

# 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.

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### Abstract

This is a unique moment in the history of the Japanese legal system, as the Japanese Government has decided to introduce “Saiban-in Seido”—a petit quasi-jury system—which will be instated in 2009.<sup>1</sup> The introduction of the first quasi-jury trial also marks the start of another newly-revised grand jury system, called “Kensatsu Shinsakai,” or the Prosecutorial Review Commission (PRC).<sup>2</sup> The revised PRC law mandated that the resolution be given legally binding status, and that the law be put into effect by May 2009, when the first quasi-jury trial begins in Japan.

While many scholars have studied the petit quasi-jury system,<sup>3</sup> the newly revised grand jury system, i.e., the PRC system, will have a far greater

1. Saiban'in no sanku suru keiji saiban ni kansuru horitsu, Law No. 63 of 2004. “Saiban-in seido” is translated as “the lay assessor” or “mixed court” system. The more appropriate translation is the “quasi-jury” system, which will be used here. See Kent Anderson & Emma Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 *ASIAN-PAC. L. & POL'Y J.*, 233, 233-35 (2004) [hereinafter *Quasi-Jury Act*] (discussing the difficulties in translating the Act).

2. “Kensatsu shinsakai” is usually translated as “inquest of prosecution” or “prosecution review commission.” The more literal translation is “prosecutorial review commission,” which will be used here. See Kent Anderson & Mark Nolan, *Lay Participation in the Japanese Justice System: A Few Preliminary Thoughts Regarding the Lay Assessor System (saiban-in seido) from Domestic Historical and International Psychological Perspectives*, 37 *VAND. J. OF TRANSNAT'L L.* 935 965-966 (2004).

3. See, e.g., Kent Anderson & Leah Ambler, *The Slow Birth of Japan's Quasi-Jury System (Saiban-in seido): Interim Report on the Road to Commencement*, 21 *ZEITSCHRIFT FÜR JAPANISCHES RECHT/J. JAPANESE L.* 55 (2006); Robert M. Bloom, *Jury Trials in Japan*, 28 *LOY. L.A. INT'L & COMP. L. REV.* 35 (2006); Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 *LAW & CONTEMP. PROBS.* 261 (1999); Iwao Sato, *Judicial Reform in Japan in the 1990s: Increase of the Legal Profession, Reinforcement of Judicial Functions and Expansion of the Rule of Law*, 5 *SOC. SCI. JAPAN J.* 71 (2002); Stephan C. Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001 *ST. LOUIS-WARSAW TRANSATLANTIC L.J.* 89 (2001/2002); Justice Sys. Reform Council, *Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century*, 2001 *ST. LOUIS-WARSAW TRANSATLANTIC L.* 119 (2001/2002) [hereinafter *JSRC*]; see also CHIHIRO ISA, *SAIBAN-IN SEIDO WA KEIJI SAIBAN O KAERUKA: BAISHIN SEIDO O MOTOMERU RIYU [CAN THE QUASI-JURY SYSTEM TRANSFORM CRIMINAL TRIALS: REASONS FOR DEMANDING THE JURY SYSTEM?]* (2006); AKIRA GOTO, SATORU SHINOMIYA, KEN NISHIMURA, and MIKA KUDO, *JITSUMUKA NO TAMENO SAIBAN-IN HO NYUMON [A PRACTITIONER'S INTRODUCTION TO THE QUASI-JURY LAW]* (2004); *Saiban-in seido ga yatte kuru [Here Comes the Quasi-jury System]* (Osamu Niikura ed., 2003); TAKASHI MARUTA, *SAIBAN-IN SEIDO [THE QUASI-JURY SYSTEM]* (2004).

impact in democratizing the criminal process and building broader public confidence in the Japanese justice system. While under the petit quasi-jury system both lay and professional judges have a role in deciding the final verdicts and appropriate sentences, the PRC is composed solely of eleven randomly chosen citizens from the local community. The system is similar to that of the United States's civil grand jury in examining and inspecting the proper functioning of local public offices, including the DA's office. Also similar to the criminal grand jury, the PRC has influence over the decision to indict.

Furthermore, contrary to past research indicating that Japanese citizens share a strong sense of obedience to legal authority and prefer a bench trial to an adversarial jury trial, the experience with civic legal participation has, in fact, increased the public's level of legal consciousness and willingness to participate in the legal system. I surveyed people who served in the PRC in Japan and people who served on juries in the United States to examine the impact of the deliberative experience on their legal consciousness. The study found that both groups were more willing than people without legal experience to serve on juries, perceived fewer obstacles in serving on juries, and had more confidence in popular legal participation. They also developed greater confidence in the ability of ordinary people to reach a fair and just decision.

## Introduction

On April 2, 1982, the first organized civic movement to introduce the jury trial in Japan, the Baishin Saiban o Kangaeru Kai ("the Research Group on Jury Trial," hereinafter RGJT),<sup>4</sup> was formed in Hitotsubashi, Tokyo. The group included well-respected Japanese non-fiction writer Chihiro Isa, who had just won a prestigious literary prize, prominent English legal scholar Hideo Niwayama, law professor and criminal defense lawyer Jitsuzo Shigeta, law professor Mitsuru Shinokura, and the prominent defense attorneys Tetsuji Kurata and Isamu Sekihara.<sup>5</sup> Another prominent attorney, Shojiro Goto, also joined the group as a charter member.<sup>6</sup> Isa was one of the very few Japanese citizens who had served in a jury trial

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4. The literal translation of the group name is "Association for the Consideration of Jury Trials." See Mark West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 82 COLUM. L. REV. 684, 715 (1992). The official English title given by the group is "The Research Group on Jury Trial," which will be used here. The group used this English title in its bulletin. See the first issue of its official bulletin: *Saiban o Kokumin no teni* [*Trials in the Hands of People*] 1 BASHIN SAIBAN [JURY TRIAL] 1, 8 (Dec. 1982).

5. Chihiro Isa, one of the original founders of RGJT, gave detailed accounts of the first meeting on the website, Baishin Saiban Renzoku-koza, Dai-ikkai [Lecture Series on Jury Trials, Number One] (May 14, 2004), [http://www.baishin.com/04kako/20040514\\_yokohama/index.htm](http://www.baishin.com/04kako/20040514_yokohama/index.htm). Isa also won the Oya Soichi Nonfiction Award in 1978 for *GYAKUTEN: AMERIKA SHIHAIKA OKINAWA NO BASHIN SAIBAN* [REVERSAL: A JURY TRIAL IN OKINAWA UNDER AMERICAN RULE] (1977).

6. For his active involvement in many prominent wrongful conviction cases, Goto received the Human Rights Award from the Tokyo Bar Association in 1992.

in U.S.-occupied Okinawa in 1964. Niwayama, an attorney and law professor at Chukyo University, later helped establish Japan's first rotating public defender system ("Toban Bengoshi Seido") in 1993.<sup>7</sup> Goto worked as a chief attorney in the Matsukawa and Yakai cases, two prominent wrongful conviction cases around the same time.<sup>8</sup> Tetsuji Kurata also worked as the chief defense attorney in another celebrated wrongful conviction case, called the Menda case, in which the defendant was released after thirty-four years of incarceration.<sup>9</sup> Other members also included a former judge, Kiyoshi Ueji, who wrote a book on popular participation in law in 1982, and attorney Isamu Sekihara, who worked on the Fukumoto case—another wrongful conviction case.<sup>10</sup>

The main purpose of the group was to hold a monthly study session to educate themselves on the jury system so that they could ultimately establish one in Japan.<sup>11</sup> They shared the view that the introduction of all-citizen juries would revolutionize the criminal process and reduce the number of wrongful convictions. In subsequent years, new members of the group started to create branch organizations, including Kyushu Baishin Saiban o Kangaeru Kai ("The Kyushu Research Group on Jury Trial," hereinafter KRGJT) in Kumamoto Prefecture in the southern island of Kyushu, Niigata Baishin Tomono Kai ("The Niigata Friends of Jury Research Group," hereinafter NFJRG) in Niigata Prefecture in the northeastern island of the Honshu, and Shimin no Saiban-in Seido Tsukuro-kai ("Citizens Committee for the Creation of a Quasi-Jury System," hereinafter CCCQJS) in Tokyo.<sup>12</sup>

7. See Hideo Niwayama, *Igirisu No Toban Bengoshi Seido [The Rotating Public Defender System in England]*, 7 KAGAWA HOGAKU [KAGAWA LEGAL STUDIES] 389-408 (1988).

8. For detailed elaborations of the Matsukawa case by an American scholar, see CHALMERS JOHNSON, *CONSPIRACY AT MATSUKAWA* (1972). For the Yakai case, see SHOJIRO GOTO & SEIKICHI UEDA, *AYAMATTA SAIBAN [MISJUDGED TRIALS]* 135-158 (1960).

9. In the Menda case, Sakae Menda was charged with the murder of an old prayer reader and his wife. He became the first death row convict to win an acquittal in post-war Japan. See Manako Ihaya, *The Death Penalty*, JAPAN TIMES WEEKLY, Apr. 20, 1991, at A5.

10. KIYOSHI UEJI, *KOKUMIN NO SHIHO SANKA [CITIZENS' PARTICIPATION IN LEGAL DECISION MAKING]* (1982). Attorney Ueji unfortunately died of heart attack during RGJT's first summer study camp in Izu, Shizuoka in August 1982. See 1 BAISHIN SAIBAN 1, 8 (Dec. 1982).

11. Including the first meeting in April 1982, the group held a total of eighty-four study sessions for the next five years between May 7, 1982, and April 19, 1989. See *Katsudo Nisshi [Activity calendar]*, 6 BAISHIN SAIBAN 1, 15 (July 1989).

12. The first activity of Kyushu RGJT was reported in *Kyushu Baishin Saiban O Kangaerukai Tsushin [Kyushu RGJT Bulletin]* 2 BAISHIN SAIBAN 7 (Dec. 1983). The first activity of the Niigata Friends of Jury Research Group was reported in *Niigata Baishin Tomono Kai tsushin (1) [NFJRG Bulletin]*, 5 BAISHIN SAIBAN 14 (July 1988). The same 1988 bulletin reported that the RGJT was being organized in other cities, including Sapporo, Osaka, and Urawa. *Id.* at 16. The key RGJT members also organized to create the CCCQJS in Tokyo on June 12, 2002. For its activities, see its homepage, *Shimin no Saiban-in Seido Tsukurokai [Citizens Committee for the Creation of a Quasi-jury System]*, <http://www.saiban.org/old/index.htm> (May 21, 2004). Those emerging groups also began to actively engage in publishing their research on jury trials. The Niigata group, for example, published two booklets: BAISHIN SAIBAN-SHAN KAISETSU SHIRYO [TRIAL BY JURY: A TENTATIVE PLAN COMMENTARY DOCUMENT] (1990) and SHIMIN NO TENI SAIBAN O [A

Another prominent RGJT member, Chihiro Saeki, and others also established Baishinseido o Fukkatsusuru Kai ("The Group to Reinstate the Jury Trial") in Osaka and became one of the most active grassroots organizations in Japan.<sup>13</sup>

The RGJT became the national center for providing resources and jury information and organized many public forums to discuss the introduction of the jury trial in Japan. The early members of the RGJT are a who's-who list of the most influential Japanese law professors, defense attorneys, and liberal or radical-thinking professional judges.<sup>14</sup> While it began as a "grassroots" organization with the goal of establishing the jury system, the RGJT soon began to publish its official bulletin, BAISHIN SAIBAN (JURY TRIAL), to legitimize their activities and advocate the establishment of citizen juries in Japan. The Japanese National Library has been keeping copies of the RGJT's publications since its first publication in December 1982.<sup>15</sup>

For the next twenty-five years, the group's membership steadily grew and the group began to hold numerous public debates and forums. In their study sessions, they had a long list of distinguished guests and speakers. One of them included the former Chief Justice of the Japanese Supreme Court, Koichi Yaguchi, who in 1989 initiated a governmental study to examine the feasibility of establishing a jury system in Japan.<sup>16</sup> He had become interested in introducing a jury system in Japan after four controversial death penalty cases, in which convictions attained with the aid of confessions were overturned. The four wrongly convicted defendants spent

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JURY SYSTEM IN A CITIZEN'S CONTROL] (1998). The RGJT also published BAISHIN SAIBAN O KANGAERU [CONSIDERING A JURY TRIAL] (Shojiro Goto ed., 1991).

13. In 1995, well-respected attorney Chihiro Saeki, who was a core RGJT member, created this civic organization in Osaka. Professor Takashi Maruta, who specialized in the United States's jury system, and Hanako Watanabe from Nihon Shiho Tsuyakunin Kyokai (Japanese Association of Legal Translation) also became the first charter members of the organization. See *Baishin Seido o Fukkatsusuru Kai*, <http://www.baishin.sakura.ne.jp> (Nov. 5, 2006).

14. In the first five issues of BAISHIN SAIBAN [JURY TRIAL], RGJT members who contributed articles included a number of prominent legal scholars and practicing attorneys, such as Professors Nobuyoshi Toshitani at Tokyo University, Yoshito Sawanobori and Itsuhiro Namazugoshi at Niigata University, Yasuo Watanabe at Hokkaido University, Seiichi Nakahara at Meiji University, and Hideaki Seki and Hideo Shimizu at Aoyama Gakuin University. Other contributing members include Attorneys Osamu Niikura, Yukio Shimomura, and Satoru Shinomiya and NHK Head Researcher Toshihiko Umezawa.

15. Katsuhiko Iimuro, one of the original founding members and a former legal columnist for TOKYO-CHUNICHI SHIMBUN stated, "[T]he publication of our bulletin and the expressed interest by the Japanese National Library to keep the copies of our bulletin truly legitimized our activities. Given a very conservative nature of legal profession, our motto was 'do not hurry to get an immediate result [on judicial reform], but there is a meaning in advocating for a change.'" Interview with Katsuhiko Iimuro, Professor of Linguistic Expressions, Chukyo University, in Nagoya, Japan (Aug. 6, 2006, on file with author).

16. See *Jitsugenshitai Shiho Eno Kokumin Sanka [Realizing Popular Participation in Law]*, 13 BAISHIN SAIBAN 1-4 (Dec. 1997).

a total of 130 years in prison before ultimately being released.<sup>17</sup>

Despite more than twenty years of the group's efforts to influence the government and the public to introduce the jury system, in May 2004 the Japanese government elected not to introduce a jury system. Instead, the government enacted the Act Concerning Participation of Quasi-Jurors in Criminal Trials (hereinafter the Quasi-Jury Act) to establish a mixed court or quasi-jury system, called *Saiban-in seido*, in which professional judges and randomly chosen citizens would determine criminal responsibility and the resulting sentence.<sup>18</sup> The Japanese Government then announced that the system would take effect in May 2009. Many RGJT members were disappointed with this compromise, and some members, including Isa, the group's founder, spoke out against the introduction of the quasi-jury system.<sup>19</sup> However, other RGJT members and similar organizations are currently holding seminars and public hearings to improve the quality of justice and enrich the quality of democratic life of Japanese citizens, who might participate as quasi-jurors.

This article examines the new twin systems of civic legal participation in Japan - a petit quasi-jury system and a newly revised criminal grand jury system, called the Prosecutorial Review Commission (PRC) system.

Part I of this article examines the political and legislative history of the quasi-jury system. Part II provides a brief history of the PRC system, its evolution, and a recent legal revision that critically altered the nature of its mission, granting citizens significant power to review and influence prosecutorial and administrative decisions. Part III more fully examines the extent of the PRC's authority, arguing that it may have more power than the quasi-jury system to examine and influence administrative decision making in the Japanese government. Part IV examines the Japanese legal consciousness and its possible transformation due to the experience of participating in the grand jury system in Japan. Part V presents the results of a comparative analysis of the impact of lay participatory experience on legal consciousness between the United States and Japan. Part VI discusses the implications of the findings and provides a critical analysis of the impact and experience of legal participation in Japan and the United States, including people's willingness to serve, commitment to moral and ethical responsibilities, effects of strict confidentiality requirements imposed on quasi-jurors, fear of possible retaliation by defendants, and their confidence as jurors. Part VII then summarizes the future function of the PRC as a civic democratic organization, which could potentially pro-

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17. Those four wrongful conviction included the *Menda*, *Zaidagawa*, *Matsuyama*, and *Shimada* cases. See CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [REINSTATEMENT OF JURY TRIAL] 155-56 (1996).

18. The English title of the Act was based on an annotated translation by Kent Anderson and Emma Saint, *supra* note 1. In this article, I replaced Anderson and Saint's term "Lay Assessors" with "Quasi-Jurors."

19. Isa has spoken at numerous conferences and public meetings to voice his strong opposition to the introduction of the quasi-jury system. See his most recent book, *ISA*, *supra* note 3. Despite his strong opposition to the quasi-jury system, he still remains RGJT's influential board member.

duce dramatic social change in Japan's traditional, conservative legal landscape. Finally, Part VIII summarizes a set of recommendations to humanize the courts and improve the quality of civilian legal participation in Japan.

### I. History of the Petit Quasi-Jury (Saiban-in) System

First, it is important to note that Japan once had a criminal petit jury system. Japan began to use jury trials in 1928, although the system was suspended in 1943 due to World War II.<sup>20</sup>

Beginning in the late 1980s and 1990s, pressure to change the existing legal system, including the introduction of lay judges in criminal cases, began to emerge. In 1999, in order to create official guidelines for Japan's judicial reform, late Prime Minister Keizo Obuchi established "Shiho Seido Kaikaku Shingikai" (the Justice System Reform Council, hereinafter JSRC).<sup>21</sup> The council had 13 members who were recruited from different political and economic sectors. Analyzing the background and affiliations of council members reveals the potential influence that various interest groups have in shaping the blueprint for Japan's judicial reform. For example, the interests of the Japanese government were expressed through two bureaucratic elites—a former chief justice of the Hiroshima high court and a former chief prosecutor of the Nagoya Public Prosecutor's Office. The council also included two members from the "Keidanren" (the Federation of Economic Organizations) and the "Keizai Doyukai" (the Japanese Association of Corporative Executives)—two of Japan's most influential business organizations—as well as a former President of the Japanese Federation of Bar Associations (the association composed of practicing attorneys, hereinafter JFBA), the President of the Federation of Private Universities, a business professor from a private university, a popular writer, a Vice President of "Rengo" (a labor organization), and the President of "Shufuren" (The Federation of Homemakers). The government's influence was evident because, aside from the aforementioned judge and prosecutor, six of the other members had previously served in various governmental committees and agencies, including one member who was a former first secretary of the Japanese embassy in Thailand.<sup>22</sup>

The term "saiban-in" ("quasi-jury") first emerged in a reference book presented by Tokyo Law Professor Masahito Inouye in the 51st public meeting on March 13, 2001. In addition to advocating the establishment of the mixed court system, the book provided six specific suggestions for the "saiban-in seido" ("the quasi-jury system"): (1) the role of saiban-in (lay judges); (2) the role of professional and lay judges; (3) the means of selecting lay judges along with their rights and duties; (4) eligibility criteria for criminal cases; (5) the ideal procedure for trial and judgment; and finally,

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

21. See Anderson & Nolan, *supra* note 2, at 939.

22. See MARUTA, *supra* note 3, at 77.

(6) appeal.<sup>23</sup> Inouye was later asked to chair the investigation committee charged with implementing the quasi-jury system recommended in the book.

The JSRC released its final report at the 62nd meeting on June 1, 2001, recommending that the eligibility of a case for quasi-jury trial should not turn on whether the defendant admits or denies the charges.<sup>24</sup> Similarly, the report agreed that criminal defendants should have no right to refuse the quasi-jury trial.<sup>25</sup> The report, however, did not specify how many lay or professional judges would serve in the quasi-jury trial. Instead, it said:

The number of judges and saiban-in on one judicial panel and the method of deciding the verdict should be determined appropriately, giving consideration to the need to ensure the autonomous and meaningful participation of saiban-in and the need to ensure the effectiveness of deliberations, and also taking into account the seriousness of the cases to which this system would apply and the significance and potential burden of the system on the general public.<sup>26</sup>

In April 2002, the Office for the Promotion of Justice System Reform (OPJSR) was established in the Cabinet Office, and the office then created eleven separate investigation committees to implement specific recommendations from the JSRC's final report.<sup>27</sup> The responsibility to deliberate on specific items of the judicial reform for the quasi-jury system was then delegated to the Quasi-jury/Penal Matter Investigation Committee ("Saiban-in Keiji Kentokai"), including the task of determining the specific number of lay and professional judges that would constitute the quasi-jury. The final proposal by the investigation committee was reported at a public meeting on January 29, 2004, and was later submitted to the OPJDR in the Cabinet Office. On March 2, the Cabinet issued its final overall proposal on Japan's judicial reform, entitled "Recommendation of the Justice System Reform Council: For the Justice System to Support Japan in the 21st Century," and

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23. See Soshō Tetsuzuki Eno Aratana Sanka Seido Kokushi An [A New Mixed Court System in Criminal Procedure: A Suggestion for the Framework] (Mar. 13, 2001), available at <http://www.kantei.go.jp/jp/sihouseido/dai51/51bessil.html>.

24. See Kokuminteki Kiban No Kakuritsu [Establishment of the Popular Base of the Justice System] (June 1, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai62/pdfs/62-4.pdf>.

25. See *id.*

26. See JSRC, *supra* note 3, Chapter IV, Part 1(1).

27. Those committees include: (1) Labor Study Committee (rodo kentokai), (2) Legal Access Investigation Committee (shiho akusesu kentokai), (3) ADR investigation committee (ADR kentokai), (4) Arbitration Investigation Committee (chusai kentokai), (5) Administrative Litigation Investigation Committee (gyosei soshō kentokai), (6) Quasi-jury/Penal Matter Investigation Committee (saiban-in seido, keiji kentokai), (7) Public Defender System Investigation Committee (koteki bengo seido kentokai), (8) Internationalization Investigation Committee (kokusaika kentokai), (9) Judicial Officer Training Investigation Committee (hoso yosei kentokai), (10) Judicial Officer System Investigation Committee (hoso seido kentokai), and (11) Intellectual Property Litigation Investigation Committee (chiteki zaisan soshō kentokai). See *Shiho seido kaikaku kentokai* [Justice System Reform Investigation Committees] (Nov. 15, 2006), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/index.html>.



submitted it to the Diet on March 16.<sup>28</sup> On May 21, 2004, the Diet passed the proposal and announced that the first quasi-jury trial would begin by May 2009.<sup>29</sup>

The Quasi-Jury Act sets up two different panels for criminal trials. A panel of three professional and six lay judges is used in a contested case, whereas a panel of one professional and three lay judges is used in an uncontested case where the facts and issues identified by pre-trial procedure are undisputed.<sup>30</sup> Since the law also requires both the government and Supreme Court to draft court rules necessary to regulate quasi-jury trial procedures and deliberations within the existing judicial framework, clearly the Diet expected that certain aspects of the quasi-jury system's operations (including the extent of evidentiary discovery and jury compensation) would go through adjustments in the coming years.

## II. Japan's Revised Grand Jury System: Prosecutorial Review Commissions (PRC)

Japan already has one system of civic legal participation, called the Prosecutorial Review Commission (PRC) system, which asks randomly-chosen Japanese citizens to examine the appropriateness of prosecutors' non-indictment decisions.

The PRC was originally created by the Allied Forces occupying Japan after World War II. General McArthur saw the PRC as important in engaging the public.<sup>31</sup> Due to the American influence on its creation, the PRC is a hybrid institution, adapting the American civil and criminal grand jury systems into the Japanese cultural and legal context. The PRC's purpose is similar to that of the American civil grand jury in examining and inspecting the proper functioning of local public offices, including the DA's office. Also similar to the criminal grand jury, the PRC has influence over the decision to indict. Given the fact that 99.9% of indicted criminal cases result in conviction, the commission's ex-post examination of the appropriateness of non-prosecution decisions is quite important in checking prosecutorial power.<sup>32</sup> A total of 201 commissions were established in each of Japan's fifty district court jurisdictions.<sup>33</sup> A commission only begins the investigation process when a victim, proxy, or the commission itself brings a complaint and applies for a commission hearing. The commission is comprised of eleven citizens randomly chosen from an electoral register, is appointed to a six-month term, and has the power to review whether or

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28. See GOTO ET AL., *supra* note 3, at 10.

29. See *id.*

30. See Quasi-Jury Act, *supra* note 1, art. 2(3).

31. See West, *supra* note 4, at 697.

32. Daijiro Yasuda, *One Aspect of Criminal Justice in Japan: Confession*, Table 1, Feb. 2005, [www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/Yasuda2005\\_OneAspectOfCriminalJusticeInJapan.pdf](http://www.law.usyd.edu.au/anjel/documents/23Feb2005Conf/Yasuda2005_OneAspectOfCriminalJusticeInJapan.pdf). In 2003, while a total of 67 cases resulted in not guilty verdicts, 78,364 cases resulted in guilty verdicts (translating to a 99.91% conviction rate) in Japan's district courts. For summary courts, the conviction rate was 99.85% in 2003.

33. *Id.*

not dispositions of non-prosecution made by public prosecutors are appropriate.<sup>34</sup>

Similar to the American grand jury, the commission investigates cases in private by summoning petitioners, proxies, and witnesses for examination,<sup>35</sup> questioning prosecutors,<sup>36</sup> asking them for additional information when necessary,<sup>37</sup> and seeking special expert advice on the case.<sup>38</sup> After deliberating the case, the commission submits one of three recommendations: (1) non-indictment is proper; (2) non-indictment is improper; and (3) indictment is proper.<sup>39</sup> A simple majority is needed for either of the first two resolutions, while a special majority of at least eight votes is needed to pass the third resolution.<sup>40</sup> The commission then delivers a written recommendation to the prosecutor's office.<sup>41</sup> Since the prosecutor, however, has the power to indict, PRC recommendations are regarded as merely advisory rather than legally mandatory.<sup>42</sup> One of most recent examples of a commission's failure to influence the prosecutor's indictment decision is in a case involving the publication of external genital photos of women by Dr. Hiroshi Kasai, Professor of Gynecology at Shiga University, in 1999.<sup>43</sup> Dr. Kasai compiled photos of his female patients external genitals in a book as the culmination of his 30 years of work and advertised the book in major Japanese newspapers. The local prosecutor's office determined that the book was a scholarly publication, that its marketing did not constitute the "sale of obscene literature," and decided not to prosecute.<sup>44</sup> The Japanese Civil Liberties Union (JCLU) submitted the motion of application to the commission, which held a hearing and resolved that indictment was proper. Subsequently, however, the prosecutor's office again determined that non-indictment was proper and took no action. Consequently, approximately 9,000 copies of the external genital book were sold in Japan.<sup>45</sup>

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34. West, *supra* note 4, at 698.

35. Kensatsu Shinsakai Ho [Prosecutorial Review Commission Law], Law No. 147, art. 37 (1948) [hereinafter PRC Law]. The content of the PRC Law is available on the government web page, Kensatsu Shinsakai Ho (June 2006), <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

36. PRC Law, art. 35.

37. *Id.*

38. *Id.* art. 38.

39. The main difference between (2) "non-indictment is improper" and (3) "indictment is proper" is that the former resolution is a request for another formal investigation of the case to reconsider the non-prosecution, while the latter is the recommendation to immediately initiate the formal prosecution of the case.

40. PRC Law, *supra* note 35, art. 27.

41. *Id.* art. 40.

42. Keiji Soshoho [Code of Criminal Procedure] art. 247 [hereinafter Keisoho]. Only prosecutors have the power to issue indictments in Japan.

43. Kinoue Inoue, *The External Genital of Japanese Women: Committee for the Inquest of Prosecution rejected non-prosecution* (Sept. 25, 1998), [http://jclu.org/katsudou/universal\\_principle/articles/314genital.html](http://jclu.org/katsudou/universal_principle/articles/314genital.html).

44. *Id.*

45. *Id.*

Prosecutors' refusals to act on the commission's recommendations undermined public confidence in the lay participatory system. Because of the non-binding power of recommendations, the commission was rarely engaged. In 2000, only 0.2% of approximately 1,000,000 non-indictments resulted in a complaint and, even when engaged, the deliberation has rarely resulted in any action.<sup>46</sup> For example, between 1953 and 2002, the commission recommended that prosecutors reconsider or indict in only 12.0% of cases (16,505 out of 138,101),<sup>47</sup> and in only 7.4% of those cases did prosecutors take their recommendation. Due to the erosion of confidence in the community regarding the commissions, recruiting commission members has become difficult, and government officers often have to visit candidates' workplaces and make formal requests to their employers or supervisors for permissions to serve.<sup>48</sup> Another problem involves the varying quality of PRC deliberations and decisions. Tokyo, Japan's largest city, for example, has three commissions reviewing an enormous number of non-indictment prosecutorial decisions, while Tottori Prefecture, with Japan's smallest population, has the same number of commissions.<sup>49</sup> The disparate number of commissions available to review prosecutorial decisions likely results in geographic differences in the quality of deliberations. Furthermore, recruitment difficulties and the public's general unfamiliarity with the PRC system have created many problems in managing and operating the PRC system.

At its seventh meeting in November of 1999, the JSRC began to examine revising the PRC law.<sup>50</sup> It took a year and a half, however, for the council to hold another substantial discussion on the revision. At the 55th meeting on April 10, 2001, the council members considered proposing that the resolutions "non-indictment is improper" and "indictment is proper" become legally mandatory.<sup>51</sup> The Ministry of Justice recommended that only the third resolution, "indictment is proper," should be

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46. Heisei 12 nen ni okeru keiji jiken no gaikyo (jo) [General situation of criminal cases in 2001 (part 1)], Apr. 23, 2000, <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai2/03.pdf>.

47. Kenshin: Odawara Kensatsushinsa Kyokai Soritsu 50 shunen Kinengo [PRC: The 50th Year of the Odawara PRC Society] (2004) at 35, Table (1), "Kensatsu Shinsakai Toriatsukai Shinsa Jikensu [Total Cases Examined by the PRC]."

48. In order to secure a sufficient number of PRC members and alternates, the PRC office staff had to visit candidates and ask their employers for permission to serve. While it may take two or three days to review each case, the appearance rate is still about 70%. See *Kokumin no Shihosanka Ni Kansuru Saibansho no Iken* [The Court's Opinions on Popular Legal Participation] (Sept. 12, 2000), <http://www.kantei.go.jp/jp/sihouseido/dai30/30bessi5.html>. The difficulties in recruiting potential PRC members were echoed in an interview with the PRC office staff in the Yokohama District Courthouse, Yokohama, Japan (interview on October 13, 2006 on file with author). The office staff often must write formal request letters to employers in order for PRC candidates to obtain permission to appear at a courthouse for PRC duties.

49. *Zenkoku no Kensatsu Shinsakai Ichiranhyo* [List of PRC Locations in Japan], (2006), <http://www.courts.go.jp/kensin/seido/itiran.html>.

50. *Shihoseido Kaikaku Shingikai: Dai 7 Kai Giji Gaiyo* [JSRC, No. 7 Proceeding Outline] (Nov. 24, 1999), <http://www.kantei.go.jp/jp/sihouseido/991126dai7.html>.

51. *Shihoseido Kaikaku Shingikai: Dai 55 Kai Giji Gaiyo* [JSRC, No. 55 Proceeding Outline] (Apr. 10, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html>.

legally binding. The Supreme Court agreed to recognize some type of legally binding status in case of the third resolution and the second resolution, "non-indictment is improper," but only when the commission's decision was unanimous. The JFBA suggested that the third resolution should carry legally mandatory status and require two-thirds of the vote. The JFBA also proposed having a practicing attorney serve as "legal advisor" to the PRC.<sup>52</sup>

Similar to its statement on the specification of the quasi-jury system, the final JSRC proposal was vague on the revision of the PRC law. Nevertheless, the first chapter of the proposal stated, "a system of giving legally binding force to specific resolutions by the Inquests of Prosecution [i.e., PRC] shall be introduced so as to reflect popular will more directly."<sup>53</sup> The second chapter also stated, "Although this system has been criticized on various grounds, it has played a considerable role. While paying attention to the guarantee of the due process of law for suspects, a system should be introduced that grants legally binding effect to certain resolutions. . ."<sup>54</sup> While the PRC law allows the commissions to make proposals or recommendations to chief prosecutors to improve prosecutorial affairs, the system has not functioned well. The third chapter thus stated, "Mechanisms should be introduced so as to enable the voices of people to be heard and reflected in the management of the public prosecutors offices, including reinforcing and making effective the system for proposals and recommendations from the Inquests of Prosecution [i.e., PRC] to chief public prosecutors regarding the improvement of prosecutorial affairs . . . and proposals and recommendations along with the responses to them could be made public."<sup>55</sup>

The OPJSR instructed the Quasi-Jury/Penal Matter Investigation Committee to deliberate on establishing a quasi-jury system and on revising the PRC law, and Chairman Inoue submitted an outline for PRC reform on November 11, 2003.<sup>56</sup> The first item was to make the PRC's decision legally mandatory (Section 1 (1)). The outline also suggests having a practicing attorney act as legal advisor for the commission (Section 2 (1)).<sup>57</sup> In

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52. *Kensatsu Shinsakai no Itteino Giketu ni Taishi Hoteki Kosokuryoku o Fuyosurutameno Hosaku: Hoso Sansha no Iken no Hikaku* [The Strategy to Provide a Legally Mandatory Status to a Particular Resolution by the PRC: Comparisons of Three Legal Professional Groups] (Apr. 10, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai55/55bessi2.html>.

53. JSRC, *supra* note 3, Ch. 1.

54. *Id.*

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

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

57. *Id.* § 2(1). See KENSATSU SHINSAKAI NO SOSIKI, KENGEN, TETSUZUKI TOU NO ARIKATA [IDEALS FOR THE PRC'S SYSTEM, AUTHORITY, AND PROCEDURE], (1) RIGARU ADOBAIZA (KASHO) NO ISHOKU [COMMISSION OF LEGAL ADVISOR (A TENTATIVE TITLE)].

April and May 2003, the investigation committee ran articles in newspapers, government bulletins, and legal journals, and set up a homepage to solicit public opinion on the proposals and guidelines.<sup>58</sup>

The public response was extensive. A court clerk criticized the committee's failure to present specific strategies for recruiting enough lay participants for commissions to convene. He said, "in recent years, many PRC meetings had to be adjourned for the poor attendance. The PRC system is in crisis. Even the media reported it. However, measures to improve recruitment had not been discussed at all."<sup>59</sup> Another person from Nara Prefecture suggested eliminating the PRC rule that automatically disqualifies candidates who are vision- or hearing-impaired. The JFBA sent a letter to the committee saying that "there was not even a single PRC member ever punished for leaking case-specific information and there is absolutely no need to increase the penalty."<sup>60</sup> Another influential civic group, called "Shimin no saiban-in seido tsukuro kai" (Citizens Committee for the Creation of a Quasi-Jury System), opposed the penalty against PRC members, suggesting that "no evidence exists to indicate that the current law failed to protect the secrecy of the PRC deliberation, thus there is no need to revise the law on punishment."<sup>61</sup> Both groups strongly advocated to make PRC resolutions legally binding. Based on public feedback, the committee submitted its final proposal and the Japanese Diet enacted the Act to Revise the Code of Criminal Procedure (including the PRC Law) on May 28, 2004.<sup>62</sup>

The revised PRC law does give PRCs the ultimate ability to force prosecution. First, when the PRC decides that the prosecutor should indict, the prosecutor will be obliged to reconsider his or her non-indictment decision, although the commission's decision is not yet legally binding. If the prosecutor still decides not to prosecute or fails to indict within three months, he or she will be invited to explain the non-indictment decision to the commission.<sup>63</sup> The commission will then re-evaluate the case, and if the PRC again recommends indictment, the recommendation is legally binding.<sup>64</sup> In the event of such decision, the court must appoint a lawyer to perform the prosecution's role until a ruling is reached.<sup>65</sup> However, the

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58. See OPJSR, *Saiban-in Seido oyobi Kensatsu Shinsakai Seido ni Tsuiteno Ikenboshu no Kekka ni tsuite* [Results of Public Opinions on the Quasi-Jury and PRC Systems] (July 2003), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/siryou/0307kekka.html>.

59. OPJSR, *Saiban-in Seido, Keiji Saiban no Jujitsu, Jinsokuka oyobi Kensatsu Shinsakai Seido no Kokkaku-an ni Tsuite no Ikenboshu no Kekka Gaiyo* [Resulting Outlines of Public Opinions on the Draft Framework of the Quasi-Jury, Enhancement and Speeding-up of Criminal Procedure and PRC Systems] 9 (Mar. 2004), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/siryou/0130kekka.pdf>.

60. *Id.* at 73.

61. *Id.* at 42.

62. Keiji Soshohoto no Ichibu o Kaiseisuru Horitsu [Act to Revise the Code of Criminal Procedure etc.], Law No. 62 of 2004, available at <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html> [hereinafter PRC Act].

63. *Id.* arts. 4 (2)( 2), 4 (6) (2).

64. *Id.* art. 41(6)( 1).

65. *Id.* art. 41(9)( 1).

actual instruction to investigate authorities will be entrusted to prosecutors.<sup>66</sup> The new PRC Law also created the position of a "legal advisor," who will be selected from the rank of practicing attorneys.<sup>67</sup> A legal advisor is appointed whenever the PRC feels that it needs advice on legal matters,<sup>68</sup> including when the commission is deciding whether to issue a legally binding recommendation for indictment.<sup>69</sup>

### III. Far Reaching Influence Beyond the Review of Prosecutorial Decisions

Given the fact that a prosecutor's indictment decision almost always leads to the conviction of the defendant, prosecutors' non-indictment decisions are a very significant part of the administration of justice in Japan. Due to the perception that prosecutors are less likely to prosecute politicians, former prosecutors, police officers, and people connected to powerful economic and political organizations,<sup>70</sup> the PRC could take on a significant role in reviewing prosecutors' non-indictment decisions in those cases.

The revision of the PRC law could potentially improve the administration of justice in Japan in four ways: (1) the commission could become a legitimate institution with the binding authority to serve as an important public check on prosecutorial power; (2) the commission will serve as a check on the local government, as the commission will be able to analyze non-indictment decisions in cases where the public is alleging misconduct by public officers or political groups; (3) the ability to register complaints will help protect and restore victims' rights; and (4) with well-organized and well-coordinated publicity efforts, the commission will be able to promote active legal participation by ordinary citizens from local communities.

The PRC's role may be even more important than quasi-jury or bench trials. The power and extensive discretion vested in prosecutors creates a great potential impact for official bias. According to recent allegations, prosecutors and police have begun to arrest and bring criminal charges against many suspected leftists, Koreans, Burakumin (descendants of out-

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66. *Id.* art. 41(9)(3).

67. *Id.* art. 39(2)(1).

68. *Id.*

69. *Id.* art. 41(4). The law requires that the PRC obtain the assistance of a legal advisor in considering the second resolution on the same case.

70. See David T. Johnson, *Bureaucratic Corruption in Japan*, (JPRI Working Paper No. 76, Apr. 2001), <http://www.jpri.org/publications/workingpapers/wp76.html> (reporting that prosecutors' tendency not to indict powerful figures in Japan for white collar crimes stems from the fact that prosecutors themselves engage in similar criminal activities, stating "leniency in the procuracy arises in part because prosecutors create and misuse slush funds as much as other bureaucrats do."); Stefan Voigt, *Power over Prosecutors Corrupts Politicians: Cross County Evidence Using a New Indicator*, LAW AND ECON. WORKSHOP, Paper 6, 7 (2006), available at [http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1157&context=berkeley\\_law\\_econ](http://repositories.cdlib.org/cgi/viewcontent.cgi?article=1157&context=berkeley_law_econ), (reporting that in many countries, "many prosecutors have incentives not to indict a member of the executive").

cast groups), and foreign workers for socio-political reasons. Furthermore, prosecutors have refused to indict police officers for illegal wiretapping and physically abusing politically unpopular defendants. The PRC system, unlike the quasi-jury system, directly deals with the problem of great prosecutorial and police discretion that otherwise exists at every stage of criminal proceedings.

Another reason that the PRC will probably play a more important role than the quasi-jury is that the overwhelming majority of quasi-jury trials will involve confessions, so that the defendant is already assumed to be guilty, and in only a very small proportion of them will the quasi-jury act as fact-finder. According to the 2005 Justice Statistics Report, for example, approximately 91.6% of criminal trials involved cases in which the defendants had already admitted their guilt, and defendants denied some or all charges in only 6.2% of the cases.<sup>71</sup> The Supreme Court estimated that there will be approximately 3,308 quasi-jury trials, of which only about 300 will be contested cases.<sup>72</sup> Lastly, public influence over the process could easily be diminished because professional judges will likely exercise, whether intentionally or unintentionally, guiding influence over the lay judges.<sup>73</sup>

A recent case dramatically illustrates the PRC's role in counteracting governmental abuse of power. In the case, a group of teachers at Tokyo municipal high schools, who had refused to salute the rising-sun flag and to sing the national anthem at graduation and enrollment ceremonies, were dismissed by Tokyo Governor Shintaro Ishihara and his officers. Since the end of World War II, Japan has been quite ambivalent toward its flag and anthem, and the Japanese government finally made them Japan's legal national symbols in 1999.<sup>74</sup> In October 2003, the Tokyo Metropolitan Board of Education made it compulsory to stand up, face the flag, and sing the anthem at graduation and enrollment ceremonies in public schools, and authorized punishment for disobedience.<sup>75</sup> In 2004 alone, 243 teachers have been punished for their disobedience and 67 more have been warned for failing to instruct their students to sing the anthem.<sup>76</sup> As of

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71. Yasuda, *supra* note 32; see also TSUJO DAI ISSHINJIKEN NO SHUKYOKU SOJININ: GOGI TANDOKU, JIHAKU NO TEIDOBETSU BENGU KANKEIBETSU ZENCHIHO KANI SAIBANSHO [SUMMARY COURT STATISTICS: CONSULTATION, INDIVIDUALS, ON DEGREE OF CONFESSIONS, BY DEFENSE COUNCIL] (2006), <http://www.courts.go.jp/sihotokei/nenpo/pdf/DKEI24.pdf> [hereinafter Court Statistics].

72. See Supreme Court, *Saiban-in seido no Taisho to Naru Jiken* [Subject cases of the Quasi-Jury System], (Apr. 2, 2006), available at <http://www.saibanin.courts.go.jp/introduction/event.html>.

73. See generally Isa, *supra* note 3.

74. Diet Enacts Flag-Anthem Bill, JAPAN ECON. NEWSWIRE, Aug. 9, 1999.

75. Tokyo Teachers to Sue Education Board over Compulsory Anthem Singing, JAPAN ECON. NEWSWIRE, Jan. 24, 2004.

76. See Norimitsu Onishi, *Tokyo's Flag Law: Proud Patriotism, or Indoctrination?*, N.Y. TIMES, Dec. 16, 2004, at A1. It is ironic that the current Japanese emperor said that the new requirement was not proper, responding "[i]t's not desirable to do it by force," when Tokyo Education Board Member Kunio Yonenaga, who oversees the new regulation, told the emperor, "Making sure that students and teachers raise the rising-sun flag

February 2006, a total of 24 schoolteachers have been fired.<sup>77</sup>

The dismissed teachers, their families, and their lawyers filed a complaint with the prosecutor's office in December 2004, alleging official misfeasance by Governor Ishihara and two superintendents of education.<sup>78</sup> Section 242 of Japan's Criminal Code of Procedure does not allow the prosecutor to refuse the complaint, requiring the prosecutor to initiate the criminal investigation accordingly.<sup>79</sup> The teachers and their supporters, however, had to file their complaints five more times until the prosecutors finally agreed to meet the teachers and their lawyers in early December 2005. On December 28, 2005, the prosecutor announced that they decided not to indict Ishihara and two other officers. The dismissed teachers and their support group then filed a complaint with the PRC in Tokyo on February 17, 2006.<sup>80</sup> Meanwhile, the Tokyo District Court dismissed a suit by a group of teachers, refusing to rescind their punishment by the Tokyo Education Board for protesting the hoisting of the national flag at a graduation ceremony.<sup>81</sup> On October 11, 2006, the PRC finally decided that the non-indictment was proper. The commission also issued a strong warning that "the leadership of the metropolitan board of education could be perceived to be heavy handed and it must exercise its leadership very carefully."<sup>82</sup> While the recent PRC's decision on the complaint has not resulted in prosecution, the PRC clearly has the legal authority to play a significant role in similar politically salient cases in the future.

Three major shortcomings of the PRC system, however, warrant careful treatment: (1) the PRC system and the PRCs' duties have not been well publicized, which has dissuaded citizens with legitimate claims from filing complaints; (2) the commissions have been poorly attended, especially in rural areas; and (3) there is no structural incentive for the prosecutor's

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and sing the national anthem at schools across the country is my job. I'm doing my best." *Id.*

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

78. "Japanese Teachers Bring Legal Action Against Governor over Flag, Anthem," *AGENCE FRANCE PRESSE* (Dec. 20, 2004). Even a retired teacher was not immune to the mandatory singing. Katsuhisa Fujita, a former social studies teacher, was indicted on December 3, 2004 during a graduation ceremony in Tokyo after he urged the crowd to boycott the mandatory singing of the national anthem. In June, 2006, the Tokyo District Court fined him 200,000 yen for "obstructing" the ceremony. See Editorial, *Education Policy on Trial*, *JAPAN TIMES*, June 7, 2006.

79. Keisoho, *supra* note 42, art. 242 ("On receipt of a complaint or accusation, a judicial police official shall promptly forward the documents and pertinent evidence pertaining to the public prosecutor.").

80. Ashizawa, *supra* note 77.

81. *Court Rejects Teachers' Suit over Flag Display Protest*, *JAPAN ECON. NEWSWIRE*, Sept. 12, 2006. It is ironic, however, that on September 21, 2006, the Tokyo District Court ordered the Tokyo Metropolitan Government to pay 12.03 million yen in compensation to 401 teachers who objected to the directive. See Jun Hongo, *Tokyo Teachers Win Anthem Fight*, *JAPAN TIMES*, Sept. 22, 2006.

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



office or the Ministry of Justice to promote or publicize the PRC duty to the local community, since prosecutors are also career bureaucrats in the Ministry of Justice.

#### IV. Japanese Legal Consciousness and Lay Participation in Legal Decision Making

In Japanese society, which reposes a high level of trust in authority figures, emphasizes group-oriented collective consciousness, and displays a strong desire to maintain harmony, RGJT founder Isa argues that it would be impossible for a quasi-jury system to function effectively.<sup>83</sup> Isa claims that an all-citizen jury trial is the only way to improve decision-making, reduce the impact of biased judges, and enhance the fairness of trials and the legitimacy of verdicts.<sup>84</sup> Law Professor Takashi Maruta argues that the deliberations of all-citizen PRCs, however, are very similar to American jury deliberation, which suggests that they are more independent of governmental influence than mixed tribunals (e.g., quasi-juries).<sup>85</sup> In Japan, due to the strong sense of obedience to legal authority, the difference between disagreeing with a fellow citizen and disagreeing with a professional judge during deliberations is significant. Does this mean that the quasi-jury system is doomed to fail even before the first trial begins in 2009? In order to examine this question, it is important to consider carefully the characteristics of Japanese legal culture and legal consciousness.

In his 1963 seminal work, Tokyo University Law Professor Takeyoshi Kawashima, known as the father of the sociology of law in Japan, coined the term "ho-ishiki" (law consciousness).<sup>86</sup> Scholars have traditionally defined legal consciousness as the way in which people make sense of the law, legal institutions, and legal norms. It is the product of experience with the law and ideologies about the law.<sup>87</sup> After observing a very small number of litigated cases and extensive, judicially-managed conciliation and mediation proceedings, Kawashima explained that Japanese citizens' reluctance to rely on litigation for dispute resolution stems from their weak legal consciousness and a deeply rooted cultural preference for informally medi-

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83. See Isa, *supra* note 3, at 3 ("You must leave the true civic legal institution to our next generation. Namely, it is the jury system."); Kiss, *supra* note 3, at 275 ("[B]ecause of the hierarchical nature of Japanese society and the Japanese respect for authority, the danger exists that the professional judge or judges would have more than simply their intended 'guiding' influence over the laypersons.").

84. *Id.*

85. Takashi Maruta, *Shiho eno Kokumin Sanka: Kensatsu Shinsakai o Chushin ni* [Citizen's Legal Participation: Mainly on the Prosecutorial Review Commission], 30 KONAN HOGAKU 109, 138 (1990).

86. See generally TAKEYOSHI KAWASHIMA, *Dispute Resolution in Contemporary Japan*, in LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY 41 (1963).

87. See, e.g., Kathleen E. Hull, *The Cultural Power of Law and the Cultural Enactment of Legality: The Case of Same-sex Marriage* 28 L. & SOC. INQUIRY 629 (2003); see generally PATRICK EWICK & SUSAN SILBEY, *THE COMMON PLACE OF LAW: STORIES FROM EVERYDAY LIFE* (1988).

ated and harmonious settlement of legal disputes.<sup>88</sup> In opposing the introduction of the jury trial in Japan, Kawashima also argued that Japanese citizens prefer judge-led, bench trials to an adversarial jury system because they would rather have their legal disputes judged by their superiors (i.e., judges) rather than their peers.<sup>89</sup>

Washington Law Professor John Haley first rejected the myths behind Kawashima's explanation of Japanese legal consciousness, arguing that Japan's low rate of litigation has little to do with cultural values and ideology.<sup>90</sup> Rather, he says, the dearth of litigation in Japan is a result of the legal system's "institutional incapacity," including an insufficient number of lawyers, bureaucratic requirements inhibiting access to the courts, and a systemic failure of the courts to provide adequate relief.<sup>91</sup> Indeed, Japan has 7,319 citizens per attorney, compared to 1,978 in France, 841 in Germany, 647 in England, and 358 in the U.S.<sup>92</sup> Additionally, Japanese litigation is very expensive and contingency fee arrangements are illegal. Hence, Japanese plaintiffs have to bear the costs themselves. Furthermore, a shortage of judges causes significant delays in court proceedings: the average length of an action is 20.3 months in contested cases.<sup>93</sup>

The view that Japanese legal culture and ideologies are the product of well-orchestrated governmental projects was shared by Sheldon Garon.<sup>94</sup> He coined the term "social management" to describe the process by which cultural values and ideologies are carefully nurtured and manipulated by the elites to fit the interests of the bureaucratic state.<sup>95</sup> Garon argues that the government has undertaken extraordinary efforts to involve citizens in various national cultural projects to "persuad[e] or teach[ ] the masses to internalize appropriate values."<sup>96</sup> The high level of trust for authority, the strong desire to maintain harmony, and other "traditional" cultural virtues and traits were thus specifically constructed by the interventionist state to manage and control Japanese society.<sup>97</sup>

The Japanese Supreme Court and the Ministry of Justice have relied on the traditional or essentialist view of Japanese legal consciousness developed by Kawashima in arguing against citizen-only juries. The Supreme Court has emphasized the strong preference of Japanese citizens for seeking amicable settlement over facing direct confrontation, as in adversarial

88. See generally TAKEYOSHI KAWASHIMA, *NIHONJIN NO HOISHIKI* [THE LEGAL CONSCIOUSNESS OF THE JAPANESE] (1967).

89. See A. Dedrick Castberg, *Prosecutorial Independence in Japan*, 16 *UCLA PAC. BASIN L.J.* 38, 71 (1997).

90. John O. Haley, *The Myth of the Reluctant Litigant*, 4 *J. JAPANESE STUD.* 359 (1978).

91. *Id.* at 378-89.

92. Kohei Nakabo, *Judicial Reform and the State of Japan's Attorney System*, 11 *PAC. RIM L. & POL'Y J.* 147, 150-151 (Yohei Suda trans.).

93. Phil Rothenberg, *New Product Liability Law*, 31 *LAW & POL'Y INT'L BUS.* 453, 510-13 (2000); Nakabo, *supra* note 92, at 175 ("The relatively small amount of damages the courts award for pain and suffering is an additional deterrent to litigation.").

94. SHELDON GARON, *MOLDING JAPANESE MINDS: THE STATE IN EVERYDAY LIFE* 6 (1997).

95. *Id.*

96. *Id.* at 7.

97. *Id.* at 15-16.

jury trials in the U.S., thereby relying on and perpetuating the myth that Japanese legal culture is characterized by "conformity" and "homogeneity."<sup>98</sup> The Supreme Court also argued that the introduction of the jury system would place a great burden on average citizens, pose an enormous economic cost to the nation, and would necessitate the repeal or amendment of many existing laws.<sup>99</sup>

Even though socio-political factors and structural constraints might play a large role in creating the current Japanese legal consciousness, with its emphasis on obedience to legal authority, the actual experience of participating in making legal decisions might have a counter-balancing effect on the legal consciousness of Japanese citizens.

For example, Chihiro Isa, one of RGJT's founders, served as a juror in a criminal trial in 1964 while Okinawa was still occupied by the United States, and that experience profoundly affected his legal consciousness. Isa said, "the jury summons I received in mid-September 1964 has changed my life. If I had not served on the jury, I never could have imagined becoming a writer or giving up my free, easy-going life style. . . . I am not sure how exactly my jury experience changed me, but I began to feel that chasing after fame and fortune seemed no longer important. . . . In a process of writing about my experience, I started to pay closer attention to the notion of rights, such as the rights of the accused, and his/her human rights."<sup>100</sup> While he was already a very successful businessperson, the experience of eight days of trial and three days of deliberation had a lasting impression, as he later became one of the premier non-fiction legal writers in Japan. Isa's experience was not an aberration.

## V. Cross-National Analysis of Civic Legal Participation

This section provides the results of a comparative analysis of Japanese and American respondents with regard to their experiences of civic legal participation. Their responses are examined in relation to their legal experiences, their perceptions of the justice system, and suggestions they might have, if any, to improve the quality of deliberation and experience in quasi-jury and grand jury systems.

### A. Methodology and Samples

We created four sets of cross-national data. In Japan, we asked the members of the Prosecutorial Review Commission Society to respond to

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98. Iwao Sato, *Survey Article: Judicial Reform in Japan in the 1990s*, 5 *SOC. SCI. JAPAN J.* 71, 79 n.12 (2002) ("The Supreme Court is especially suspicious of attempts to reform judge appointments, increase the number of judges, and introduce popular participation in trials, analogous to the Anglo-American jury system or the continental European popular participation system, wherein some lay assessors cooperate on an equal footing with professional judges."); *Id.* at 79 (quoting the same Supreme Court document: "Importance has been attached to offering homogeneous legal services and to achieving equally fair decisions across the nation under a uniform judicial system.").

99. Kiss, *supra* note 3.

100. Isa, *supra* note 3.

our research questions.<sup>101</sup> From September to December 2005, with the help of the President of the Japanese Prosecutorial Review Commission Society, we asked 229 members in 11 prefectural and regional offices to fill out the survey questionnaire. We interviewed those members who were willing to be interviewed by telephone.

In the United States, we asked prospective jurors who reported to a county courthouse in Dallas, Texas to fill out the same questionnaire. The survey was conducted between March 7 and April 3, 2006. A total of 2,564 prospective jurors responded to the survey questionnaire, and 1,011 of them indicated that they had previously served on juries.

Japan's PRC respondents are also sub-divided into those who did and did not engage in actual deliberations. In some regional districts, a small number of cases and/or poor attendance made it impossible to constitute the commission. In other cases, some PRC members remained as alternates and, therefore, did not participate in the deliberation. A total of 137 respondents said that they examined actual cases and participated in the deliberation.

#### B. Survey Questions

More than 70 questions were asked of the respondents, divided into the following seven sets: (1) willingness or desire for legal participation; (2) perceived obstacles to legal participation; (3) confidence in civilian legal participation; (4) commitment to moral/ethical responsibilities; (5) confidence in jurors' abilities; (6) fear of serving due to possible retaliation from defendants and/or their families; and (7) specific Japanese quasi-jury questions, including confidentiality requirements, resident aliens' potential participation as quasi-jurors, possible affirmative programs to increase female and minority attorneys, and publicity about quasi-jury service in local communities. Respondents were asked to rate their agreement on a five-point Likert scale: (1) strongly agree; (2) somewhat agree; (3) uncertain/neutral; (4) somewhat disagree; and (5) strongly disagree.

#### C. External Validity of 2005 PRC Survey

First, let us examine the representativeness and general significance of the 2005 PRC survey results and its findings. In 2000, the JFBR asked all members of the PRC Society to respond to a one-page survey questionnaire. The survey was perhaps the largest survey project ever conducted on

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101. In order to promote popular legal participation and publicize the importance of its duty in Japan, the Prosecutorial Review Commission Society was established in 1955. Currently many regional branch offices exist all over Japan. While approximately 490,000 people have served in review commissions, not everyone automatically becomes a member of the society. The active conduct of business of the society is only supported by members' volunteer work. There are variations as to the extent of activities and member recruitments among regional branches. When the JFBA asked the society members to respond to a survey questionnaire in 2000 in one of the largest surveys ever conducted on popular legal participation, 2,315 members completed the questionnaire. See JFBA, *KENSATSU SHINSA KYOKAIIN NI TAISURU ANKE-TO KEKKA HOKOKUSHO* [THE FINAL REPORTS OF THE RESULTS OF THE JFBA SURVEY] (2001).

the Japanese grand jury system. The questionnaire was sent to approximately 5,800 PRC Society members all over Japan, and 2,315 of them responded (i.e., a 39.9% response rate).<sup>102</sup> The 2005 survey, on the other hand, asked the members of eleven prefectural PRC society offices to respond to the two-page questionnaire, and a total of 229 respondents completed the questionnaire.

Table 1 shows very similar results between the PRC surveys conducted in 2000 and 2005 in terms of respondents' profiles and their opinions

**Table 1: The 2000 JFBA Survey and the 2005 Cross-National Survey of Prosecutorial Review Commissions Society (PRCS) Members**

Variables and Questions	2000 JFBA <sup>1</sup>	2005 CNJR <sup>2</sup>
Gender	—	66.3%
Male		
Age <sup>3</sup>		
20-29	0.7%	0.5%
30-39	3.0	1.5
40-49	8.4	3.9
50-59	22.1	14.2
60-69	32.5	36.3
70-79	26.5	37.3
80-89	6.3	6.4
90 & over	0.5	0.0
<b>(A) Opinions on the PRC System and Experience</b>		
I feel my PRC experience was a positive one	98.2	98.6
PRC that asks civilian participation is a good system	90.2	93.5
<b>(B) Quality of PRC Deliberation</b>		
I feel that the deliberation covered the main issues	89.6	87.4
My employer would not be resentful of my quasi-jury duty <sup>4</sup>	72.4	64.1
In high profile cases, quasi-jurors are incapable of separating actual evidence from media coverage <sup>5</sup>	35.7	49.3
<b>(C) Opinion on the Introduction of the Jury System</b>		
I support introducing a jury system in Japan <sup>6</sup>	76.5	70.6

Note: n=2,315 for the 2000 Japanese Federation of Bar Associations (JFBA) survey & n=229 for the 2005 Cross-National Jury Research (CNJR) survey

1. The figure shows the percentage of those who responded with "yes."
2. The figure shows the percentage of those who responded with "strongly agree" or "somewhat agree" with the statement.
3. The respondents who failed to give their age are excluded from the analysis.
4. The question in the 2000 JFBA survey was phrased as: "Some critics claim that pretrial publicity often influences trial outcomes. When prejudicial publicity against defendants saturates the community, despite the judge's instruction, jurors often become incapable of making a fair and right judgment." The question in the 2005 CNJR survey is phrased as: "In a media saturated trial like the Wakayama Curry murder case, quasi-jurors are incapable of separating facts from media reports."
5. The question in the 2000 JFBA survey was phrased as: "If selected as a juror, you may have to spend several days in a courthouse. Do you believe that people will understand the importance of your jury duty?"
6. The question in the 2005 CNJR survey was phrased as, "I support introducing a jury system if debated in the Cabinet."

regarding their PRC experiences.<sup>103</sup> While the 2000 survey did not report the gender breakdown, it is safe to say that the results of the 2005 survey may be generalized over PRC members who responded in 2000. For example, both surveys found that the majority of PRC respondents were in their 60s and 70s. While the 2000 JFBA survey failed to ask for the age at which respondents served in the PRC, the 2005 survey shows that the majority of PRC members served in their 40s and 50s. Similarly, the overwhelming majority of them were employed when they served. The age and economic profiles of the respondents who served in the Japanese grand jury are very similar to those of American jurors.<sup>104</sup> The majority of respondents indicated their support of the ruling Liberal Democratic Party (53.6%), and nearly one half of them indicated that they were conservative in their political views (48.9%). Many have been in the PRC Society for a long time – members who served in their 20s have been in the Society for an average of 31.3 years, and those who served in their 30s and 40s (45.4% of the respondents) for an average of 27.6 and 20.7 years, respectively.

When posed with questions about their support for the introduction of the jury system, rather than the mixed court system, more than 70% of PRC members in both surveys indicated that they would support the introduction of the jury system in Japan (76.5% in 2000 and 70.6% in 2005).

#### D. Legal Consciousness of PRC Members

Table 2 examines PRC members' experiences with legal participation and their opinions on the quality of deliberation in the commission and on the newly revised PRC law. The PRC respondents who actually participated in case deliberations tended to feel that their experience was more positive and that the PRC system was a better governmental system than those who did not participate in deliberations. Their positive experience is also reflected in their willingness to serve again: almost three out of four respondents with deliberative experience stated that they wanted to serve on a commission again sometime in the future (76.1%).

However, when respondents were asked whether or not they initially wanted to serve, many PRC respondents did not originally share their enthusiasm (38.5% and 53.3% for those with and without deliberation experience, respectively). Such lack of enthusiasm, or even strong hesitation, for duty was not uncommon among PRC members. In a recent interview conducted by a Japanese newspaper reporter about his experience, Tatsuhiro Ojima, 64, recalled, "I'd never even heard about such a commission, nor did I know anything about the courts or the legal system, so it felt a bit scary."<sup>105</sup> He responded to the present survey, stating, "At first, I felt I

103. It is important to note that almost 40% of the PRC respondents came from two prefectures, Aichi and Chiba—two of the largest metropolitan regions in Japan.

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

105. Setsuko Kamiya, *Men with a Mission: Inquest Service Fuels Ardor for "Democracy"*, JAPAN TIMES, Feb. 27, 2005.

**Table 2: Japanese Prosecutorial Review Commission Members' Experiences and Opinions on the Quality of Deliberation and New Requirements**

	Participation in PRC Deliberation	
	Yes	No
<b>(A) Opinions on the PRC System and Experiences</b>		
I feel my PRC experience was a positive one	100.0	95.6
PRC that asks civilian participation is a good system	95.5	86.4
<b>(B) Motivations to Become a PRC Member</b>		
To tell the truth, I did not want to become a PRC member initially.	38.5%	53.3%
I want to serve as a PRC member again	76.1	51.1
<b>(C) Quality of Deliberation</b>		
I feel that the deliberation covered the main issues	90.1	—
I feel that the DA's participation in joint deliberation could have been helpful	53.0	70.5
<b>(D) New PRC Rules: Prosecutors' Explanations &amp; Confidentiality Requirement</b>		
A confidentiality rule is a good rule	97.0	91.1
The new PRC rule mandated prosecutors' explanation on an indictment decision. I believe that DA's explanation is necessary	96.9	93.1

Note: n=229

was not confident and it is cumbersome, but I was able to feel a strong sense of accomplishment after having done it and I am very glad that I have served.”<sup>106</sup>

Similarly, the vast majority of PRC participants felt that the deliberation covered the main issues (90.1%). With respect to the new PRC rule that requires public prosecutors to explain their decisions after the commission issues the “indictment is proper” resolution, the overwhelming majority of PRC members supported the requirement of prosecutorial explanations (96.9%). When asked whether or not the prosecutors' participation in deliberation could benefit their decision making, only 53.0% responded affirmatively. The finding is significant for the quasi-jury system, where both professional and lay judges deliberate together to determine the trial outcome.

Therefore, although nearly all PRC members are willing to listen to prosecutor's explanations and their views of the case, only half of the respondents (53.0%) are willing to engage in actual deliberation with prosecutors. Unexpectedly, we also found that the overwhelming majority (97.0%) of PRC members favor imposing a confidentiality rule on PRC members.

#### E. Cross-National Analysis of Legal Consciousness Among Japanese and American Respondents

Table 3 shows the results of a cross-national analysis of the legal experiences of Japanese and American jurors. The overwhelming majority of

106. A PRC survey questionnaire administered at the Matsudo PRC Society (on file with author).

Table 3: Japanese Legal Consciousness and the Impact of Lay Participation in the Legal Process

QUESTIONS	American Jurors		Japanese PRC Members	
	YES	NO	YES	NO
<b>(A) Willingness for Legal Participation</b>				
I am willing to serve as a juror <sup>1</sup>	92.7%	82.8%	58.0%	48.9%
I feel it is my duty to serve as a juror when needed <sup>2</sup>	94.7	87.1	90.9	88.9
<b>(B) Perceived Obstacles to Jury Service</b>				
If I could pick the date of jury service 6 months in advance, I could easily serve	72.7	67.8	81.4	65.9
My employer would not be resentful of my jury duty	81.9	72.2	62.4	60.9
<b>(C) Confidence in Public Legal Participation</b>				
It is extremely difficult for ordinary people to determine the verdict (i.e., guilty/not-guilty)	24.5	26.3	51.1	51.8
It is difficult for ordinary citizens to determine an appropriate penalty in a criminal trial	40.5	40.5	32.3	41.3
In high profile cases, jurors are incapable of separating actual evidence from media coverage <sup>3</sup>	37.1	42.2	46.2	53.5
<b>(D) Moral/Ethical Responsibilities</b>				
I would feel overwhelmed if I had to make a judgment on the defendant and his/her charges	24.1	29.0	75.0	87.0
I am confident that, if I became a juror, I could make a fair and just judgment	94.5	88.0	62.6	50.0
<b>(E) Confidence in Jurors' Abilities</b>				
If I became a defendant in a criminal case, I would prefer a jury trial to a judge trial <sup>4</sup>	82.3	73.6	56.0	60.9
A jury's decision reflects the community's values and judgments	86.2	81.5	92.4	84.1
<b>(F) Fear of Serving as Jurors: Possible Retaliation from Defendants and/or Their Families</b>				
If I became a juror, I would be concerned about potential retaliation from the defendant	25.0	30.8	54.1	68.9
In a trial where many gang supporters may appear, I believe I could make a fair judgment as a juror	83.2	75.0	50.7	45.6
<b>(G) Confidentiality, Resident Alien's Participation, and Publicity about Jury Service</b>				
It would be very difficult for me never to discuss my jury experience	49.2	46.2	54.0	55.6
The importance of jury duty is widely advocated in my community	72.4	59.8	14.6	11.3
Every taxpayer including permanent residents (non-citizens) should be allowed to serve on juries	41.6	44.8	55.1	29.4
It is important to increase female judges/lawyers as they only make up 12% of Japan's bar <sup>5</sup>	58.2	61.5	75.3	72.7

Note: A number of respondents are: American respondents (n=2,564) and Japanese respondents (n=229).

1. The term "juror" was translated as "quasi-juror (Saiban-in)" in the Japanese survey questionnaire.
2. The Japanese question was phrased as: "If quasi-jury service is considered a duty that must be performed, I feel that I must serve."
3. The Japanese question was phrased as: "In a media saturated trial like the Wakayama Curry murder case, quasi-jurors are incapable of separating facts from media reports."
4. The Japanese question was phrased as: "Saiban-in's decision is fairer than judge's decision."
5. The American question was phrased as: "It is important to create programs to increase a number of female and minority lawyers."

American respondents expressed their willingness to serve as jurors (92.7% and 82.8% for those with and without jury experience, respectively). A smaller majority of Japanese PRC members with deliberative experience (58.0%) were interested in serving again as jurors, and of those Japanese respondents without deliberative experience, fewer than half (48.9%) wanted to serve as jurors. When we proposed jury service as an



official duty requested by the government, however, the great majority of Japanese respondents indicated their desire to serve.

The next set of questions examined the respondents' work-related responsibilities as potential obstacles or barriers to their serving on juries. With respect to possible schedule conflicts with jury service, more than 80% of PRC members with deliberative experience felt that it would be easier for them to serve if they could pick the date of jury service six months in advance (72.7% and 67.8% for Americans with and without jury experience, respectively). Similarly, the majority of those with jury experience felt that their employers would not be resentful of their jury duty (81.9% and 62.4% for American and Japanese respondents). For both the American and Japanese sample sets, those respondents with jury experience predicted that schedule conflicts and work-related resentment from their employers would be less than respondents without jury experience. The next set of questions examined the respondents' confidence in civilian legal participation and jurors' ability to determine a fair verdict, set an appropriate sentence, and separate facts and evidence from prejudicial media reports, especially in highly publicized criminal cases. Those with deliberative experience consistently showed greater confidence in jurors' ability to determine both the verdict and the penalty and to separate facts and evidence from potentially prejudicial media reports. With regard to the ethical responsibility of jury duty, both American and Japanese respondents with deliberative experience are also less likely to feel overwhelmed in judging the defendants and their crimes.

The majority of Japanese respondents, regardless of whether they had deliberative experience, expressed strong concerns about their safety related to jury service, possibly for fear of retaliation by the convicted defendant. In both America and Japan, respondents with jury experience are less concerned about the potential threat of retaliation from the defendant than those respondents without deliberative experience. Accordingly, the vast majority of American respondents said they could come to a fair decision even in a jury trial where many gang supporters appear in court (83.2% and 75.0% for those with and without jury experience, respectively). While the PRC members with deliberative experience showed greater confidence in their ability to make a fair judgment in such situations than those without deliberative experience, Japanese respondents in general are more fearful of potential retaliation by defendants.

As in the United States, it is illegal for participants in both the PRC and quasi-jury systems to disclose "deliberation secrets" or case-specific information, and almost half of both American and Japanese respondents felt it difficult to comply with the confidentiality requirement. The Japanese respondents found the confidentiality requirement slightly more burdensome than the American respondents.

American respondents were generally uncomfortable with the idea of permanent resident aliens serving on juries. The only exception was that slightly more than half of Japanese respondents with deliberative experience felt that non-citizens should be allowed to serve on the jury (55.1%).

The majority of all four groups supported affirmative action type programs to increase gender diversity in the bar. Surprisingly, among the four groups, the lowest level of support for such affirmative programs was found among American jurors (58.2%).

A very small percentage of Japanese respondents felt that the importance of jury duty is espoused in their communities (14.6% and 11.3% for PRC members with and without deliberative experience). By contrast, a large majority of American jurors indicated that they had been exposed to publicity about the importance of jury duty in their local communities (72.4% and 59.8% for those with and without deliberative experience). These findings underscore that the system of civilian legal participation is inadequately publicized in Japan.

#### F. Public Confidence in the Criminal Justice System

Table 4 examines the effect of legal participation on confidence in the government and the criminal justice system. Past jury research has indicated that positive jury experience leads to greater confidence in the system of justice.<sup>107</sup> Our findings are consistent with previous findings that people with jury experience tend to consistently show a higher level of confidence in the system of government and justice. They also show greater confidence in those who work in the justice system, including judges, prosecutors, defense attorneys, the police, and jurors.

An interesting finding is the near complete confidence expressed by Japanese PRC respondents in prosecutors (99.2% and 100.0% for those with and without deliberative experience, respectively), although American jurors' level of confidence is also very high (83.8%). The difference between American and Japanese respondents' views may be due to the fact that PRC members' jobs are specifically to review prosecutors' exercise of discretion in determining non-prosecution. Japanese respondents also showed more confidence in both print and electronic media than American respondents. While respondents of both nationalities generally trust newspapers more than TV or radio, four out of every five Japanese respondents expressed their confidence in newspapers (80.0% and 78.0% for those with and without deliberative experience), whereas only about half of American respondents did (52.5% and 53.8% for jurors and non-jurors).

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107. John Gastil et al., *Seeing is Believing: The Impact of Jury Service on Attitudes Toward Legal Institutions and the Implication for International Jury Reform*, (2006) (unpublished manuscript on file with author); cf. John Gastil, *Deliberation at the Margins: Participant Accounts of Face-to-Face Public Deliberation at the 1999-2000 World Trade Protests in Seattle and Prague*, 5 QUALITATIVE RESEARCH REPORT, 1 (2004) (discussing the connection between public deliberation and civic engagement with regard to the WTO protests).

**Table 4: Japanese and American Respondents' Confidence in the Government, the Criminal Justice System, and the Mass Media**

Confidence	American Jurors		Japanese PRC Members	
	Yes	No	Yes	No
<b>(A) The Overall Government</b>				
Federal/Central Government	77.5%	72.1%	82.2%	80.0%
<b>(B) The Criminal Justice System</b>				
The Court (Judges)	94.1	88.2	98.5	100.0
Prosecution	83.8	77.7	99.2	100.0
Defense Attorneys	81.1	74.3	93.9	83.0
Jurors (Quasi-Jurors)	92.3	84.2	90.5	86.5
Police	88.6	81.7	93.2	85.4
<b>(C) Mass Media</b>				
TV/Radio <sup>1</sup>	47.2	44.2	65.2	56.1
Newspapers	52.5	53.8	80.0	78.0

1. In a Japanese survey questionnaire, only TV (not radio) is asked.

## VI. Potential Problems with Japan's Civic Legal Participation

The overwhelming majority of Japanese respondents, and a majority of American respondents, indicated that their legal experiences were very positive and expressed their willingness to serve again. These findings seem to support past research that positive civic legal experience leads to greater civic confidence and positive attitudes about the jury and other criminal justice institutions. The respondents with jury experience also saw fewer obstacles than those without jury experience to carrying out jury duties and expressed greater confidence in juries' abilities generally to make fair and just decisions based on the facts and evidence. Similarly, they felt less fear of retaliation from defendants and found it less difficult to keep information regarding their jury experience confidential. These findings hold for both Japanese and American respondents.

Despite the PRC members' greater confidence and willingness to serve, it is important to note that both the quasi-jury and PRC laws have imposed very strict confidentiality requirements on civilian legal participants. Article 79 of the Quasi-Jury Act specifically states, "[w]hen persons employed as quasi-jurors or reserve quasi-jurors leak deliberation secrets or other secrets learned in their employment, they are subject to a fine of up to 500,000 yen and/or imprisonment for up to 6 months."<sup>108</sup> As stated earlier, the Quasi-Jury Law has impacted the PRC Act and its Article 44 now has the same text as Article 79 of the Quasi-Jury Act. Previously, the penalty was a fine of up to 10,000 yen with no possibility of incarceration. But the new law makes the consequences for disclosing deliberative secrets and information by PRC members more severe.

108. Quasi-Jury Act, *supra* note 1, art. 79.

#### A. Lack of Publicity on the Quasi-Jury and Prosecutorial Review Commission Systems

The importance of civic legal participation has not been widely communicated to Japanese communities, suggesting that PRC duties probably remain virtually unknown in Japan. For example, in a 1990 national poll by the Japanese Cabinet Office, 68.8% of respondents had no knowledge of the PRC system or PRCs' duties.<sup>109</sup> Even among those with knowledge of the PRC system, 73.8% of them did not know who could actually be selected for the commission.<sup>110</sup> Public unfamiliarity with the PRC system, PRCs' duty, and their civic importance has also caused panic and even hysteric reactions in those who have been summoned for PRC duty. For example, a woman in Nagasaki Prefecture committed suicide after she received a summons for jury duty because she thought she was receiving something from the prosecutor's office.<sup>111</sup> In addition to its obscurity, strict confidentiality requirements and severe penalties imposed on quasi-jurors and PRC jurors may further discourage, and even scare, many people from jury service.

On March 14, 2006, a justice minister announced that, in an effort to publicize the quasi-jury system and the importance of civic legal participation in Japan, the Ministry of Justice along with the Supreme Court and the JFBA have so far sponsored approximately 4,000 forums and symposiums and about 200,000 people attended them.<sup>112</sup> The current publicity efforts by the Japanese government, however, may not be sufficient. For example, before the first jury trial began in 1928, the pre-war Japanese government held 3,339 nation-wide lectures and forums to educate the public about the importance of lay legal participation, and a total of 1.24 million people attended those meetings. Similarly, the government produced and distributed 8.24 million copies of educational pamphlets and materials on jury service and made seven movies to publicize the jury system.<sup>113</sup> Considering that only men aged 30 and over who paid an annual tax of three yen or more were eligible for jury service, i.e., only three percent of the entire Japanese population, the pre-war Japanese government did a better job than the current government in publicizing the importance of jury service and jury trial.<sup>114</sup>

#### B. Jury Diversity and Resident Aliens' Legal Participation

Despite viewing their jury experiences positively and developing greater confidence in the criminal justice system as a result, Japanese and Ameri-

109. Naikakufu Seifu Kohoshitsu [Cabinet Office, Public Relations], *Kensatsu Shinsakai Seido ni Kansuru Seron Chosa* [Public Opinion Poll on the PRC System] (Oct. 1990), <http://www8.cao.go.jp/survey/h02/H02-10-02-15.html>.

110. *Id.*

111. Mitsuru Shinokura, *Shitteimasuka? Kensatsu Shinsakai* [Have You Heard of Them? Prosecutorial Review Commissions] 405 SHOSAINO MADO 13, 14 (1991).

112. *Daijin Kakugi go Kishakaiken no Gaiyo* [Outline of Press Meeting by Minister] (Mar. 17, 2006), <http://www.moj.go.jp/SPEECH/POINT/sp060317-01.html>.

113. MARUTA, *supra* note 3, at 187.

114. *Id.*

can jurors are similarly opposed to resident aliens serving on juries. If jury service is a positive experience, and the jury system is positively regarded by its participants, why not allow every taxpayer, including permanent resident aliens, to serve on juries? The availability of jury service for resident aliens is of great importance in Japan, as Koreans constitute the largest ethnic minority group and approximately 80% of them were born in Japan.<sup>115</sup> Unlike the United States, the Japanese government does not confer citizenship on people born in the country, and permanent aliens have no right to vote or participate in the civic legal system in Japan. Due to discrimination against members of Korean and other ethnic minorities, racial profiling has become common and remains a cornerstone of public and criminal justice policy.<sup>116</sup> Granting voting rights and the privilege of jury service to resident aliens would introduce their views, opinions, and life experiences into legal decision making in Japan. While Japan still faces a long, difficult road to legal reform favoring non-citizens, South Korea revised its election law in 2005 and granted the right to vote in local elections to permanent foreign residents living there for three years or more, including ethnic Japanese, Chinese, American, and other minority groups.<sup>117</sup> The 2005 law also lowered the voting age from 20 to 19, thereby expanding the voting population.<sup>118</sup> The first election under the new law took place on May 31, 2006.<sup>119</sup> Changes in the electoral system and expansion of the political franchise may be another sign of South Korea's movement towards the development of a fairer and more balanced democracy in East Asia. In the near future, permanent resident aliens in South Korea, who are already entitled to vote, may be permitted to serve on juries.

South Korea's legal transformation has been quite remarkable because, unlike Japan, South Korea never had a history of jury trials. The introduction of the jury system may also have impacted another branch of the South Korean government. In 2005, the Ministry of Defense announced that it would also adopt a jury system in which officers, noncommissioned officers, and rank-and-file soldiers could participate as jurors in an effort

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115. If Burakumin, formally called "Eta," is considered as an ethnic minority group, the Korean population is then the second largest minority group in Japan. For socio-historical studies of those two ethnic minorities in Japan, see generally YASHUNORI FUKUOKA, *ZAINICHI KANKOKU, CHOSENJIN: WAKAI SEDAINO AIDENITTI* (1993) and its English translation, *LIVES OF YOUNG KOREANS IN JAPAN* (2000).

116. One example of racial profiling as part of public policy could be seen in a recent governmental proposal to create a crime index of "foreignness" at the National Research Institute of Police Science (NRIPS). The forensic indexing system by NRIPS was designed to determine the nationality of perpetrators based on samples of blood and semen from crime scenes. See Debito Arudou, *Forensic Science Fiction*, *JAPAN TIMES*, Jan. 13, 2004.

117. See Cho Chung-un, *Elections Expand Voting Rights for Foreigners, Younger Citizens*, *KOREA HERALD*, May 25, 2006.

118. *Id.*

119. *Id.*

to increase public trust in military tribunals.<sup>120</sup>

The quasi-jury law imposes a lifetime ban on quasi-jurors from sharing case-specific information from their deliberations. Section 2 of Article 79 imposes criminal liability on quasi jurors if:

a secret learned in their employment (excluding deliberation secrets) is leaked . . . [and] a deliberation secret of either the quasi-jurors' or empanelled judges' opinions or the number of those who held these opinions, which the quasi-jurors were allowed to hear at deliberations conducted with empanelled judges and quasi-jurors, or deliberations conducted with only empanelled judges, is leaked.<sup>121</sup>

According to this law, it is almost impossible to share any information from one's jury experience with anyone. Because American jurors often talk about their experiences at school, in the workplace, and at home, they can share information regarding the jury trial with a greater audience without disclosing deliberative or case-specific, sensitive information. Indeed, if popular participation in the administration of criminal justice would greatly improve civic attitudes towards the system of government, why not allow former jurors to share their experience with other people?

Past research indicates that civilian participation in law has the potential to fulfill the following functions in a system of checks and balances in a democratic government: (1) improve the quality of decision making; (2) reduce the impact of biased or overzealous judges; (3) keep the justice system responsive to changing community values and judgments; (4) represent the diversity of civilian experiences and perspectives; and (5) decrease the likelihood of governmental abuse of power and arbitrary exercise of discretion in prosecutorial decisions.<sup>122</sup> In order to fulfill the socio-legal functions of the jury system, the government will need to educate the public on the importance of the jury system over the next several years.

## VII. The Revised PRC as an Agent of Social Change in Japan's Legal Landscape

The PRC holds tremendous potential to become an important mechanism for social change in Japan. As stated earlier, Japan has one of the highest criminal conviction rates in the world: 99.9% of the criminal cases under indictment by Japanese prosecutors result in conviction.<sup>123</sup> Such an unusually high conviction rate might mean that public prosecutors are highly selective in the cases they choose to prosecute, and that charges are

120. Joo Sang-min, *Military Seeks to Revise Martial Laws*, KOREA HERALD, July 20, 2005. In 2012, the South Korean jury system will be reviewed and permanently implemented with or without major changes.

121. Quasi-Jury Act, *supra* note 1, art. 79(2)(i), (ii).

122. See Stephen Thaman, *Japan's New System of Mixed Courts*, ST. LOUIS-WARSAW TRANSATLANTIC L.J. 89, 93-95 (2001/2002). For racially diverse jury representation and its effects on trial fairness and verdict legitimacy, see HIROSHI FUKURAI & RICHARD KROOTH, *RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION* (2003).

123. Yasuda, *supra* note 32, para 2.

usually filed in cases with the greatest likelihood of success, such as those in which defendants have already given confessions.<sup>124</sup> Karel van Wolferen once said that in Japan, “[t]o all intents and purposes . . . the prosecutor is judge.”<sup>125</sup> The reverse side of the powerful prosecutorial exercise of discretion is that, if one can escape the indictment, he or she will most likely be cleared of the alleged wrongdoing. Those who escape indictment, however, tend to come from particular socio-political sectors of Japanese society. They generally are members of law enforcement agencies, lawmakers in the Diet, or bureaucratic elites in the Japanese government.<sup>126</sup> The controversial “shobun seikun” (requests for instructions on steps to be taken) system of responsibility within the prosecutors office, for example, has led to the dismissal of many cases involving individuals with close ties to the government.<sup>127</sup> Van Wolferen stated, “Individual prosecutors . . . are expected, before taking action against influential officials, ministers, Diet members or local government leaders, to write preliminary reports for their superiors all the way up to the ministry of justice, and to wait for their consent.”<sup>128</sup>

The PRC has reviewed alleged criminal acts and unethical conduct committed by this group, whose interests have long been protected by prosecutors. As examined in Part III, the PRC has been investigating many alleged instances of official misconduct, including the recent allegation of official misfeasance by Tokyo government officials. In the following three much-publicized cases, the PRC has issued “indictment is proper” resolutions where the defendants were law enforcement officers, a legislator in the Diet, and government bureaucrats after prosecutors investigated their cases and decided not to prosecute. In one of the cases, the PRC issued two “indictment is proper” resolutions. In all three, however, the prosecutor refused to act on the commissions’ recommendation. Those government-related cases, however, will be significantly affected once the newly revised PRC law is put into effect in May 2009.

#### A. The Case against Chief and Deputy Chief Police Officers

On July 21, 2001, in Akashi City in southern Japan, a large crowd of 130,000 people attended a fireworks display organized by the Akashi Municipal Government. A stampede occurred shortly after 8:30 p.m. on a six-meter-wide, 100-meter-long pedestrian bridge connecting a train station and seashore where the fireworks display was held.<sup>129</sup> Nine children from five months to nine years of age were crushed to death and 247 people were injured in the stampede. Two elders were also killed, including a 71 year old woman who covered a pram on the pedestrian overpass with

124. *See id.* at para. 1 (“The Confession Rate in Japan is . . . relatively high at about 92%.”); DAVID JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN*, 243 (2002) (suggesting that the confessions are the cornerstone of Japan’s entire criminal justice system); Court Statistics, *supra* note 71.

125. KAREL VAN WOLFEREN, *THE ENIGMA OF JAPANESE POWERS* 221 (1990).

126. *Id.* at 223-24.

127. *See id.*

128. *Id.*

129. *Ten People Crushed to Death at Fireworks Display*, *JAPAN TIMES*, July 23, 2001.

her body to save a two-month-old boy.<sup>130</sup> The Akashi police initially blamed the incident on youths who were allegedly sitting and watching the fireworks on the bridge, blocked others, and caused unexpected overcrowding that triggered the deadly stampede.<sup>131</sup>

Later it was revealed that those youths actually played a principal role in rescuing victims, by climbing on top of the bridge, pulling children up, directing the crowd to safer places, and calling for help.<sup>132</sup> The report by the municipal investigation panel found that the Akashi Police Station, the city government, and a security firm were together responsible for the incident by being “unbelievably reckless” in their preparations for the event.<sup>133</sup> The report stated that the disaster was foreseeable because Akashi City also held a millennium celebration in December 2000 at the same site and a similar situation resulted when nearly 3,000 people surged onto the foot-bridge.<sup>134</sup> The panel also found that top administrators of the Akashi Police Station in particular failed to place officers on the overpass or take any other measures to prevent the accident.<sup>135</sup> Despite the findings of the panel and investigations by prosecutors, in December 2002 the prosecutor’s office decided not to indict the chief or deputy chief officer of the Akashi Police Station for the incident. Four months later, the families of the victims filed an appeal of the prosecutor’s decision. In April, 2004, the commission issued an “indictment is proper” resolution and urged prosecutors to indict the two officers.<sup>136</sup> The commission stated that the two officers had the lead responsibility for drawing up security and crowd control plans for the event, and it was their failure to issue adequate instructions to subordinates that resulted in the fatal accident.<sup>137</sup>

The prosecutors again decided not to indict. In a civil compensation suit filed by victims’ families, however, the district court asserted that the Akashi police’s security planning was lax, and that much of the blame lay with the police chief, although he was not indicted.<sup>138</sup>

The families filed another review of the non-indictment decision, and in December 2005, the PRC delivered another “indictment is proper” reso-

130. *Man Remembers Wife Who Saved Baby Boy in Fatal Stampede*, JAPAN ECONOMIC NEWSWIRE, July 21, 2002.

131. *Youths Suspected in Akashi Fireworks Fatal Stampede*, KYODO NEWS SERVICE, July 23, 2001.

132. *Akashi Hodokyo Jiko: Gokaisareta Yaneno Ueno Shinjitsu [Akashi Pedestrian Bridge Accident: Misunderstood the “Above the Roof” Truth]*, KOBE SHIMBUN, Aug. 5, 2001.

133. *Panel Finds City, Police at Fault in Fireworks Stampede*, JAPAN ECONOMIC NEWSWIRE, Jan. 30, 2002.

134. *Police Must Assume Primary Responsibility for Crowd Control*, MAINICHI DAILY NEWS, Feb. 4, 2002.

135. *Paper Sent on 12 in Overpass Disaster*, DAILY YOMIURI, May 10, 2002.

136. *Indictment of Cops Urged in Bridge Deaths*, DAILY YOMIURI, Apr. 24, 2004.

137. *Id.*

138. *Poor Crowd Control Proved Fatal; Local Government, Police, Security Guards Held Responsible for Akashi Crush*, DAILY YOMIURI, Dec. 18, 2004; Editorial, *The Akashi Tragedy*, ASAHI SHIMBUN, May 17, 2006. In July 2005, the court ordered the prefecture, the city, and a security company to pay 568 million yen in compensation to families of victims of a stampede. See *Court Awards 568 Mil. Yen in Damages for 2001 Fireworks Deaths*, JAPAN ECONOMIC NEWSWIRE, June 28, 2005.



lution. After another brief investigation, in June 2006, the prosecutors dismissed the PRC recommendation, refusing for the third time to prosecute.<sup>139</sup> The prosecutors stated that it was impossible for the two officers to have predicted the incident when planning security measures.<sup>140</sup> Since the PRC twice recommended prosecution, the revised PRC law would have given the second resolution legally binding authority to initiate the prosecution of the police officers. Nevertheless, with the advice of their attorneys, the families of victims announced in November 2006 that they would file a third appeal of the prosecutor's non-indictment decision, but only after May 2009, when the revised PRC law will give the PRC resolution legally binding status.<sup>141</sup>

#### B. The Case Against Members of the Ruling Liberal Democratic Party

The revised Political Funds Control Law, which took effect in 2000, banned corporate donations to individual lawmakers.<sup>142</sup> However, the law placed no restrictions on donations by registered political groups, including political associations and organizations formed by corporations or individual donors.<sup>143</sup> In November 2001, the Japan Dentists Association (JDA), a powerful political organization, reported that a 50 million yen donation was given to the Kokumin Seiji Kyokai (National Political Association, hereinafter NPA), a political fund-raising organization set up by the ruling Liberal Democratic Party.<sup>144</sup> In April 2002, it was revealed that the LDP lawmakers failed to report to the authorities the full amount of donations they received. Former Vice President of the Liberal Democratic Party Taku Yamasaki stated that he reported the donation to the government in accordance with the new law, and that the failure to report the correct amount was only a procedural mistake.<sup>145</sup>

Upon further investigation by prosecutors, the JDA director general admitted that the 50 million yen was intended to be distributed to three specific LDP members on the instructions of the JDP President—30 million yen to Yamasaki and 10 million yen each to a former senior vice minister in the new Ministry of Health, Labor and Welfare, and a former Lower House member. The NPA then issued fake and forged receipts for the political donations, even though the money had been delivered to individual LDP

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139. *Prosecutors Again Refuse to Indict Cops over Crush*, DAILY YOMIURI, June 26, 2006.

140. *Ex-Police Officers to be Exonerated from Indictment over Stampede*, JAPAN ECONOMIC NEWSWIRE, June 24, 2006.

141. *Moto shochora no kiso motome 3dome no mositate e* [The third motion to be filed to prosecute the former chief] ASAHI SHIMBUN, Oct. 17, 2006.

142. *Donations to Individual Politicians Banned*, MAINICHI DAILY NEWS, Dec. 16, 1999, at 1.

143. *Reiji Yoshida, LDP Body Accused of Hiding Donations with Faked Receipts*, JAPAN TIMES, Oct. 19, 2004.

144. *Yamasaki 'Deserves to be Indicted' over Donation*, DAILY YOMIURI, July 28, 2005.

145. *Top Politicians Failed to Put Figure on Donations Received*, MAINICHI DAILY NEWS, Apr. 18, 2002.

lawmakers, not LDP's fund-raising organization.<sup>146</sup> Yamasaki later admitted that he received the sum of 50 million yen cash in a paper bag from the dentists association and kept it in his locker for a month.<sup>147</sup> Despite evidence of the false receipts, admission by JDA's director general of the money delivery instructions, and Yamasaki's admission that he personally received the money, the Tokyo District Public Prosecutors Office decided in January 2005 not to prosecute Yamasaki or the two LDP lawmakers, citing insufficient evidence against them.<sup>148</sup>

Two months later in March 2005, a complaint was filed to review the non-indictment decision.<sup>149</sup> After reviewing financial records and investigative materials seized by the prosecutor's office during the initial investigation, the Second Tokyo PRC issued an "indictment is proper" resolution in July 2005 against Yamasaki for the violation of the Political Funds Control law.<sup>150</sup> The commission stated that using the party's fundraising body was a cover, and that the JDA was indeed donating directly to the LDP lawmakers, including Yamasaki.<sup>151</sup> In October 2005, the prosecutor's office reopened the case against Yamasaki.<sup>152</sup> In less than two months, the prosecutors again dropped the case against Yamasaki because the prosecutors stated that they could not disprove his claim that the donations were intended for the party.<sup>153</sup>

After another appeal was filed, the Second Tokyo PRC again re-examined the second non-indict decision. In July 2006, the Second Tokyo PRC issued the "non-prosecution is proper" resolution this time, agreeing with the prosecutor's non-indictment decision on Yamasaki. However, the commission stated that the final resolution was not what they collectively agreed upon, acknowledging that, while the evidence clearly indicated the intent of the JDA to make personal donations to specific LDP lawmakers, they felt that the existing law makes a detour contribution legal, and its immediate revision was needed to ban the donation-rerouting practice.<sup>154</sup>

As Japan's political parties still rely heavily on donations from interest groups and prosecutors, and existing laws fail effectively to check illegal donations to legislators of the ruling party, it is no wonder that Japan is perceived to be one of the most corrupt countries in the world. In 2005,

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146. Yoshida, *supra* note 143. It was also revealed that former Prime Minister Ryutaro Hashimoto also received an unreported 100 million yen directly from the JDA. See *Hashimoto Grilled on Donation*, JAPAN TIMES WEEKLY, Mar. 5, 2005.

147. See Yoshida, *supra* note 143; *Inquest Panel Says LDP's Yamasaki Deserves Indictment*, JAPAN ECONOMIC NEWSWIRE, Jul. 27, 2005.

148. See *Inquest Panel*, *supra* note 147.

149. See *Hashimoto Grilled on Donation*, *supra* note 146.

150. *Former LDP Vice President Yamasaki Should be Indicted: Prosecution Inquest Panel*, JAPAN PRESS WEEKLY, July 28, 2005.

151. *Id.*

152. *Prosecutors Reopen Political Donation Case Against LDP's Yamasaki*, JAPAN ECONOMIC NEWSWIRE, Oct. 30, 2005.

153. *Cases Dropped over Dental Donations*, ASAHI SHIMBUN, Dec. 9, 2005.

154. *Genkoho no Genkai Shimesu: Yamasaki Fukusosai Kenkin ni Fukiso Soto [Limitation of the Existing Law: "Non-indictment is Proper" for the Donation to LDP Vice President Taku Yamasaki]*, ASAHI SHIMBUN, July 12, 2006 [hereinafter *Genkoho*].

Japan ranked 21st on a list of 159 nations on the Corruption Perceptions Index.<sup>155</sup> Among the Group of Seven industrialized countries, only Italy ranked as more corrupt than Japan.<sup>156</sup> While the second PRC commission arrived at a different decision than the first commission's, both strongly criticized the deep collusion between lawmakers and special interest groups. The second commission further identified the limitations of the existing law and made a strong push to revise it.<sup>157</sup> After May 2009, the members of the PRC will hopefully realize the power of the binding resolution and effectively deploy it to curtail deceptive detour donation practices among lawmakers and interest groups.

### C. The Case Against Green Cross Corp. and the Ministry of Health and Welfare

In addition to law enforcement officials and legislators, Japanese bureaucratic elites have systematically evaded indictment. The most recent public health disaster was a nationwide outbreak of hepatitis C and HIV/AIDS caused by the use of tainted blood products in Japanese hospitals. The pharmaceutical firm Green Cross Corp. ("Midori Juji") and high-ranking officials at the Ministry of Health and Welfare were together responsible for allowing these tainted products to stay on the market, even after being officially warned of their dangers. It is estimated, for example, that two million people nationwide have been infected with hepatitis C or HIV/AIDS from tainted blood product distributed by Green Cross.<sup>158</sup> Almost 90% of people with HIV/AIDS were also found to have contracted hepatitis C.<sup>159</sup>

The analysis of the viral outbreaks exposed a phenomenon called "amakudari" (descending from heaven), signifying the deep collusion between government agencies and the private companies they are supposed to regulate. When senior Ministry of Health and Welfare officials reach retirement age, for example, they literally "descend from heaven" and obtain well-compensated positions in pharmaceutical companies in Japan's

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155. Hideo Tsuchiya, *Money and Politics, Now and Then*, NIKKEI WEEKLY, July 31, 2006.

156. *Id.*

157. *Genkoho*, *supra* note 154.

158. As of December 27, 2005, 583 people infected by HIV/AIDS virus tainted products died. As of 1997, two thousand people were known to have contracted HIV/AIDS virus. The true number of infected patients still remains unknown because the official number excluded those who indirectly contracted the virus from family members or those who failed or decided not to report to the authority. Secrecy is common among AIDS patients, and most victims in the litigation decided not to publicize their names. See Ryuhei Kawada, AIDS Scandal: Yakugai Eizu [Drug-induced AIDS] (Nov. 2006), <http://www.kawada.com>. Similarly, the secrecy is common among patients with hepatitis C virus. Only 10 of 96 plaintiffs across the country made their real names public. See Yohei Seiki & Jun Nagata, *First Ruling Near in Suit over Drug-Caused Hepatitis C Debacle*, JAPAN TIMES, June 20, 2006.

159. *Yakugai Aizu Higaisha, Wari ga C Gata Kanen Nimo Kansen [90% of HIV/AIDS Patients Infected by Hepatitis C Virus]* NIHON KEIZAI SHIMBUN, Oct. 6, 2006.

most heavily regulated industries.<sup>160</sup> The three past presidents of Green Cross were former high-ranking health ministry officers, who had guided the governmental regulations regarding the production and circulation of blood products in Japan.<sup>161</sup>

The disclosure of the collusion between Green Cross and the government has also exposed much deeper historical roots and logical twists. The genesis of the recent viral outbreak also lies with the Japanese government's concerted efforts to keep secret the extensive germ, chemical, and biological experiments conducted by Unit 731 of the Imperial Army during WWII. Specifically, Unit 731 and its medical teams conducted germ and biological warfare experiments on Chinese civilians and Chinese, Korean, Russian, American, and other prisoners of war during World War II. The cover-up of the most gruesome atrocities committed by Unit 731 was partly assisted by the United States immediately after WWII, when America decided to shield some of the war's worst criminals in exchange for their knowledge on germ, chemical, and biological warfare.<sup>162</sup>

Because none of the unit's members were classified as war criminals, they went on to prominent careers in politics, academia, and business and later played key roles in the development of Japan's pharmaceutical industries and the formulation of health-related government policies.<sup>163</sup> For example, some of them became presidents of the Japan Medical Association and the Japanese Society of Bacteriology, professors at prominent medical schools at Tokyo, Kyoto, Hyogo, and Nagoya City universities, President of Kyoto Prefectural Medical University, professors at the National Defense Academy and Showa Pharmaceutical University, and directors of the National Institute of Health at the Ministry of Health and Welfare. They also found positions at Kitazato Research Institute (formerly the Infectious Diseases Control Center) and Toshiba Bio-Physical and Chemical Research Center.<sup>164</sup>

In 1950, Ryoichi Naito, an army doctor from Unit 731, founded the Japan Blood Bank, which later changed its name to Green Cross Corp. in 1964.<sup>165</sup> The unit's commander, Masaji Kitano, became a director of

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160. See van Wolferen, *supra* note 125, at 45 ("Since the retirement age is fifty-five, such bureaucrats will have another twenty years or so in which to help ensure 'smooth communications' between industry and the ministries.")

161. See Setsuo Miyazawa & Hiroshi Otsuka, *Legal Education in Japan: Legal Education and the Reproduction of the Elite in Japan*, 1 *ASIAN-PAC. L. & POL'Y J.* 2, 17 (2000).

162. Steven Butler, *A Half Century of Denial*, 119 *U.S. NEWS & WORLD REP.*, July 31, 1995, at 56.

163. See David McNeill, *The Deepest of Wounds: Enmity in the East*, *INDEP.*, Apr. 20, 2005, at 26 ("Many (former Unit 731 members) went on to have lucrative post-war careers in the medical industry."); Glenn Davis, *Japan Professor Slams AIDS Attitude*, *UPI*, Mar. 1, 1996.

164. See Davis, *supra* note 163; 731 Butai no Setsuritsu Kara Haisen (Shoko Inmetsu) made [From the Establishment of Unit 731 to Defeat] (Nov. 17, 2006), <http://www1.ocn.ne.jp/~sinryaku/731butaisheturitu.htm>.

165. Elizabeth Kiritani, *My Nippon: Fourth Route Morality*, *DAILY YOMIURI*, July 13, 1996; *Green Cross Founder Hid Info About Unit 731: Letter*, *Kyodo News Service*, August 14, 1998.

Green Cross, and other former members also served on the Green Cross's staff during the 1970's and 1980's.<sup>166</sup> The firm ultimately became the leading pharmaceutical company and the largest producer of blood products in Japan.<sup>167</sup> Between 1977 and 1988, Green Cross manufactured and sold an unheated and virus-contaminated blood product called Fibrinogen-BBank, which caused a nationwide hepatitis C virus outbreak.<sup>168</sup> In the early 1980's, Green Cross manufactured and sold another tainted blood product, Christmassin, which caused a HIV/AIDS viral outbreak. Those tainted blood products were widely used at Japanese hospitals until 1988, despite the fact that the United States retracted the certificate for products made of fibrinogen in 1977 and issued numerous warnings about the dangers of unheated blood products.<sup>169</sup>

The National Institute of Health (NIH), the laboratory subsidiary of the Ministry of Health and Welfare, is responsible for testing the safety of commercial drugs. In the early 1980's, the institute tested the blood products manufactured by Green Cross and reported that there were no signs of a dangerous virus.<sup>170</sup> It was later revealed that, at the time of testing, several former members of Unit 731 worked as directors at the NIH laboratory.<sup>171</sup> Despite numerous warnings about the risk of viral infections with unheated blood products, the Ministry of Health and Welfare effectively delayed the approval of heat-treated blood products and the importation of heat-treated blood products until July 1995.<sup>172</sup> One close observer of the crisis stated that the delayed response gave "Green Cross, Japan's largest blood product supplier, time to catch up with competitors already producing heat-treated products."<sup>173</sup> Shingo Shibata, a sociology and philosophy professor at Hiroshima University, likened the attitude of the NIH lab and Green Cross to the crimes of the notorious biological warfare unit, which the unit has never acknowledged.<sup>174</sup> Under criticism, Green Cross merged with Yoshitomi Pharmaceuticals Industries in 1988, which then merged with Mitsubishi-Tokyo Pharmaceuticals in 2001 to create Mitsubishi Pharma.<sup>175</sup>

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166. Davis, *supra* note 163.

167. Butler, *supra* note 162; Doug Struck, *Tokyo Court Confirms Japan Used Germ Warfare in China*, WASH. POST, Aug. 28, 2002, at A15 (stating that a district court in Tokyo found that Japan conducted germ warfare during World War II).

168. *11 Hepatitis Victims Awarded 168 Million Yen*, JAPAN TIMES, Aug. 31, 2006. *Plaintiffs Appeal Court Ruling over Hepatitis C Infection*, JAPAN ECONOMIC NEWSWIRE, Sept. 12, 2006.

169. Tomoko Otake, *FDA Hit Coagulant's 'Shortcomings' in '77*, JAPAN TIMES, Sept. 1, 2004; *Japanese State and Firm Blamed for Hepatitis C Infection*, AGENCE FRANCE-PRESSE, June 21, 2006.

170. Davis, *supra* note 163.

171. *Id.*

172. Mark Levin, *Smoke Around the Rising Sun: An American Look at Tobacco Regulation in Japan*, 8 STAN. L. & POL'Y REV. 99, 105 n.157 (1997) (referring to Ministry Knew in 1983 Firm Recalled Bad Blood, JAPAN TIMES, Feb. 23, 1996).

173. *Id.*

174. Davis, *supra* note 163.

175. *State, 3 Drug Firms Sued over Hepatitis Infection*, JAPAN ECON. NEWSWIRE, Oct. 21, 2002.

In September 1996, Tokyo prosecutors indicted hemophilia expert and Teikyo University Vice President Takeshi Abe, who headed the Health and Welfare Ministry's AIDS research group,<sup>176</sup> and former Ministry of Health and Welfare Biologics and Antibiotics Division Director Akihito Matsumura on charges of professional negligence resulting in death for their roles in the HIV/AIDS viral outbreak.<sup>177</sup> In October 1996, Osaka prosecutors also indicted three former presidents of Green Cross on the same charges.<sup>178</sup> Tokyo prosecutors chose not to bring charges, however, against Yoshinori Kobayashi, former head of the Pharmaceutical Affairs Bureau in the Ministry of Health and Welfare, and Jinuemon Konishi, president of Nippon Zoki, another pharmaceutical company that produced the tainted blood product.<sup>179</sup>

A mother of a hemophiliac who died of AIDS appealed the prosecutorial decision to the First Tokyo PRC. Her child contracted the HIV virus from Nippon Zoki's blood products at Teikyo University Hospital, where Takeshi Abe used unheated blood product for the hemophilia treatment.<sup>180</sup> On December 11, 1996, the PRC issued an "indictment is proper" resolution and recommended that negligence charges be brought against Kobayashi and Konishi.<sup>181</sup> The commission stated that Kobayashi, who was responsible for overseeing pharmaceutical issues, was fully aware of the risk of HIV infection from the unheated blood products, and that Konishi failed to issue a notice warning of the product's risk, and continued to sell the tainted products.<sup>182</sup> Two weeks later, however, the prosecutors announced that they refused to follow the commission's recommendation to prosecute.<sup>183</sup>

The true genesis of the viral outbreak may lie in the Japanese government's effort to hide war crimes committed by the members of Unit 731, which ultimately led to their lucrative post-war careers in the medical industries and government bureaucracies. The Japanese government still has not officially recognized that the unit committed war crimes,<sup>184</sup> although the unit's human and biological warfare experiments have been well documented by historians and participants.<sup>185</sup> The actual PRC delib-

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176. 3 *Former Presidents of Green Cross Indicted*, DAILY YOMIURI, Oct. 10, 1996.

177. *Prosecutors to Indict Matsumura Faces Negligence Charges*, MAINICHI DAILY NEWS, Oct. 25, 1996.

178. 3 *Former Presidents of Green Cross Indicted*, DAILY YOMIURI, Oct. 10, 1996, at 2.

179. *Judicial Watchdog Requests Indictments in HIV Scandal*, MAINICHI DAILY NEWS, Dec. 12, 1996, at 12.

180. *No Indictment of 2 Men in HIV Case Described Unjust*, JAPAN ECON. NEWSWIRE, Dec. 11, 1996.

181. *Judicial Watchdog*, *supra* note 179.

182. *Id.*

183. *No Indictment for 2 Major Figures in HIV Scandal*, MAINICHI DAILY NEWS, Dec. 27, 1996; Kiyoshi Ishida, *Upon Tradition of the Participatory Court in Modern Japan: Focus on the Institution of Civil Associate Judge*, 14 BULL. OF TOMAKOMAI KOMAZAWA UNIVERSITY 53 (2005).

184. Mari Yamaguchi, *Quiet Tokyo Neighborhood may be Sitting on a Gruesome WWII Secret*, MAINICHI DAILY NEWS, Sept. 17, 2006.

185. *See, e.g.*, DANIEL BARENBLATT, *A PLAGUE UPON HUMANITY: THE SECRET GENOCIDE OF AXIS JAPAN'S GERM WARFARE OPERATION* (2004); HAL GOLD, *UNIT 731 TESTIMONY* (1996);

eration may not have taken into consideration Japan's war crimes and the government's responsibilities. Nevertheless, the PRC system allows ordinary citizens to deliberate on these and other politically explosive cases, and its members will soon have the power to make a legally binding decision to make the government more responsive to the will of Japanese citizens.<sup>186</sup>

Without the power to bind prosecutors, however, the commission's resolution in this case failed to send a powerful message to bureaucratic elites and legislators, who have endangered the lives of many citizens and engaged in unethical and immoral conduct. Thus, the revision of the PRC law to give resolutions binding authority is long overdue, and it may revolutionize the role of all-citizen review commissions in the criminal justice process in the future.

Given the social importance of criminal cases reviewed by all-citizen commissions in their own communities, it is no wonder that nearly all PRC members who participated in deliberations stated that their experience was positive. In encouraging active participation by ordinary citizens in the legal process, the PRC has the potential to mitigate the discretionary power of prosecutors through public oversight. The PRC also helps to register the claims of victims and their families and legitimize their voice within the criminal justice system. And, even more importantly, the PRC offers an effective set of checks necessary to ensure fair and proper conduct by big business and government bureaucrats. While the PRC system has long suffered from obscurity, unfamiliarity, and under-utilization, the revised PRC law should lead to greater public awareness of the system, enhance the public's ability to make the government responsive to changing community needs and values, and, hopefully, serve as an important means to effect much-needed changes in Japan's conservative legal landscape.

## Conclusion

Isa, the RGJT founder and one of the fiercest opponents of the quasi-jury system, argued, "the deliberation should be done among the people without the judges' presence. If a judge sits there - even one, he is going to influence them. . . . It is very plain, but the trouble is that in Japan not even the lawyers can see it."<sup>187</sup> Without fixing this fundamental flaw, the quasi-jury system, Isa warns, could further legitimize the current discriminatory

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ROBERT HARRIS & JEREMY PAXMAN, *A HIGHER FORM OF KILLING: THE SECRET HISTORY OF CHEMICAL AND BIOLOGICAL WARFARE* (2002); SHELDON HARRIS, *FACTORIES OF DEATH* (1994); PETER WILLIAMS & DAVID WALLACE, *UNIT 731* (1989).

186. Given the politically sensitive nature of criminal cases reviewed by the PRC, political and ideological incentives may exist for its members to engage in jury nullification, similar to the U.S. jury tradition. See FUKURAI & KROOTH, *supra* note 122, at 199-202.

187. Gabrielle Kennedy, *Trial by Judge: Reformers Tackle a Trial System in Which Indictment Invariably Means Conviction*, AM. CHAMBER COMMERCE JAPAN J., Sept. 2004, at 32, 34.

and inequitable system because the citizens will now become part of the problem.<sup>188</sup>

This article has examined the emergence of Japan's twin democratic systems of lay participation in legal decision making: the petit quasi-jury and PRC grand jury. While many scholars have analyzed the petit quasi-jury system, this paper argues that the newly revised PRC grand jury system may have a far greater impact than the quasi-jury system in democratizing the criminal process and building broader public confidence in the criminal justice system.

This article also examined civilian legal participation and its impact on legal consciousness in Japan and the United States. The analysis of both PRC and American jurors found that the experience of civic legal participation expands the public's legal consciousness and willingness to participate in the legal process. Specifically, PRC grand jurors are more willing than those without deliberative experience to serve on quasi-juries, perceive fewer obstacles to serving on juries, have more confidence in public legal participation, and have developed greater confidence in ordinary people's ability to make a fair and just decision. Almost all PRC members indicated that their jury experience was very positive, and the great majority of them indicated that they would be willing to serve on a PRC again. The PRC members also indicated that they would welcome help by prosecutors to explain their non-indictment decisions, but PRC members were less likely to endorse prosecutors' participation in deliberations. Our research also found that the importance of quasi-jury duty is not widely conveyed, and the system of civilian legal participation remains relatively unknown in Japanese communities. Lastly, the majority of PRC members expressed their support for the introduction of the jury system in Japan, where currently only lay judges engage in deliberation.

This article also argued that the PRC has tremendous potential to exercise its oversight power beyond just reviewing a prosecutor's decision-making process. Since the PRC law revision gave the resolutions legally binding status, the commission can also serve as an important check on local government because the commission will be able to assess non-indictment decisions regarding alleged criminal conduct by public officers or political groups against whom the public has filed complaints. While there have been allegations of prosecutors' failure to prosecute politicians, law enforcement officers, and government bureaucrats, the PRC is now properly positioned to review the decisions of prosecutors not to indict those political and governmental elites. Hopefully, the present research will be helpful in building a fair and equitable system of civic lay participation in Japan and other East Asian societies.

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188. *Id.*