practice, such as Japanese judges' uncritical attention to

<sup>76</sup> See *Kokuminteki Kiban no Kakuritsu* [Establishment of the Popular Base of the Justice System], June 1, 2001, available at <http://www.kantei.go.jp/jp/sihouseido/dai62/pdfs/62-4.pdf>.

<sup>77</sup> *Id.*

<sup>78</sup> Saikō Saibansho [Sup. Ct. Office], *Saiban-in saiban no Jisshi Jokyo ni Tsuite (Seido Shiko-Heisei 22nen 10gatumatu, Sokuho)* [Implementation of Saiban-in saiban (From Its Inception to the End of October, 2010)] (2010).

<sup>79</sup> *Id.*

<sup>80</sup> Fukurai, *supra* note 13, at 818-21.

<sup>81</sup> *Kakuseizai Mitsuyu Aitsugu Muzaihaki Saibanin Saiban to Kososhin Handan Zure* [Smuggling Stimulant Drugs and Reversal of Not Guilty Saiban-in Verdicts: Gap between Lay Judge Trials and Appellate Reviews], SANKEI SHIMBUN, Apr. 15, 2012 (showing four non-guilty verdicts currently under review by appellate courts), <http://news.goo.ne.jp/article/sankei/nation/snk20120415082.html>.

<sup>82</sup> Sang Hoon Han & Kwangbai Park, *Citizen Participation in Criminal Trials of Korea: A Statistical Portrait of the First Four Years*, YONSEI L. J. (this issue); See also Jae-Hyup Lee, *Korean Jury Trial: Has the New System Brought About Changes?* 12 ASIAN-PACIFIC L. & POL'Y J. 58, 64 (2010) ("In a majority of cases (91.2%), the jury found the defendants guilty," suggesting 8.8% acquittal rate for the first two years of jury operation in Korea).

<sup>83</sup> Chihiro Saeki, BAISHIN SAIBAN NO FUKKATSU 10-14 (1996).

confession evidence extracted under physical and psychological duress or even torture.

The same thing can be said of the PRC in its evaluations of the propriety of non-indictment decisions made by public prosecutors. Citizen participation in legal decision-making process is more likely than that of professional judges to increase the adversary and accusatorial character of the criminal trial, strengthening the principle of immediacy and the presumption of innocence in the criminal trial. And similar legal principles and criminal justice safeguards should apply to the lay adjudication of illegal activities and unethical conduct by American military personnel stationed in both Korea and Japan.

#### **IV. KOREA'S JURY TRIALS AND MILITARY CRIMES: HOW TO ADJUDICATE THEM?**

Intense public scrutiny and media attention have been paid to American military crimes in Korea. Many crime victims, their families, and residents in local communities have often demanded governmental negotiations on the jurisdictional authority over military felons and their adjudication in local courts. In the future, such political discussion and legal negotiations must involve a potential revision of the Status of Forces Agreement (SOFA) that the U.S. signed with Korea. South Korea currently serves as a strategic home to the Eight U.S. Army Division, the U.S. Air Forces Korea, and the U.S. Naval Forces Korea, with more than thirty-thousand military personnel strategically placed at eighty-two U.S. armed forces bases on the Korean Peninsula.<sup>84</sup>

The original SOFA between South Korea and the U.S. was signed in 1966 and there have been numerous negotiations for revisions over the years, with the most recent and significant revision coming in 2000-2001.<sup>85</sup> In December 2000, the Korean government finally reached a new accord with the U.S. government. Since 1995, this had followed eleven rounds of talks during which the Korean police was given the right to detain American servicemen suspected of rape and murder, as part of a revised agreement governing U.S. troops stationed throughout the country.<sup>86</sup>

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<sup>84</sup> See US Dep't of Defense, *Base Structure Report Fiscal Year 2011 Baseline: A Summary of DoD's Real Property Inventory 7*, available at <http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf>.

<sup>85</sup> R. Chuck Mason, *Status of Forces Agreement (SOFA): What Is It, and How Has It Been Utilized?*, CONGRESSIONAL RESEARCH SERVICE 1, June 18, 2009.

<sup>86</sup> San-hun Choe, *U.S., South Korea Agree on New Rules Governing U.S. Troops*, NORTH COUNTY TIMES, Dec. 29, 2000.

Under the revised treaty, U.S. soldiers accused of murder, rape, arson, drug trafficking and other serious crimes are to be turned over to South Korea upon an indictment.<sup>87</sup> In murder or rape cases, South Korean police have the right to arrest and detain U.S. military suspects. Under the old treaty, the U.S. military held custody of accused soldiers until all appeals had been exhausted in the South Korean legal system.<sup>88</sup>

The Korean government, however, still has no legal jurisdiction over American military personnel involved in accidents or misconduct while on duty, similar to the SOFA signed with the Japanese government.<sup>89</sup> The U.S. government relies on its own military court to try military personnel who committed crimes or caused accidents during their official duty, and oftentimes they are acquitted or punished very lightly.

For example, the 2002 killing of two Korean schoolgirls was adjudicated, not in the Korean court, but in a U.S. military tribunal. In June 2002, an armored vehicle driven by Sergeant Mark Walker and Sergeant Fernando Nino of the U.S. Army fatally ran over two 13-year-old schoolgirls on a civilian road in a northern Korean village.<sup>90</sup> The killing of two young girls was classified as an accident in the performance of official duty. In December 2002, a U.S. military tribunal acquitted the two offenders of negligent homicide.<sup>91</sup>

A Korean Congressional report indicated that, between 1967 and 1998, 50,082 crimes were committed by U.S. military personnel in Korea, and 56,904 American soldiers and their families were involved in crimes, including murder, brutal rapes, and sexual abuse.<sup>92</sup> The report also stated that the actual figure might be much higher, if military crimes that were handled by the U.S. military police have been included in the overall statistics. The report suggested that the total number of crimes committed by U.S. soldiers from September 8, 1945, when American troops were first stationed in Korea, to the beginning of millennium, was estimated to be around 100,000.<sup>93</sup> Another study by the Ministry of Justice also showed a slightly different figure from the congressional report, suggesting that, between 1967 and 1987, 45,183 American soldiers were involved in 39,452 criminal cases, but the Korean government was able to exercise its jurisdiction only in 234 cases, punishing only 351

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

<sup>88</sup> *Id.*

<sup>89</sup> *Id.*

<sup>90</sup> *U.S. Soldiers Charged for Korean Deaths*, BBC NEWS WORLD EDITION, July 5, 2002, <http://news.bbc.co.uk/2/hi/asia-pacific/2097137.stm>.

<sup>91</sup> *Id.*

<sup>92</sup> *Statistics on Crimes Committed by U.S. Troops in South Korea*, in REPORT ON US CRIMES IN KOREA 1945-2001 [hereinafter REPORTS ON U.S. CRIMES], as reprinted in THE INTERNATIONAL ACTION CENTER, <http://www.iacenter.org/Koreafiles/ktc-civilnetwork.htm>.

<sup>93</sup> *Id.*

American soldiers, in which 84 soldiers were convicted of rape and 89 were convicted of murder and robbery.<sup>94</sup>

Similar to rape cases in Okinawa, many rape cases were also intentionally hidden and forgotten in South Korea, while the countless cases of rape were committed by American soldiers, including a woman gang raped by 4 soldiers in March 1946; a 14-year-old schoolgirl raped in 1956; a daughter and a mother both raped in 1967; a woman raped by 8 soldiers in the mountains in 1971; one-month pregnant teacher raped in 1986 by 5 soldiers in the middle of Team Spirit military exercise; a handicapped schoolgirl sexually assaulted in 1996; and a 6-year-old girl sexually harassed in 1997.<sup>95</sup> In 2000, a U.S. serviceman confessed to murdering a Korean bar hostess after he repeatedly demanded abnormal sexual activities after one sexual intercourse.<sup>96</sup> More recently in 2011, a 21-year-old U.S. soldier brutally raped a 17-year-old girl, while threatening her with a knife and pair of scissors.<sup>97</sup> Former U.S. government official Gregory Henderson, who served at the U.S. Embassy in Seoul in the 1950s and 1960s, completed in his thesis entitled, “Politically Dangerous Factors in U.S. Troops Exercising Operation and Control Right in Korea,” in which he stated that “every U.S. soldier from officer down enjoys material indulgence in Korea. Material indulgence includes abundant supply of fresh bodies of young local women.”<sup>98</sup>

Political pressure was mounted by the Korean government to engage in new negotiations with the U.S. government to modify the SOFA. As well in 2008, the Korean public demanded the establishment and introduction of the jury system. The Korean jury was introduced in 2008, and immediately offered a potential vehicle for adjudicating heinous crimes committed by off-duty American military personnel in Korea. Unfortunately, no soldiers, their dependents, or civic military employees have ever been subjected to the jury trial. As the consent of the defendant is required for jury trials, such a requirement *de facto* have prevented lay adjudication of military felons in Korea.<sup>99</sup> Equity demands that the South Korean government must change and eliminate the defendant’s consent requirement when it

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<sup>94</sup> *Id.*

<sup>95</sup> *Id.*

<sup>96</sup> *U.S. Soldier confessed to Barmaid Murder*, KOREA TIMES, Feb. 22, 2000 (“Upon having his demands rejected, he beat and strangled her to death”).

<sup>97</sup> Jon Rabirotff & Yoo Kyong Chang, *U.S. Soldier Gets 10 Years in Rape of Korean Teenage Girl*, STARS & STRIPES, Nov. 1, 2011.

<sup>98</sup> REPORTS ON U.S. CRIMES, *supra* note 92.

<sup>99</sup> The Jury Law, art. 8, para. 1.

Under the “Ascertainment of Intention of Defendant,” the law states “[A] court shall inquire a defendant of an eligible case, in writing or by other means without exception, of whether he/she desires a participatory trial.”)

reviews the Jury Law in 2013.<sup>100</sup>

At the same time, the possible introduction of Japan's grand jury system (i.e., the PRC) provides another legal path to adjudicate military felons in Korea. The PRC makes it possible to evaluate the Korean government's decision not to prosecute military felons because of the lack of jurisdictional authority or other procedural reasons. Similar to the 2011 Naha PRC's decision to indict an American military employee for the death of a 19-year-old Okinawa youth, the PRC can evaluate the prosecutors' non-indictment decision based upon a request by victim's families or their proxy, examine evidence and investigative materials, listen to testimony, and make a decision whether or not to issue an indictment against the accused. Although this accident took place while on-duty, the Naha PRC decided to indict the military personnel. The PRC decision later forced the Japanese and American governments to negotiate the jurisdictional authority over on-duty crimes and helped establish new criminal procedures, which eventually allowed the Japanese prosecutor to indict and convict the military employee for his on-duty crime.

Do Korean citizens support the lay adjudication of military felons in jury court? Do they also support the possible introduction of the PRC in Korea? What are their opinions about these crucial issues? The following section examines the attitudes and opinions of a group of Korean university students who responded to a number of questions involving the possible establishment of the PRC system in Korea and its potential function in the indictment of American soldiers. The survey was conducted at Kyonggi University in Korea in October, 2010. A total of 309 students participated in the survey research and gave their responses to both open and closed ended questions.<sup>101</sup> The majority of respondents were woman (63.4%), and their age ranged from 19 to 33 (mode of 20, and median age of 22).

Since this survey is the first of its kind to examine Korean people's perception and opinions on the possible introduction of Japan's grand jury system in Korea, the questionnaire was designed, first, to educate college respondents about Japan's PRC system, the deliberative procedure, the legally binding authority of its second indictment decision, as well as its potential oversight function over the Korean prosecutors. Another system of lay adjudication, i.e., *Saiban-in Seido* (a quasi-jury system) in Japan, was also explained briefly. The questionnaire also included a series of questions about their attitudes and opinions about

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<sup>100</sup> Jae-Hyup Lee, *Getting Citizens Involved: Civic Participation in Judicial Decision-Making in Korea*, 4 E. ASIA L. R. 177, 181 ("In 2013, the final format and scope of the [jury] system will be determined.").

<sup>101</sup> Research assistants for the second author helped distribute survey questionnaires at a number of undergraduate classes at the College of Humanities in Kyonggi University in Korea.



lay participation in Korea.

For example, when asked whether or not they wanted to participate in the jury trial in Korea, the majority of students said that they were uncertain for jury participation (50.2%), while only one-fifth said that they wished to be a juror (19.7%). With respect to the adjudication of military crimes, the great majority said that American soldier's crimes were improperly handled by U.S. military courts (72.5%) and that Korean citizens should have the right to hold military felons accountable when military personnel victimized them (69.4%). When asked if they personally knew victims of military crimes, 13.7% of them said that they did. The majority also said that, if they served in the trial of military felons, they would be concerned about the threat of potential retaliation by defendants and/or their families (57.0%). The majority also agreed that having Korean residents in a jury would help prevent future crimes by American soldiers (55.8%). Nearly a half of respondents also said that local residents were capable of rendering a fair verdict in the trial of foreign soldiers (48.7%).

Nearly all of respondents supported the introduction of the PRC system in Korea (81.2%), and the great majority said that they wanted to participate in the PRC deliberation to review the non-indictment decision on alleged crimes committed by American soldiers (69.1%). Most respondents also said that the Korean jury trial should be able to adjudicate military crimes regardless of the duty status of soldiers (82.5%).

Various questions on military crimes and their adjudication tend to trigger special emotive reactions from Korean participants. The majority of respondents supported the introduction of the PRC system and was willing to participate in its deliberation to examine non-indictment decisions involving alleged military crimes. The following are detailed narrative responses to questions involving the introduction of the PRC system in Korea, showing the multitudes of concerns and new ideas about why the PRC's oversight is needed in Korea.

### *A. COLLEGE STUDENT SURVEY AND INTERVIEW*

#### **1. "SHOULD THE PROSECUTION REVIEW COMMISSION (PRC) BE INTRODUCED IN KOREA?"**

Since most respondents supported the likely introduction of Japan's PRC in Korea, the opinions that supported the introduction included: that the introduction of Japan's PRC "[is] necessary to secure the right of people and their safety" and "further prevents the commission of military crimes [in Korea]." One respondent indicated that "we need to introduce our own

independent system [in addition to the PRC] to proactively try military felons.” Another respondent who supported the PRC introduction in Korea warned that “while the oversight system like the PRC may be necessary in Korea, but [I am] not certain whether the system is truly meant for Korea because its deliberation may involve hundred-percent [anti-American] personal biases.”

Other critical views included that: “[the introduction of PRC becomes] a symbol of democracy [in Korea];” “[the PRC is] possible to be misused politically. But if many people feel the indictment is imminent, we still should respect their decision”; “the introduction [of the PRC] should decrease the instance of unfair handling of criminal cases in Korea”; “the prosecutors’ decision is most likely to be politically influenced, and thus the PRC allows the citizens to make objective decisions.” Finally, the PRC is important to neutralize power differences between the Korean and U.S. governments, suggesting that “many military felons had gone unpunished because of U.S. political influence, so this [PRC] will neutralize the power differential”; and “the PRC is necessary to institute measures to ensure the fairness [of trial proceedings].” Some also suggest that: “if external pressures forced Korean prosecutors to decide not to prosecute, [we need to reply on the PRC] to issue the indictment and prosecute [military felons]”; and “the indictment by the general citizenry is imminent, because the [Korean] prosecution is likely not to prosecute [military felons] as they are afraid of [retaliation from the] U.S. military.”

These who opposed the establishment of the PRC stated that: “since the first non-indictment decision obviates the need of prosecution, the PRC’s pro-indictment decision will not have legally binding authorities”; and “[we already have] the established system of prosecutorial measures, so [there is] no need to change.” Some questioned the effect of biases introduced by ordinary citizens, suggesting that “[people] should refrain from introducing their personal biases [into deliberations];” “specially-qualified people are needed [for the PRC]” because “[some people are] not intelligent enough to serve [in the PRC]”; and “many people are not interested [in citizen participation in legal decision-making].”

## **2. “SHOULD THE KOREAN PROSECUTION HAVE THE RIGHT TO EXERCISE JURISDICTION OVER ON-DUTY ACCIDENTS OR CRIMES?”**

Similar to the Japan-U.S. SOFA, the Korea-U.S. SOFA demands the bifurcated system of jurisdiction over accidents or crimes committed by American military personnel in Korea. While the Korean government has the right to exercise jurisdiction over off-duty accidents or

crimes committed by American military personnel, the U.S. military has the right to exercise jurisdiction over on-duty accidents or crimes. Many respondents indicated that the Korean prosecutors should have the right to exercise jurisdiction over on-duty accidents or crimes, suggesting that “as long as they [American soldiers] continue to stay in Korea, they should abide by Korean law, regardless of whether or not [accidents or crimes took place] while on- or off-duty” and “crimes committed in Korea should be adjudicated in Korean court.” One respondent stated that “the duty-status should have no bearing with crime, [as it should be adjudicated in Korean court].” Some expressed the need to create the optimum deterrence against military personnel, stating that “[the unilateral imposition of Korea’s right to exercise jurisdiction over all military crime] imposes maximum deterrence to future military criminals” and “the gravity of offense should dictate who bears the right to exercise jurisdiction.” One respondent criticized the U.S. military for failing to properly punish their personnel, stating “past incidents which received an extensive media coverage exposed the controversy over duty status and the U.S. military failed to exercise their responsibility over them. Thus the Korean government should have the right to exercise jurisdiction [over all crimes or incidents regardless of duty status].” One opponent of extending the jurisdictional right to on-duty accidents or crimes stated that “on-duty crimes or accidents should be tried in [US] military court.”

### 3. WHO IS WORSE - KOREAN SOLDIERS OR AMERICAN MILITARY PERSONNEL?

College respondents were also asked to respond to the question: “Which military personnel are causing greater problems to Korean residents -- Korean or American? Both Korean and American soldiers currently share the military base in Pyeongtaek, Korea, for example. The huge military base in Pyeongtaek serves a home to a South Korean naval base and a large concentration of U.S. military troops, and it is possible that both Korean and American soldiers engaged in illegal activities or unethical conduct in adjacent areas. For instance, the first *Saiban-in* trial in Okinawa involved a sexual assault against an Okinawan woman by Japan’s self-defense personnel, not a U.S. soldier, suggesting that residents of local communities have also been subjected to Japanese military crimes.<sup>102</sup> Similarly, Korean military personnel may thus have been seen as criminal predators in local communities.

The majority of respondents, however, felt that American soldiers are the ones who most likely victimize local residents (65.2%). A mere 8.7% indicated that Korean soldiers were

<sup>102</sup> *JMSDF Sailor Nabbed for Attempted Rape*, WEEKLY JAPAN UPDATE, June 18, 2009.

worse predators of local residents, while 25.4% said that neither of them were predators (0.7% said that both Korean and American soldiers equally victimize local residents). Respondents who viewed American soldiers as the major predator stated that “Korean soldiers were bound by Korean laws so their crime ratio is low” and “very light punishment by the U.S. military promotes the culture of impunity.” The location of military bases is also seen as the major reason for the proliferation of military crimes, suggesting that “nearly all crimes by American soldiers were committed by those who stationed at the U.S. Army Yongsan Garrison in [the City of] Seoul and they remain the main culprits.” Korean soldiers were less likely to commit crimes against Korean residents because “Korean soldiers’ parents are Korean citizens and thus I believe they do not harm us. On the other hand, American soldiers are different, as indicated by many media reports, including the recent assault against a 60-year-old lady.” Others expressed similar opinions, stating that “many Korean soldiers become patriotic once they wear Korean military uniforms, and they do not commit crimes [against Koreans]” and “ultimate consequences of crime will affect Korean soldiers more negatively than U.S. soldiers.” Some pointed out ideological differences, stating that “[American soldiers likely engage in criminal activities due to] their cultural or ideological differences” and “American soldiers’ educational level is lower than those of general population in the US, except those in administrative divisions. Thus, they are more likely to engage in criminal activities, some of which may reflect racism imbued in American culture.”

These who felt that Korean soldiers are more culpable stated that “as a former Korean soldier, I feel that Korean soldiers are more culpable.” Two respondents suggested that “recent media analysis revealed more crimes committed by Korean soldiers than American soldiers,” and that “in terms of absolute numbers, Korean soldiers’ crimes are much greater than U.S. soldiers’.”

One respondent said that neither U.S. nor Korean soldiers were problems, suggesting that “I served as a military security guard in an American military base and had many contacts with American military personnel. My experience tells me no difference in actions between Korean and American soldiers. Therefore, I do not believe that American soldiers are more culpable than Korean soldiers.” Two pointed out the effect of biased media reports, stating that “foreigners likely suffer from wrong impressions,” and that “[The Korean] media likely focuses on American soldier crimes and offers no objective measures to truly evaluate the extent of criminal activities [in Korea].” While the opinion survey was the first of its kind to examine the attitudes and opinions about the possible introduction of the PRC in Korea, most respondents strongly supported the adoption of the PRC system in Korea. Many also

supported its effective oversight of both Korean prosecutors and U.S. military personnel. While some Korean respondents expressed their concerns about the lay adjudication of military crimes, most of them also saw the necessity of lay adjudication of military crimes in Korean courts, not in U.S. military tribunals. Many also supported the elimination of defendants' consent for jury trial in order to adjudicate military crimes in lay court. Both the lay adjudication of military crimes and the PRC's ability to challenge prosecutors' non-indictment decisions will then help create to a strong sense of political sovereignty and judicial independence in Korea.

### *B. AMERICAN MILITARY CRIMES IN EAST ASIA*

The long history of American soldiers' heinous crimes, including sexual assaults against women and children in both Okinawa and South Korea, are indicative of continued sexual exploitation and predatory culture present at U.S. military bases. The South Korean government had introduced the all-citizen jury trial in 2008 for the first time in its legal history, but crimes committed by American soldiers are yet to be subject to the adjudicative process through Korea's jury system because of the required consent by the defendant for jury proceedings. In the future, the Korean court may thus consider requiring the mandatory adjudication of all military felons in its jury system, when their crimes are serious and violent.

Besides the jury trial, the PRC can also become another important legal institution of citizen participation in Korea. The PRC should also encourage the participation of the judiciary to evaluate PRC decisions because of lay participants' ability to inject civic sentiments into its deliberations and decisions, and, like in Japan, the PRC decision necessitates the judicial clarification over the application of bilateral treaties or relevant international laws on domestic affairs, including the ability of the Korea-U.S. Status of Forces Agreement (or SOFA) to shield American military felons from criminal prosecutions in South Korea. When foreign soldiers victimize Korean women, children, and local residents, the PRC may recommend the indictment of American soldiers despite extra-territorial rights guaranteed under the SOFA provision. The introduction of the PRC may thus serve to constitute as an effective deterrent against future military criminals, as they may be held legally responsible for the consequences of their illegal acts or unethical conduct in Korea.

Today, the U.S. government has established U.S. military bases in more than 130 countries, and deployed its military personnel in over 150 countries around the globe, well

beyond Okinawa and South Korean borders.<sup>103</sup> Military crimes that victimize local residents become part of realities in these countries, and the judicial system in these nations now must deal with the consequence of America's military strategies and policies within their own national borders. The possible establishment of the PRC system in these countries may assist in the creation of an effective judicial institution to combat military crimes. The civic oversight of military activities in these countries may also serve to function as the effective deterrent against sexual exploitation and predatory culture present at American military bases.

## V. CONCLUSION

Dick Cheney, whom renowned political critic Norm Chomsky once called "the Administration,"<sup>104</sup> had been responsible for permitting the continuation of torture programs, running illegal wireless wiretap programs, and orchestrating extra-ordinary rendition, was never successfully implicated in charges of any crimes by congressional representatives or U.S. senators. It was a group of ordinary citizens in South Texas who decided to indict Cheney and his protégé Alberto Gonzalez for illegal and immoral business maneuvers. Nonetheless, the judge in local court, under the tremendous pressure from Washington, decided to dismiss the indictments rendered by the group of fair-minded citizens.

Japan also witnessed similar history of political predation and inequities. But since its implementation in 2009, the PRC has successfully indicted a police chief, a prominent political powerbroker, and economic elites, including three past presidents of the Japan-Railway (JR) West, one of the largest and most powerful private corporations. The PRC also successfully indicted military personnel stationed in Okinawa. The PRC has become an important channel through which ordinary people's moral sentiments – their sense of justice, fairness, and equity – were introduced in the deliberation of the criminal indictment against American military personnel in Okinawa.

Like many fair-minded citizens in Texas and their demand for equity and justice, people in Korea must also continue to mount external pressure in order for the government to institute and establish the more equitable lay adjudication system. Once adopted in South

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<sup>103</sup> CHALMERS JOHNSON, *NEMESIS* 5 (2008).

<sup>104</sup> *Noam Chomsky on Obama's Foreign Policy, His Own History of Activism, and the Importance of Speaking Out*, *DEMOCRACYNOW!*, Mar. 15, 2010 ("They (business world, corporate planners, and state planners) couldn't get rid of Cheney, because he was the administration, so can't dismantle it"), [http://www.democracynow.org/2010/3/15/noam\\_chomsky\\_on\\_obamas\\_foreign\\_policy](http://www.democracynow.org/2010/3/15/noam_chomsky_on_obamas_foreign_policy).



Korea, the PRC's decision is likely to create further legal debates because of its ability to check the prosecutors' discretionary powers in criminal matters. PRC decisions in Korea could lead to greater public debates about the adjudication of military felons, the legitimacy of American military bases in Korea, and possible revisions of the US-Korea SOFA. The adoption of the PRC in South Korea is thus expected to serve as an effective judicial institution with proper checks-and-balances against inequitable procedures of the Korean government, as well as the U.S. military establishment in Korea.

**KEYWORDS**

Lay Adjudication, Grand Juries, Prosecution Review Commissions, Military Crimes, American Military Bases

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