

# A Step in the Right Direction for Japan's Judicial Reform:

## Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation

BY HIROSHI FUKURAI\*

### I. Introduction

In commemorating the tenth year anniversary of the JSRC, the UC Hastings conference assembled a group of socio-legal scholars and legal experts from both Japan and the U.S. to analyze the extent of the implementation of the judicial reforms suggested by the Justice System Reform Council (hereinafter JSRC). The aim of this article is to critically examine the impact of the JSRC's proposed judicial reforms in the area of criminal justice and lay participation in legal decision-making.

After two years of careful deliberation by the thirteen JSRC members on potential reforms to the Japanese justice system, the council finally submitted a detailed report (*Ikensho*) to Prime Minister Jun'ichiro Koizumi on June 12, 2001 outlining their suggestions and recommendations.<sup>1</sup> In this ground-breaking

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\* Professor of Sociology and Legal Studies at the University of California, Santa Cruz. This research was supported by the 2009-2010 Toyota Foundation Grant (D09-R-0081). I appreciate Professor Setsuo Miyazawa for organizing the symposium at the University of California, Hastings College of Law. My appreciation is also extended to Weiqi (William) Qiu for his editorial assistance.

1. Shih□ Seido Kaikaku Shingikai [JSRC], Shih□ Seido Kaikaku Shingikai Ikensho: 21-seiki no nihon o Sasaeru Shih□ Seido [Report of the JSRC - A Justice

document, the JSRC made specific proposals to introduce two distinct systems of citizen participation in Japan's justice system: (1) *Saiban-in Seido* (a quasi-jury system or mixed tribunal) and (2) a revised *Kensatsu Shinsakai* (Japan's grand jury system or Prosecution Review Commissions (PRC)).<sup>2</sup> The establishment of these twin bodies of lay adjudication was designed to broaden the institution of decision-making in criminal matters to include a representative panel of Japanese citizens chosen at random from local communities. Japan once had an all-citizen jury system and began to use jury trials in 1928, but the system was abruptly suspended by the Japanese military government in 1943 in favor of a collegial professional bench trial system.<sup>3</sup> The lack of lay participation in the justice system in the postwar era has led to the creation of symbiotic power relations among three key agencies of Japan's criminal justice system, namely the police, prosecutors' office, and the court.<sup>4</sup>

The reintroduction of the citizen participation system in criminal proceedings thus represented one of the fundamental changes to Japan's legal structures and status quo, and this article examines such changes in lay participation and its effects in the area of criminal justice. Attorney Shunsuke Marushima who served as Senior Staff of the Secretariat in the JSRC declared that much of the reforms in criminal justice, especially with respect to prosecution and police procedures, were expected to go through dramatic and significant changes in their operational procedures because of popular participation in the administration of criminal justice in

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System for Japan in the 21st Century], June 12, 2001, available at <http://www.kantei.go.jp/jp/sihouseido/report/ikensyo/pdf-dex.html> [hereinafter *JSRC Report*]. The official English translation entitled Recommendations of the Justice System Reform Council -For a Justice System to Support Japan in the 21st Century- is available at <http://www.kantei.go.jp/foreign/judiciary/2001/0612report.html>.

2. Hiroshi Fukurai, *The Re-birth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 321-28 (2007).

3. Mamoru Urabe, *A Study on Trial by Jury in Japan*, in THE JAPANESE LEGAL SYSTEM 483-91 (Hideo Tanaka ed. 1976).

4. Japan is said to have the "world's highest conviction rate" of nearly 100%. See generally DAVID T. JOHNSON, THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN 215 (2002). Such a near perfect conviction rate could not have been achieved unless there has been a close and symbiotic collaborative working relation among Japan's police agencies, public prosecutors' offices, and courts.

Japan.<sup>5</sup> This suggests that a critical assessment of genuine effects of the council recommendation in the area of criminal justice can be best achieved in its relation to the operative and procedural impact of the twin systems of lay adjudication.

Part II of this article first examines the two systems of lay adjudication in criminal proceedings, including the *Saiban-in Seido* (a quasi-jury system) and the revised Prosecution Review Commission (PRC). The *Saiban-in* panel that consists of three professional and six citizen judges adjudicates serious crimes committed in local communities, much like citizen participation in America's petit-jury trials.<sup>6</sup> The PRC, on the other hand, asks eleven randomly chosen Japanese citizens to examine the appropriateness of prosecutors' non-indictment decisions, an adjudicative institution to which the U.S. has no juridical equivalence. While the former deals exclusively with the adjudication process of criminal matters in Japan, the latter has a greater potential to influence the decisions made by Japanese prosecutors. The strengths and weaknesses of each of these systems will be critically examined.<sup>7</sup>

Part III then proceeds to analyze the criminal justice process itself that has been significantly impacted with the introduction of the two lay adjudication systems. At the outset, the JSRC recommendation was apt to eliminate numerous causal factors behind criminal procedural anomalies that previously led to not only wrongful convictions but also violations of criminal defendants' rights. For instance, the JSRC recommendation suggested ensuring greater transparency to the usually closed investigation and investigative processes, which in turn facilitated the deliberation of lay participants in *Saiban-in* trials. This article first examines how these problematic areas were impacted by the introduction of *Saiban-in* trials, as they were also discussed and debated by the JSRC members. These factors include: (1) the use of police detention centers as "substitute prisons" for interrogation; (2)

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5. Interview with Shunsuke Marushima conducted by the author at the UC Hastings College of the Law School (Sept. 8, 2012) (a interview report on file with the author) (The introduction of "the *Saiban-in* system will undoubtedly force the changes in the police procedure and investigative methods" & "reforms in the PRC [Prosecutorial Review Commission] will lead to a discussion on the reform of the procuracy").

6. Fukurai, *supra* note 2, at 311-23.

7. *Id.* at 323-28.

limited access to counsel; (3) use of physical and psychological torture to extract forced confessions; (4) judicial complacency toward the use of confession documents obtained via dubious means; and (5) the lack of pretrial release for defendants.

Part III will continue to examine other consequences of judicial reforms that will invariably affect citizens' judicial capacities, including the implementation of: (1) pre-trial conference procedures; (2) new victim participation systems that were first introduced in 2008 and later incorporated into the *Saiban-in* trial; and (3) the National Public Defender System (*Kokusen Bengo Seido*) and the Japan Legal Support Center on *Saiban-in* trials.

Part IV will shift my focus toward an evaluation of much broader socio-legal impacts of the new systems of lay adjudication on criminal procedure; I will consider if and to what extent these new structures expanded citizens' ability to properly adjudicate crimes committed by an exclusive group of foreigners who have been historically protected under the rights of extraterritoriality, including the members of the U.S. Armed Forces stationed in Japan. The first *Saiban-in* trial of American military personnel took place in May 2010 in Okinawa.<sup>8</sup> The JSRC proposal also allowed the PRC to enforce the criminal prosecution of formally called "untouchables," namely powerful politicians, government bureaucrats, and business elites. The PRC's decision on the forceful prosecution of military personnel also instigated a bi-lateral negotiation between the U.S. and Japanese governments on the new conditions of the Status of Forces of Agreement (SOFA), involving the right to exercise a proper jurisdiction over military accidents or crimes committed by armed personnel while on-duty.<sup>9</sup>

Finally, Part V explores the potential expansion and diffusion of *Saiban-in* trials into civil and administrative litigation. The JSRC has

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8. Hiroshi Fukurai, *People's Panel vs. Imperial Hegemony: Japan's Twin Lay Justice Systems and the Future of American Military Bases in Japan*, 12 ASIAN-PAC. L. & POL'Y J. 95, 96 (2010).

9. Travis J. Tritten & Chiyomi Sumida, *AAFES Employee Indicted in Fatal Collision*, STARS & STRIPES (Nov. 25, 2011), <http://www.stripes.com/news/aafes-employee-indicted-in-fatal-collision-1.161616>. For broader socio-legal ramifications, see Hiroshi Fukurai, *Japan's Lay Judges, and Why Australia Should Listen Up*, EAST ASIA FORUM (June 28, 2012), <http://www.eastasiaforum.org/2012/06/28/citizen-adjudication-systems-in-japan-and-why-australia-should-follow-suit/>.

already suggested the possibility of incorporating citizen participation into certain classes of civil cases. And while the possible incorporation of *Saiban-in* into administrative litigation will also be explored here, the council has already recognized that administrative trials regarding disputes against governmental policies have been extremely difficult for citizens to adjudicate effectively. Yet the relevance of such analyses cannot be overstated, especially given the recent surge of civil and administrative lawsuits filed against the Tokyo Electric Power Company (TEPCO) and the Japanese government in the aftermath of the Fukushima nuclear disaster in March 2011.<sup>10</sup> Active participation of citizens in the adjudication of civil and administrative disputes has the potential to ensure that the rights of victims in these types of cases are upheld and their remedies properly dispensed. For these categories of litigation, it is important to incorporate the people's fair-minded perspectives and common sense judgments into the deliberation of such legal disputes. Lastly, Part VI will conclude with a reprisal of the overall impact of the JSRC recommendations on Japan's legal landscape.

## II. Two Pillars of Lay Adjudication: *Saiban-in Seido* and the new Prosecution Review Commission (PRC or Japan's Grand Jury System)

The JSRC suggested the introduction of two systems of lay adjudication, namely, a hybrid model of citizen's legal participation found in the *Saiban-in* trial and a revised PRC system that will review prosecutors' non-indictment decisions. The JSRC recommendation required that the PRC's deliberative decisions would no longer serve as a mere advisory role to Japanese prosecutors, but hold legally binding authority over prosecutorial

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10. Yuko Kubota, *Shareholders File \$67 bln Lawsuit Against TEPCO Executives*, REUTERS (Mar. 5, 2012), <http://www.reuters.com/article/2012/03/05/tepcolawsuit-idUSL4E8E54M620120305> ("In the biggest claims of its kind in Japan, 42 shareholders filed a lawsuit . . . accusing 27 current and former TEPCO directors"). However, a total number of lawsuits filed against TEPCO are significantly less than the lawsuits filed against the British Petroleum after the 2010 Deep-water Horizon explosion and oil spill. See also *Fukushima Victims Turn from Courts in Search for Disaster Compensation*, GREENWIRE, June 26, 2012 (the amount of litigation "is minimal compared with the several hundred suits filed against BP PLC").

decision-making.<sup>11</sup>

In part, the introduction of the lay judge systems was suggested by the JSRC members in response to the frequent criticisms of Japan's criminal justice system's shortcomings in its failure to prevent wrongful convictions and violation of criminal defendants' rights, including the use of a police detention center as a substitute prison to extract forced confessions, defendants' lack of access to defense counsel or pre-trial release of criminal suspects or defendants, continual reliance on the use of forced confession in trials, and judges' uncritical attitudes toward the legitimacy of forced confessions.<sup>12</sup> Many Japanese and international scholars, civic activists, and victims of wrongful convictions and their families have been increasingly vocal.<sup>13</sup> These initial complaints coalesced into a substantial grassroots movement in the 1980s and 1990s and provided the impetus to facilitate the discussions to bring back the all-citizen jury system that was suspended by the Japanese military government in 1943 in the midst of WWII.<sup>14</sup> The resurrection of citizen legal participation was seen to eliminate many of causal factors of wrongful convictions and violation of human rights of criminal defendants. Lay participation in *Saiban-in* trials was also expected to inject citizens' critical insights and common sense judgments into the intimate working relationship among judges, prosecutors, and defense attorneys.

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

After the jury system was suspended in 1943, the resurrection of citizens' participation system in the justice system has been the

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11. Fukurai, *supra* note 2, at 327.

12. Hiroshi Fukurai & Kaoru Kurosawa, *Impact of Popular Legal Participation on Forced Confessions and Wrongful Convictions in Japan's Bureaucratic Courtroom: A Cross-National Analysis in the U.S. and Japan*, 7 U.S.-CHINA L. REV. 1, 3-7 (2010).

13. Fukurai, *supra* note 2, at 317-20.

14. Hiroshi Fukurai & Richard Krooth, *What Brings People to the Courtroom? Comparative Analysis of People's Willingness to Serve as Jurors in Japan and the U.S.*, 38 INT'L J. L. CRIME & JUST. 198, 200 (2010). There were also some significant anomalies of Japan's jury system, including: (1) defendants who preferred a jury trial had to give up rights to appeal; (2) the jury merely answered a set of interrogatories framed by a presiding judge who could reject its findings; and (3) a jury trial was expensive and difficult to administer. See David T. Johnson, *Early Returns from Japan's New Criminal Trials*, 36 ASIAN-PAC. J. 3 (2009), available at [http://www.japanfocus.org/-David\\_T\\_Johnson/3212](http://www.japanfocus.org/-David_T_Johnson/3212).

major goal of many grassroots movements and progressive civic activities.<sup>15</sup> One of five major sections of the final JSRC recommendation was thus entirely devoted to the necessity of establishing the new lay participation system in Japan. The JSRC's first discussion on the creation of a lay participatory system was held in a reference material presented by Tokyo Law Professor Masahito Inouye in the 51<sup>st</sup> public meeting on March 13, 2001.<sup>16</sup> The term, "*Saiban-in*," was first coined by Inouye who explained the need to establish the hybrid jury system with the following six distinct characteristics: (1) a role for citizen or lay judges (i.e., *Saiban-in*) in the judicial process; (2) a role for professional judges in coordination with lay judges within the same process; (3) a standardized method for the selection stipulation of the rights and duties of the lay judges; (4) deliberation for final verdicts; (5) a formal method of a trial procedure and judgment; and (6) an appellate procedure.<sup>17</sup>

Inouye was subsequently asked to chair the Lay Assessor/Penal Matter Investigation Committee (LAPMIC) ("*Sabain-in Seido, Keiji Kentokai*") to implement his own recommendations on the hybrid court system. On January 29, 2004, the final report was submitted at the thirty-first LAPMIC meeting to the Reform Promotion Office in the Cabinet.<sup>18</sup> On March 16, on the basis of the LAPMIC report, the Cabinet Office completed its final proposal entitled "Recommendation of the Justice System Reform Council: For the Justice System to Support Japan in the 21<sup>st</sup> Century" and submitted it to the National Diet (Japan's bicameral legislative body equivalent to the Congress in the U.S.).<sup>19</sup> Finally it passed the

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15. Fukurai, *supra* note 2, at 317-20.

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

17. *Id.*

18. SAIBAN-IN SEIDO & KEIJI KENTOKAI, DAI 31-KAI, GJII GAIYO [A "SAIBAN-IN" SYSTEM AND PENAL INVESTIGATION COMMITTEE, 31<sup>ST</sup> MEETING, DISCUSSION SUMMARIES] (Jan. 29, 2004), <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanim/dai31/31gaiyou.html>.

19. Noboru Yanase, *Saiban-in Ho no Rippo-Katei (3) [The Legislative Process for the Establishment of the Lay Assessor Law, Part Three]*, 10 SHINSHU DAIGAKU HOGAKURONSHI [SHINSHU U. L.J.] 119, 123 (2008) (reviewing the legislative history of the Lay Assessor Act), available at <https://soar-ir.shinshuu.ac.jp/dspace/handle/10091/3875>.

proposal and announced that the first *Saiban-in* system be implemented in May of 2009.<sup>20</sup> The Quasi-Jury Act provides two different panels for the criminal trial.<sup>21</sup> The panel of three professional and six lay judges is selected in a contested case,<sup>22</sup> while one professional and four lay judges are chosen in uncontested cases where facts and issues identified by pre-trial procedure are undisputed.<sup>23</sup>

The first *Saiban-in* trial took place on August 4, 2009.<sup>24</sup> As of May 2012, a total of 21,944 citizens had already presided as lay judges in *Saiban-in* trials. The majority of these trial participants responded positively to their experience in their trials. At the same time, some participants were critical of the contents of trial proceedings, such as methods and manners in which evidence was presented in trial, undue influence of professional judges throughout the trial, and crime victims' participation and their emotive influence during the deliberation. These outstanding issues will be reviewed in the latter part of this report.

#### ***B. Revised Kensatsu Shinsakai (Prosecution Review Commissions (PRC))<sup>25</sup>***

The PRC was first established in 1948 with the help of the Supreme Commander for the Allied Powers (SCAP) with the explicit intent to curtail the extremely powerful prosecutorial institution of the Japanese government prior to the end of WWII.<sup>26</sup> It is, in many respects, akin to a Japanese version of the American

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20. *Id.*

21. Saiban-in No Sanka Suru Keiji Saiban Ni Kansuru Horitsu [The Act Concerning Participation of Lay Assessors in Criminal Trial], Law No. 63 of 2004. "Saiban-in Seido" is translated as the system of "the lay assessor" and/or "the quasi-jury." 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].

22. Quasi-Jury Act art. 2(2).

23. *Id.* art. 2(3).

24. See generally Makoto Ibusuki, "Quo Vadis?" First Year Inspection to Japanese Mixed Jury Trial, 12 ASIAN-PAC. L. & POL'Y J. 24, 25-26 (2010).

25. The PRC is also referred as the Committee (or Commission) for the Inquest of Prosecution (CIP).

26. Kensatsu Shinsakai Ho [Prosecution Review Commission Law], Law No. 147, art. 37 (1948) [hereinafter PRC Law]; see also Fukurai, *supra* note 2, at 323-28.

grand jury equipped with the specific function to review and assess the propriety of prosecutors' indictment decisions. The PRC consists of eleven citizens chosen randomly from local communities.<sup>27</sup> Based on the evaluation of evidence, the PRC issues prosecutors one of the following three recommendations: (1) non-indictment is proper (i.e., the prosecutor's decision was appropriate); (2) non-indictment is improper (i.e., the prosecutor should reconsider the non-charge decision); and (3) indictment is proper (i.e., the prosecutor should have prosecuted the accused).<sup>28</sup> Since nearly all indictments issued by the Japanese prosecution lead to conviction in Japan, the PRC's ex-post facto review of the appropriateness of non-prosecution decisions is extremely important for checking the potential abuse of prosecutorial power.<sup>29</sup> The near-perfect conviction of indicted cases by the prosecution also means that if one can somehow escape the indictment, his or her innocence is factually established. In other words, the abuse of indictment power by the Japanese prosecutors potentially lies in their discretion in decisions not to prosecute potential suspects or criminals. Nonetheless, the PRC's decision was merely regarded as an advisory capacity.

With respect to tremendous power vested in Japan's prosecutors, prominent American sociologist David Johnson argued that "democratizing the procuracy was a primary Occupation aim . . . [because] prewar prosecutors had abused their power by trampling [on] human rights . . . [in order to pursue] their own political objectives."<sup>30</sup> Even during the postwar era, Johnson warned that Japanese prosecutors had gradually become even more powerful than their American counterparts with respect to the

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27. For the function, purpose, and history of the PRC, see Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHICAGO-KENT L. R. 789 (2011).

28. PRC Law, *supra* note 26, art 27.

29. *Prosecutors or Persecutors? A Legal Scandal May Spark Reform of the Japanese Judicial System*, THE ECONOMIST (Oct. 14, 2010), <http://www.economist.com/node/17259159> (Japan "has a fishily high conviction rate, at 99.9%."); see also J. Mark Ramseyer & Eric B. Rasmusen, *Why the Japanese Conviction Rate So High?* 30 J. LEGAL STUD. 53, 53 (2001) ("Conviction rates in Japan exceed 99 percent.").

30. David T. Johnson, *Why the Wicked Sleep: The Prosecution of Political Corruption in Postwar Japan* (JPRI, Working Paper No. 34, 1997), <http://www.jpri.org/publications/workingpapers/wp34.html>.

following four specific areas: (1) power to access pre-indictment investigation and interrogations of suspects in substitute prisons in conjunction with the police; (2) monopoly of power to dispose of cases by making or dropping charge decisions, regardless of the strength of evidence; (3) power to recommend a proper judgment and sentencing decisions, as well as the ability to appeal acquittals; and (4) supervision over the execution of the severity of sentences, including death penalties imposed by the court.<sup>31</sup> Japan's PRC is then expected to offer tremendous reform over these areas.

Thus, given the tremendous power of Japan's prosecutors and people's responses to oversee the potential abuse of prosecutorial authority, the JSRC first discussed the revision of the PRC Law in its seventh meeting on November 24, 1999.<sup>32</sup> More detailed discussion regarding the revision of the PRC Law took place in the 55<sup>th</sup> meeting on April 10, 2001.<sup>33</sup> Initially, there was no unified opinion on the mandatory status of the PRC decisions. The reference material submitted to the meeting showed comparisons of different opinions and reforms suggested by 13 committee members, each reflecting the preferred opinions by three powerful branches of vested interest groups, including the JFBA, the Supreme Court, and the Ministry of Justice. The Ministry of Justice recommended that only the third resolution, "indictment is proper" should be considered legally binding, while the Supreme Court agreed to consider both "non-indictment is improper" and "indictment is proper" the legally binding status.<sup>34</sup> The JFBA's recommendation was similar to that of the Ministry of Justice, adding that the approval for the decision only requires two thirds of the vote.<sup>35</sup> The JFBA also made suggestions to create the position of a "legal advisor" in support of the discussion and deliberation for the PRC members and that this individual be selected from a pool of practicing attorneys, and not from either public prosecutors or bureaucratic judges of the

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31. JOHNSON, *supra* note 4, at 15.

32. Shihoseido Kaikaku Shingikai Dai 7 Kai Giji Gaiyo [JSRC, 7<sup>th</sup> Meeting, Discussion Summaries] (Nov. 24, 1999), <http://www.kantei.go.jp/jp/sihouseido/991126dai7.html>.

33. Shihoseido Kaikaku Shingikai Dai 55 Kai Giji Gaiyo [JSRC, 55<sup>th</sup> Meeting, Discussion Summaries] (Apr. 10, 2001), <http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html>.

34. *Id.*

35. *Id.*

Japanese government.<sup>36</sup>

The Reform Promotion Office finally delegated the authority to the Quasi-Jury/Penal Matter Investigation Committee. On November 11, 2003, Committee Chair Inouye presented the summary of the recommendation in the committee meeting, suggesting that the PRC's decision be given legally binding status and that the legal advisor be selected from the rank of practicing attorneys.<sup>37</sup> The committee finally completed its report, and on May 29, 2014, the Japanese Diet enacted the Act to Revise the Code of Criminal Procedure, revising the existing PRC Law.<sup>38</sup>

The revised PRC Act bestowed on the PRC the authority to demand explanations for non-prosecution decisions and made an indictment mandatory if the commission had already twice recommended prosecution. The revised law established a two-step process to make the PRC resolution legally binding. First, when the PRC decides that an indictment is proper, prosecutors will be obliged to reconsider the non-indictment decision, although the commission's decision is not legally binding at that time. If prosecutors still choose not to prosecute or if they fail to indict within three months, prosecutors will be invited to explain their inaction or non-indictment decision to the commission.<sup>39</sup> Following this, the commission will then re-evaluate the case and can make a legally binding decision in favor of an indictment.<sup>40</sup> In the event of such a decision, the court must appoint a lawyer who will perform the prosecution's role until a final ruling is reached.<sup>41</sup> Since only the prosecutor has the power to indict and prosecute the accused, the actual instruction to investigate authorities, however, will still be entrusted with the prosecutors.<sup>42</sup>

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36. *Id.*

37. KANGAERARERU KENSATSU SHINSKAI 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/saibannin/dai29/29siryou1.pdf>.

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

39. PRC Act arts. 41 (2)(2) & 41 (6) (2).

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

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

42. *Id.* art. 41 (9) (3). See Mark West, *Prosecution Review Commissions: Japan's*

The court appoints a lawyer to the newly created role of legal advisor in circumstances when the Commission needs specialized legal advice.<sup>43</sup> Such a situation is likely to arise during the second half of the two-step process – after prosecutors have rejected the PRC's initial indictment recommendation and the Commission is considering the prosecutor's second non-indictment decision.<sup>44</sup>

### **III. Impact of Lay Adjudication on Criminal Justice Procedures: Remedial Measures to Eliminate Procedural Problems in the Criminal Process**

This section examines how both the practice of criminal justice and the judicial process have been affected by the introduction of the twin systems of lay adjudication. The analysis primarily focuses on the effect of the *Saiban-in* trial on the criminal justice proceedings. While the PRC does change the ways in which prosecutors make indictment decisions in criminal cases, it does not directly influence trial court proceedings themselves. The impact of the PRC on the prosecution system will be examined in the latter part of this report.

Past research has identified a multitude of causal factors that led to the prevalence of wrongful prosecutions and convictions, and they can be largely summarized into five distinct areas, as have been already indicated. Practicing attorneys and legal scholars have also identified other related factors. For example, prominent defense attorney Shojiro Goto who has worked on many wrongful conviction cases in his career pointed out: (1) the problem of prosecutors' frequent use of an arrest warrant on a separate, pretrial criminal charge in order to allow the continued interrogation of criminal suspects; (2) manufacturing of fabricated and falsified evidence; (3) purposeful suppression of exculpatory evidence and destruction of proof, and (4) judges' deeply ingrained

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*Answer to the Problem of Prosecutorial Discretion*, 93 COLUM. L. REV. 684, 697 (1992) (stating that "because only the prosecutor has the power to indict, all PRC recommendations were considered merely advisory and not binding," indicating that even after the new PRC Act was passed, the prosecutor still remains authority to provide an appointed counsel prosecutorial instructions to investigate the accused).

43. PRC Act art. 39 (2) (1).

44. *Id.* art. 41 (4). It is legally "required" that the PRC acquires the assistance of a legal advisor in considering the second resolution on the same case.

biases and prejudices against criminal defendants.<sup>45</sup>

The following section examines whether or not the JSRC's recommendations and proposals helped to eliminate these outstanding problems and issues.

#### A. *The Use of Substitute Prisons [Daiyo Kangoku]*

With respect to the issues relating to the custody of criminal suspects, the JSRC report was seriously concerned about the use of custody facilities in police stations in lieu of actual detention facilities. The use of substitute prison has been historically responsible for the brutal investigation of the suspect by police and/or prosecutorial investigators for the extraction of coerced confessions.<sup>46</sup> However, the word, "*Daiyo Kangoku*," appeared only once in the JSRC recommendations, merely stating that the "improper custody of suspects and of defendants must be prevented and rectified."<sup>47</sup> The JSRC recommendation thus failed to directly address the causal link between custodial detention and the use of brutal interrogation techniques by investigative officers for the forced extraction of confessions from suspects because nearly 92% of all criminal defendants in Japan result in making confessions.<sup>48</sup>

This is despite the fact that the Japanese Constitution specifically provides a comprehensive prohibition against the use of enhanced interrogation techniques, the extraction of forced confessions under lengthy detention, and self-incriminations. Article 38 states that (1) "No person shall be compelled to testify against himself," (2) "A confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence," and (3) "No person shall be convicted or punished in cases where the only proof against him is his own

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45. SHOJIRO GOTO, ENZAI [WRONGFUL CONVICTION] 216-31 (1979). See SEIKICHI UEDA & SHOJIRO GOTO, AYAMATTA SAIBAN [WRONGFUL TRIALS] 199-220 (1960); CHIHIRO SAEKI, BAISHIN SAIBAN NO FUKKATSU [RESURRECTION OF THE JURY TRIAL] 157-63 (1996) (elaborating the problem of defendants' confessionary statement and a summary report of interrogation by police investigators).

46. JOHNSON, *supra* note 4, at 253-62. See generally SETSUO MIYAZAWA, POLICING IN JAPAN: A STUDY ON MAKING CRIME (1992).

47. Issues Related to Custody of Suspects and of Defendants, in JSRC REPORT, *supra* note 1, Ch. II, Pt. 2 (4) (2) (a).

48. JOHNSON, *supra* note 4, at 75 (stating that "the fact that 92 percent of all defendants confess is hardly surprising").

confession.”<sup>49</sup> Similarly, Article 36 states that the “infliction of torture by any public officer and cruel punishments are absolutely forbidden.”<sup>50</sup> Despite the Constitutional prohibition, the legal basis for the use of police holding cells comes from Article 1, Section 3 of the antiquated 1908 Prison Law, which was used to allow the use of detention cells in police stations for interrogation. This century-old law was finally replaced by the new Criminal Detention Law [*Daiyo Keiji Shisetsu-ho*] in 2006, but the new law still failed to abolish custodial facilities themselves or even the use of facilities for interrogation purposes.<sup>51</sup> While the JFBA proposed a series of recommendations to improve the right of detained criminal suspects, the special committee to discuss the actual content of the Criminal Detention Law convened for mere two months, and the strong oppositions from both the Justice Ministry and the National Police Agency gave way to limited reforms.<sup>52</sup>

The JSRC report also recognized that the use of custodial facilities and detention cells in police stations purportedly helped extend the criminal investigation and facilitate “illegal” interrogations of criminal suspects.<sup>53</sup> Even with these acknowledgements, the JSRC recommendation nonetheless failed to eliminate the substitute prisons which continue to exist today.

To help propose new remedies to these problems, including the elimination of the substitute prisons, a special committee was

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49. CONSTITUTION OF JAPAN [hereinafter *JAPAN CONSTITUTION*] art. 38. An English translation is available at <http://www.constitution.org/cons/japan.txt>. See also Jeff Vize, *Torture, Forced Confessions, and Inhuman Punishments: Human Rights Abuses in the Japanese Penal System*, 20 UCLA PAC. BASIN L.J. 329, 344 n.144 (2003).

50. JAPAN CONSTITUTION art 36.

51. JAPANESE WORKERS' COMMITTEE FOR HUMAN RIGHTS (JWCHR), THE HUMAN RIGHTS REPORT FOR CONVEYING THE REAL CONDITION IN JAPAN 45 (2006) (stating that “Daiyo Kangoku continues to exist with a different name: ‘*Daiyo Keiji Shisetsu*’ (substitute penal institute)).

52. JFBA, KOKIN NI-HOAN TAISAKU HONBU: KEIJI KOKIN SEIDO KAIKAKU JITSUBEN HONBU NO KATSUDO KEIKA [TASKFORCE FOR TWO CUSTODIAL DETENTION LAWS: ACTIVITIES OF HEADQUARTERS FOR THE PROMOTION OF CUSTODIAL DETENTION REFORMS], Keiji Hi-Shuyosha Shogu-ho no Seiritsu [Part 3: The Passage of the Criminal Detention Law] (2006), <http://www.nichibenren.or.jp/activity/criminal/detention/taisakuhonbu.html>.

53. *Issues Related to Custody of Suspects and of Defendants*, in JSRC REPORT, *supra*, note 1, Ch. II, Pt. 2 (4) (2) (a) (“Various concerns have been pointed out regarding the custody of suspects and of defendants, such as how *daiyo kangoku* (use of custody facilities in police stations in lieu of detention facilities) should be”).

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created in 2011. It is called "the Legal Council: The Special Committee for Criminal Justice in New Ages (SCCJNA, "Shinjidai no Keiji-shiho Seido Tokubetsu Bukai" hereinafter the Special Committee)." The Special Committee has 25 criminal justice experts and has attempted to address the continued problem of substitute prisons.<sup>54</sup> The SCCJNA Chair, Katsuhiko Honda, received a letter from Amnesty International, asking him to eliminate the substitute prison immediately and to introduce the use of audio and visual recording devices at each and every phase of the investigative process.<sup>55</sup>

The problem of substitute prison was first pointed out in the second SCCJNA meeting on July 28, 2011.<sup>56</sup> At its fifth meeting, Attorney Kazuko Nakayama further attributed it as the primary cause of wrongful convictions in the past; she insisted the complete elimination of substitute prison on November 29, 2011.<sup>57</sup> The committee discussions still continue today, though it is safe to say that the government opposition, particularly, from the Ministry of Justice and the National Police Agency stands firmly against the complete elimination of interrogative facilities in Japan.

### ***B. Limited Access to Defense Counsel***

The JSRC report suggested the importance of establishing a systematic process to ensure "sufficient meetings between suspects and defense counsel" during the criminal process.<sup>58</sup> While the public defense counsel for individuals who have no legal counsel is disallowed by the government until after an indictment, the JSRC recommendation promulgated the Act to Amend the Criminal Proceedings [*Keiji Soshō-ho-to Ichibu Kaisei-ho*] in May 2004 and establish a National Public Defender System [*Higisha Kokusen Bengo*

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54. Meibo [The Special Committee, Membership ] (June 22, 2012), <http://www.moj.go.jp/content/000099259.pdf>.

55. Catherine Barber, *Kokai Shokan* [Open Letter of the Amnesty International ] (June 2012), <http://www.amnesty.org/en/library/asset/ASA22/010/2012/ja/fdf52fbdb-fac4-4fb9-b5de-e869a2c88904/asa220102012ja.pdf>.

56. MINISTRY OF JUSTICE, *The Special Committee* (July 28, 2011), [http://www.moj.go.jp/kentou/jimu/kentou01\\_00041.html](http://www.moj.go.jp/kentou/jimu/kentou01_00041.html).

57. THE LEGAL COUNCIL, *Hosei Shingikai, Shin-jidai no Keiji-Shiho Seido Tokubetsu Bukai: Dai 5-Kai Kaigi, Gijiroku* [*The Special Committee for Criminal Justice in New Ages: The Minutes of the Council Proceedings of the Fifth Meeting*] (Nov. 29, 2011), <http://www.moj.go.jp/content/000084089.pdf>.

58. JSRC REPORT, *supra* note 1, Ch. 2, Pt. 2 (4) (2) (b) ("With Regard to Measures to Ensure the Propriety of Questioning of Suspects").

*Seido*]. The new law allows the indigent to obtain defense counsel during the pre-indictment stage of the criminal process.<sup>59</sup> Through the JSRC recommendation, a systematic process for ensuring sufficient meetings between indigent suspects and defense counsel during the criminal process has been sufficiently established.

The JFBA had previously established a free attorney-on-duty service [*Toban Bengoshi Seido*] for detained suspects, but the scope of its services has been quite limited. The Japan Legal Support Center (JLSC or “*Hoterasu*”) was established in 2006 to provide basic legal support to criminal defendants. However, only those whose total net wealth, including cash and bank accounts, does not exceed a half million yen (\$6,000) are allowed to access legal services of a public defense lawyer.<sup>60</sup>

Nonetheless, recent government statistics showed a dramatic increase in the number of defense counsels since the start of the *Saiban-in* trial in 2009. In 2007 and 2008, a total of 140,271 and 133,412 defendants received detention warrants respectively, while a little more than 6,000 defendants were able to secure court-appointed attorneys. After the introduction of *Saiban-in* trials in 2009, the number of court-appointed attorneys for criminal defendants increased to 46,666 in 2010 and 70,618 in 2011, despite the fact that less numbers of detention warrants were issued in the latter two years combined than the previous two years.<sup>61</sup>

### C. Use of Physical and Psychological Torture to Obtain Forced Confessions

Japanese investigators have historically considered the direct

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59. See the following governmental site for the content of the Act, <http://www.kantei.go.jp/jp/singi/sihou/hourei/keiji.html>. The English version of the Act is available at <http://www.hoterasu.or.jp/cont/100167450.pdf>.

60. Those whose net worth exceeds a half million yen can file a petition to a local bar association to acquire a lawyer. For some reason, if the lawyer was unable to represent the client, he/she can file a petition to the JLSC to acquire a public defender. For the explanation of the detailed procedure for the acquisition of a court-appointed attorney, even in situations where one's financial wealth exceeds a half million yen, please see the homepage of the Kyoto Daiichi Horitsu Jimusho [Kyoto Daiichi Law Office], <http://www.daiichi.gr.jp/publication/johobox/2006/091.html>.

61. MINISTRY OF JUSTICE, *Higisha Kokusen Bengo Seido no Tokei Shiryo* [Statistics for the National Public Defender System] (2011), <http://www.moj.go.jp/content/000100782.pdf>.

questioning of suspected criminals as more important and efficient than the process of conducting searches and seizures for evidence.<sup>62</sup> Thus, in practice, the use of psychological and physical tortures has been an accepted norm and became carefully systematic means of obtaining confessions. The JSRC recommendations have attempted to address the problem, and while some changes have been implemented, there has not been pervasive and effective reform. So despite some progress, the use of recording devices was still not allowed in police detention cells, where an overwhelming majority of alleged physical and psychological tortures take place.<sup>63</sup>

Until the end of the Tokugawa Period in 1868, various methods of torture were prescribed by law, and both torture and coerced confessions were considered an integral part of the criminal justice system.<sup>64</sup> The value of confession was considered not only as evidentiary, but also redemptory because those who confessed could expect more lenient treatment.<sup>65</sup>

After the establishment of the modern state, the Japanese government decided to abolish torture as a principal means of soliciting confessions in 1879; however, today's investigators still rely on the use of psychological and physical torture, including intimidation and physical abuse, to extract confessions from detained suspects.<sup>66</sup> Police and prosecutorial reliance on physical and psychological violence to obtain confessions has long been criticized by both the Japanese public and the broader international human rights community because of the systematic disregards and abuses of the accused's human rights. While there are no clear statistics on the prevalence of the use of torture for obtaining confessions, Professor Toshikuni Murai estimated that, among all of voluntary and/or extraneously coerced confessions by criminal

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62. GOTO, *supra* note 45. See also TOSHIKI ODANAKA, ENZAI WA KOSHITE TSUKURARERU [IN THE MAKING OF THE WRONGFUL CONVICTION CASES] (1993).

63. HUMAN RIGHTS NOW, *HRN to Organize a Conference with JFBA on Transparency of Police Investigation* (Aug. 16, 2012), <http://hrn.or.jp/eng/activity/area/japan/hrn-to-organize-a-conference-with-jfba-on-transparency-of-police-investigation/>.

64. Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 181-99 (1994).

65. *Id.* at 198-99.

66. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CALIF. L. REV. 317, 330 (1992).

suspects and defendants in Japan, coerced and forced confessions could account for as high as fifty percent of all confession cases in Japan.<sup>67</sup> Historians, however, have argued that the prohibition against the use of torture is relatively new to Japan, arguing that the historical legacy of mistreating criminal suspects still largely prevails in the penal system, and an impasse exists that prevents the enactment of international human rights laws within Japan.<sup>68</sup>

Japan's courts have rarely overturned convictions on the basis of torture or inhumane treatment. From 1952 to the early 1990s, for example, over 12,000 complaints of torture and similar inhumane abuses were reported. However, only 15 cases were accepted by the courts, and only eight resulted in the punishment of police.<sup>69</sup> On one level, proving torture has been extremely difficult given the closed nature of the interrogation in substitute prisons. In order to make the investigative process more open and transparent, in July 2006, prosecutors began implementing the use of video-recording devices during their interrogations.<sup>70</sup> However, the recording was only applied to a very small number of criminal cases and was only limited to interrogations conducted by the Tokyo Prosecutors' Office.<sup>71</sup> In February 2007, a similar practice of recording interrogations was extended to eight regional prosecutorial offices. However, the recording was still limited to only 170 of all the criminal cases.<sup>72</sup> The Japanese police began recording the questioning of suspects in 2009 and prosecutors did so in 2011 on a test basis only.<sup>73</sup> In July 2012, the Supreme Public Prosecutors Office announced that some "elite" prosecutors used a recording device in

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67. Teresa Watanabe, *Victims of a Safe Society: Behind Japan's Low Crime Rate and Civilized Streets is a Criminal Justice System Criticized as the Most Backward in the Industrialized World*, L.A. TIMES, Feb. 27, 1992, at A1.

68. Vize, *supra* note 49, at 343.

69. Ramlogan, *supra* note 64, at 182.

70. Shinya Sakane, *Torishirabe no Kashika ni Mukete [Towards the Transparency of Investigative Processes]*, 6 LIBRA 26 (2006), available at [http://www.toben.or.jp/message/libra/pdf/2006\\_09/p26p27\\_RASINBAN.pdf](http://www.toben.or.jp/message/libra/pdf/2006_09/p26p27_RASINBAN.pdf).

71. *Id.*

72. JFBA, *Torishirabe no Rokuon Rokuga no Shiko ni Tsuiteno Kenshokekka ni Taisuru Ikensho [Opinion for the Investigative Results on the Trial of Audio-Visual Recording Devices during Interrogation]* (Mar. 18, 2009), [http://www.nichibenren.or.jp/library/ja/opinion/report/data/090318\\_3.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/090318_3.pdf).

73. *Man Given Jail Term After Entire Questioning Process Videotaped*, JAPAN ECONOMIC NEWSWIRE, Feb. 24, 2012.

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all or part of their interrogation sessions during a pilot project nationwide; most of these recorded cases involved the violation of tax law and financial regulations, and not violent and serious criminal offenses.<sup>74</sup>

Japan has so far signed two key international treaties governing abuses in prisons and detention centers, namely the International Covenant on Civil and Political Rights (ICCPR) which was ratified in 1979<sup>75</sup> and the Convention Against Torture (CAT), to which Japan acceded in 1999.<sup>76</sup> Despite the signing of these international treaties, Japan continues to solicit confessions obtained through physical duress and/or psychological pressure, and safeguards against torture and self-incrimination have been systematically ignored.

Prominent legal scholar Stephen Thaman suggested a different strategy for ensuring greater transparency in investigative processes via the adoption of the new codes of criminal procedure. According to Professor Thaman, Italy and Venezuela have both adopted new laws that require defense counsel to be present during an interrogation for any of the evidence obtained during it to be admissible in court.<sup>77</sup> The U.S. Supreme Court in *Escobedo v. Illinois* also ruled that criminal suspects have a right to counsel during police interrogation, stating that law enforcement "which comes to depend on the confession will, in the long run, be less reliable and more subject to abuses than a system which depends on extrinsic evidence independently secured through skillful investigation."<sup>78</sup> Prominent Japanese legal writer Chihiro Isa similarly argued that the over-reliance on the confessionary evidence leads to diminished investigative efforts from the police and prosecutors to properly

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74. Prosecutors Record Most Interrogations During Own Investigations, JAPAN ECONOMIC NEWSWIRE, July 4, 2012.

75. See generally GLOBAL RIGHTS PARTNERS FOR JUSTICE, *The Violations of the Rights of Lesbian, Gay, Bisexual and Transgender Persons in Japan: A Shadow Report* (Oct. 2008), at 2, available at [http://www.globalrights.org/site/DocServer/Shadow\\_Report\\_Japan.pdf?docID=10043](http://www.globalrights.org/site/DocServer/Shadow_Report_Japan.pdf?docID=10043).

76. JFBA, *Report on the Japanese Government's Implementation of the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment* (Jan. 18, 2007), at 1, available at <http://www2.ohchr.org/english/bodies/cat/docs/ngos/JFBA.pdf>.

77. Stephen Thaman, *Japan's New System of Mixed Courts: Some Suggestions Regarding Their Future Form and Procedures*, 2001 ST. LOUIS-WARSAW TRANSATLANTIC L.J. 89, 105 (2001-02).

78. *Escobedo v. Illinois*, 378 U.S. 478, 488-89 (1964).

seek and obtain material, forensic, and/or other corroborating evidence.<sup>79</sup> Instead, such investigative methods and overreliance on confessions may often lead to more instances of wrongful convictions.<sup>80</sup>

The JSRC recommendations, on the other hand, have generally failed to closely scrutinize Japanese investigative methods and the pervasive use of confession in Japanese courts. The word, "confession" or "Jihaku," was used only twice in the JSRC's comprehensive report - in a section with the subheading, "With Regard to Measures to Ensure the Propriety of Questioning of Suspects." The report gave a basic treatment of the issue, stating that the use of "questioning lacks propriety, arising out of an excessive emphasis on confessions of suspects . . . [and] questioning of suspects must not be improper, and measures to prevent improper questioning naturally are necessary."<sup>81</sup>

Between 2007 and 2009, however, in an effort to respond to both domestic and international pressure, the Japanese government made some effort to promulgate a transparency law that would shed light on the criminal investigative process; but, their efforts have been systematically undermined either through the denial of the proposal by the upper house of the Diet or through the dissolution of the Diet even after both upper and lower houses gave prior approval.<sup>82</sup> In October 2009, the government also created a standing committee on judicial affairs and submitted an interim report on the committee resolutions in June 2010.<sup>83</sup> In February of 2010, the National Police Agency also convened a study group to examine the sophistication of investigative methods under the leadership of the chairman of the National Public Safety Commission, resulting in a voluntary introduction of a recording device in a limited number of interrogation sessions.<sup>84</sup>

Given recent controversies with the falsification of floppy data

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79. CHIHIRO ISA, SHIHO NO HANZAI [CRIMES BY THE JUDICIARY] (2006).

80. *Id.*

81. JSRC REPORT, *supra* note 1, Ch. 2, Pt. 2 (4) (2) (b) ("With Regard to Measures to Ensure the Propriety of Questioning of Suspects,").

82. Seiichi Hishinuma, *Homu Iinkai no Shuyo Kadai: Shihoseido Kaikaku Shingikai Ikensho Kara 10-Nen* [Main Themes of the Standing Committee on Judicial Affairs: Ten Years from the Recommendations of the JSRC], 324 RIPPO TO CHOSA 24, 30 (2012).

83. *Id.*

84. *Id.*

by the Chief and Deputy Directors at the Special Investigation Division of the Osaka Prosecutor's Office in 2010, the Supreme Court submitted the report on the falsification incident on December 24, 2010, suggesting the measures to introduce the transparency in investigative processes and restore the reputable status of the public prosecutors and their offices.<sup>85</sup> In this case, three prosecutors were indicted over the intentional tempering of data on a floppy disk in the course of their investigation into alleged abuse of Japan's postal discount system.<sup>86</sup> Another study group which was created by the Minister of Justice submitted a report on March 31, 2011, reiterating the importance of introducing transparency into investigative processes by public prosecutors.<sup>87</sup> Following this, former Justice Minister Satsuki Eda ordered the introduction of the audio-visual recording during suspect investigation and interrogation and, by September 2011, the use of recording devices were applied to 31 criminal defendants in 247 cases.<sup>88</sup> While the Japanese executive office have made some notable efforts, neither a concrete law or a set of new regulations has yet to be promulgated nor adopted to increase the transparency in the Japanese criminal justice system. The SCCJNA is thus currently assessing the proper investigative method to be used by the police and prosecutors and discussing the possible introduction of the recording device at each and every investigative process.<sup>89</sup>

#### *D. Judicial Neglect Over the Use of Confession Documents and Other Written Materials*

In addition to the fact that the criminal process still lacks effective oversight to prevent the extraction of forced confessions from criminal suspects or defendants, scholars have also pointed to

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85. JAPAN SUPREME COURT, *Iwayuru Korosho Moto Kyokucho Muzai Jiken ni Okeru Sosa, Kohan Katsudo no Mondaiten-to ni Tsuite* [Regarding the Problems of the Investigation and Trial Proceedings of the Case Involving the Innocence of the Chief Director of the Ministry of Health and Welfare] (Dec. 2010), <http://www.moj.go.jp/content/000076308.pdf>.

86. *Top Prosecutor to Quit Over Scandal*, JAPAN TIMES (Dec. 17, 2010), <http://www.japantimes.co.jp/text/nm20101217a7.html>.

87. MINISTRY OF JUSTICE, *Kensatsu no Saisei ni Mukete* [Restoring the Integrity of the Prosecutor's Office] (Mar. 31, 2011), <http://www.moj.go.jp/content/000076299.pdf>.

88. Hishinuma, *supra* note 82, at 31.

89. See the following government site for the committee proceedings, <http://www.moj.go.jp/shingi1/shingi03500012.html>.

the attitudes of Japanese judges as contributing to the problem. Senshu University Law Professor Toshiki Odanaka has pointed out that four features underlying the indifference and negligence of Japanese judges may lead to wrongful convictions in Japan. They are: (1) disregard of the fairness of criminal investigative processes, (2) indifference toward circumstances and conditions surrounding the suspect when soliciting confessions, (3) uncritical attitudes toward the credibility and authenticity of confessions and expert opinions, and (4) indifference toward possible internal contradictions of narratives provided by coerced confessions.<sup>90</sup>

Kwanzei University Law Professor Takashi Maruta also stated that Japanese judges' systemic disregard for the rights of the accused and near-blind acceptance of confession as the queen of all evidence may stem from their homogenous social origins and legal trainings they have received, as well as the stringent bureaucratic control exerted by the Secretariat of the Supreme Court.<sup>91</sup> He argues that judges are not independent thinkers when it comes to making legal decisions and writing legal opinions.

Judges in Japanese courts were all children of the same type of high-income parents, all studied at the same leading high schools, went to the same bar exam preparatory schools, graduated from the same universities, studied at the same [legal] training institute and, without ever experiencing any other profession, spend most of their lives in court with colleagues who all share the same mode of thinking.<sup>92</sup>

Professor Maruta also suggests that Japanese judges have very little autonomy or judicial independence, as they are subject to reappointment every ten years and may be reassigned to different courts in remote regions in Japan. The threat of denying reappointment and the "shipping" of non-compliant judges to far-away "satellite" courthouses has effectively been used by the Secretariat of the Supreme Court to ensure that judges follow standardized procedures, efficiently manage their case loads, and issue opinions that do not challenge the court's legal status quo and

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90. ODANAKA, *supra* note 62.

91. TAKASHI MARUTA, SAIBAN'IN SEIDO [THE QUASI-JURY SYSTEM] 43 (2004).

92. *Id.* The excerpt (i.e., the translation of Maruta's original quote) was taken from Colin P.A. Jones, *Book Review: Prospects for Citizen Participation in Criminal Trials in Japan*, 15 PAC. RIM L. & POL'Y J. 363, 364 (2006).

precedents. Japanese judges who fail to skillfully dispose a large number of criminal cases become subject to negative and critical evaluations by the Supreme Court in periodic merit and promotion considerations.<sup>93</sup> The Secretariat's critical evaluations of, and strict bureaucratic control over, the Japanese judge thus helped standardize the court's opinions, control ideologies of individual judges, and promote efficient bureaucratic dispositions of a large number of criminal and civil cases. This is despite the fact that judges' complete independence has been guaranteed under Article 78 of the Japanese Constitution, which states that "Judges shall not be removed except by public impeachment unless judicially declared mentally or physically incompetent to perform official duties. No disciplinary action against judges shall be administered by any executive organ or agency."<sup>94</sup>

The JSRC suggested the introduction of transparency and accountability into the evaluation and assessment of judicial candidates for appointment and personnel process for the merit and reappointment procedures. Under the section title of the "Reexamination of the Personnel System for Judges (Securing Transparency, Objectivity)" in the JSRC's final report, the reform council pointed out that "personnel evaluation that serves as the basis for the personnel management lacks transparency and objectivity . . . [and] appropriate mechanisms should be established for the purpose of ensuring, as much as possible, transparency and objectivity with regard to the personnel evaluation of judges, by making clear and transparent who should be the evaluator and the standards for evaluation."<sup>95</sup>

After the JSRC made the recommendation to reform the judge system in 2001, the Investigation Committee on the Legal Professional System [*Hoso Seido Kento-Kai*] was created by the Reform Promotion Office, and the Supreme Court, based on the

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93. TAKASHI MARUTA, BAISHIN SAIBAN O KANGAERU [CONSIDERING THE JURY TRIAL] (1990).

94. JAPAN CONSTITUTION art. 78. For the discussion of the independence of Japan's judiciary, please see Takayuki Ii, *Japan's Judicial System May Change, but Its Fundamental Nature Stays Virtually the Same? Recent Japanese Reforms on the Judicial Appointment and Evaluation*, 36 HASTINGS INT'L & COMP. L. REV. 459 (2013) (included in this special issue of HICLR).

95. JSRC REPORT, *supra* note 1, Ch. 3, Pt. 5 (3) ("Reexamination of the Personnel System for Judges (Securing Transparency, Objectivity)").

committee report, created the “Rule on the Lower Court Judges Nominating Advisory Commission” on February 12, 2003.<sup>96</sup>

With the introduction of new rules into the nomination process, more than 500 new judges were added to the judiciary by 2010.<sup>97</sup> At the same time, the new system which appoints judges from the rank of practicing attorneys has not functioned as initially expected.<sup>98</sup> Despite the effort to increase the size of the judiciary, only a handful of nominations came from practicing attorneys. In 2003, when 11 attorneys were nominated, four were found to be “not qualified,” and only seven were accepted as judges.<sup>99</sup> At the same time, 109 graduates from the Legal Training and Research Institute (LTRI) of the Supreme Court were nominated and 101 of them were accepted as qualified judges.<sup>100</sup> In 2009, while 106 LTRI graduates qualified as judges, only 1 attorney was accepted as a qualified judge.<sup>101</sup>

The lack of diversity among Japan’s judges and their applicants and still a relatively small size of the Japanese judiciary did not help lessen the significant workload of average judges, affecting the nature of *Saiban-in* trials themselves. Consequently, as the *Saiban-in* trials progressed, trial judges began to allow the reading of investigative materials and in-court recitation of confessionary statements, instead of creating the opportunity to directly question the defendants, witnesses, investigators, or other relevant personnel involved in the investigation of criminal cases in court. Since these investigative materials and confessionary statements have been specifically written and prepared by police and/or prosecutorial investigators, they were often accused of inaccurately reflecting the contents of actual statements made by the accused or witnesses.<sup>102</sup>

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96. Takayuki Ii, *Japanese Way of Judicial Appointment and Its Impact on Judicial Review*, 5 NAT'L TAIWAN U. L. REV. 73, 94 (2010).

97. Shunsuke Marushima, *Historical Genealogy of Japan's Judicial Reform: Its Achievements and Challenges*, 2012, 36 HASTINGS INT'L & COMP. L. REV. 349 (2013) (included in this edition of HICLR).

98. *Id.*

99. Ii, *supra* note 96, at 98 (see Table 2).

100. *Id.*

101. *Id.*

102. Lester W. Kiss, *Reviving the Criminal Jury in Japan*, 62 LAW & CONTEMP. PROBS 261, 265 (1999) (“This practice is problematic because the manner of speech and demeanor of witnesses and of the defendant can have a strong influence on the finder of fact; if these elements are not fully considered, the defendant may not be receiving a fair trial”).

These emerging trends in *Saiban-in* trials seem to resemble the over-reliance on the use of written dossiers in collegial bench trials, prior to the introduction of *Saiban-in* trials in 2009. The Supreme Court reported in May 2012 that for criminal trials convened from January to June in 2011, in which defendants already admitted their guilt, in-court readings of investigative materials took twice as long as the actual questioning of the defendants themselves.<sup>103</sup> One *Saiban-in* judge who participated in a murder trial stated that "Reading of investigative records went on and on and it was extremely difficult to understand their contents. I wish that I was able to pose direct questions."<sup>104</sup>

The Supreme Court also found that the in-court recitation of investigative records and the direct questioning of defendants themselves each comprised 37% and 28% of the trial proceedings, respectively.<sup>105</sup> At the Kobe District Court, the reading of written records occupied nearly a half of the trials themselves (46%), while the direct questions of defendants was mere 21% of the entire trial proceeding.<sup>106</sup> The ratio of reading records vis-à-vis questioning defendants in *Saiban-in* trials improved somewhat in 2012.<sup>107</sup> But significant changes still need to be made to reverse the trend in the direct recitation of investigative records and materials from the court proceeding.

#### *E. Limited Pretrial Release for the Accused*

Another major problem in Japan's criminal proceeding is the lack of pre-trial release of the accused. There has largely been no post-indictment bail system or pre-indictment release system in Japan. Requests for pre-indictment bail are universally rejected on the ground that no such program exists, suggesting that the suspect is not entitled to bail during the "mandatory" or "pre-indictment" twenty-three day detention period. This is contrary to Article 89 of the Code of Criminal Procedure which states that post-indictment

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103. Shigeyuki Maekawa, *Jihaku Jiken no Saiban-in Saiban: Shomen Yomiage Chojikan-ni* [Saiban-in Trials in Admitted Criminal Cases: Long Hours of Reading Investigative Materials], KOBE SHIMBUN (May 22, 2012), <http://www.kobe-np.co.jp/news/shakai/0005073072.shtml>.

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

bail is possible in Japan.<sup>108</sup> There are, however, many grounds on which a judge may deny such a bail request by criminal suspects. Post-indictment bail thus becomes extremely difficult to obtain, and approximately 80% of the indicted await trial while in custody.<sup>109</sup>

According to the JFBA report in 1996, only 16.3% of defendants were released on bail.<sup>110</sup> The report argues that denials of charges or remaining silent are taken as indications of the defendants' tendency to destroy evidence which serves as the basis for denying bail.<sup>111</sup> As a result, Japanese judges tend to give greater weight to recommendations by prosecutors in comparison to requests by defendants and their defense counsel.

Given the fact that access to defense counsel is incredibly limited and pre-indictment release is impossible, today's defense lawyers tend to recommend that the suspect remain completely silent in custody and not engage in any conversation with police or prosecution investigators. Because Japan does not have its own equivalent set of Miranda Rights, where criminal suspects in police custody are informed of his/her rights, a movement to systematically popularize the use of Miranda warnings was introduced by a group of progressive lawyers to encourage defendants to remain silent in substitute prisons or under any other custodial situation.<sup>112</sup> Attorney Takashi Takano, who created the *Miranda no Kai* (The Miranda Association), has shown that his group's efforts and strategies have been very successful. For example, prosecutors decided not to indict more than 90 percent of that group's clients despite their complete silence in custody.<sup>113</sup>

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108. See JAPANESE FEDERATION OF BAR ASSOCIATIONS, ALTERNATIVE REPORT TO THE FOURTH PERIODIC REPORT OF JAPAN ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS 57 (Sept. 1998).

109. *Id.*

110. *Id.*

111. *Id.*

112. Takashi Takano, *The Miranda Experience in Japan*, in THE JAPANESE ADVERSARY SYSTEM IN CONTEXT 128-39 (Malcolm K. Feeley & Setsuo Miyazawa eds. 2002).

113. See HENSHUSHA NO KOE [Editor's Voice], Miranda no Kai [The Miranda Association], <http://mirandanokai.net/body/news/hitokoto.html> ("Koremade miranda-ho-shiki no bengo katsudo o yatta hinin jiken no 9wari-ijo wa fukiso ni natteiru" ["In more than 90% of contested criminal cases where we applied Miranda warnings -- asking the suspect to remain silent in custody -- prosecutors failed to issue indictments"].

To bolster its argument for pre-indictment or pre-trial release for criminal suspects or defendants, the JSRC cited the recommendation of the UN Human Rights Committee as the basis for the possible establishment of the pre-indictment bail system [*Kisomae Hoshaku Seido*.]<sup>114</sup> The council recommendation also pointed out the problem with the issuance of warrants, as well as the uncertainties around how the judges' decisions for the request for the defendant's post-indictment release on bail were made in order to reduce improper custody of defendants in substitute prisons.<sup>115</sup> As of today, the pre-indictment bail system has yet to be established in Japan. Current JFBA President Keishi Yamagishi, in his speech at the Japan National Press Club, emphasized that it is imperative for Japan to establish a pre-indictment bail system in order to eliminate the ongoing use of substitute prisons and lengthy detentions of criminal suspects or defendants without representation by effective defense counsel.<sup>116</sup>

Former JFBA Secretary-General Shunsuke Marushima reported at the UC Hastings Symposium that there has been an increase in the rate of court dismissals of detention requests by prosecutors, as well as an increased admissions of "quasi-complaints against the use of detention [*Jun Ko-koku*]" filed by defense attorneys.<sup>117</sup> Indeed, government statistics show a steady increase in the rate of the court's denial of detention requests by prosecution since 2003.<sup>118</sup> In 2008, one year before the start of the *Saiban-in* trial, the rate of dismissal was 0.77% which was trivial. It rose to 1.32% in 2010<sup>119</sup>

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114. *Id.*

115. JSRC REPORT, *supra* note 1, Ch. II, Pt. 2, (4) (2) (a) ("Issues Related to Custody of Suspects and of Defendants").

116. Kenji Yamagishi, *Keiji Shiho Kaikaku eno Torikumi to Higashi Nihon Daishinsai, Genpatsujiko no Hisaisha, Higaisha eno Hoteki Shien* [Strategies for Criminal Justice Reforms and Legal Assistance to Victims of East Japan Earthquake and Nuclear Accidents] (June 19, 2012), <http://www.jnpc.or.jp/files/2012/06/542922f8dd20192de70171b40e9838da.pdf>.

117. Marushima, *supra* note 97.

118. Hanzai Hakusho, 2010-nen Ban [The White Paper on Crimes in 2010], at 12 (2010), available at <http://www.moj.go.jp/content/000010214.pdf>.

119. Keiji Jiken, 2010 nen-do [Criminal Cases in 2010], Dai 15 hyo: *Reijo Jiken no Kekka* [Results of Arrest Warrant], available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B22DKEI15~16.pdf>. There were 124,045 detention requests and 1,648 of them were denied.

and then 1.45% in 2011.<sup>120</sup> While the increase is still trivial, the court's denial of detention request gives defendants better access to effective legal counseling.

#### *F. Pre-Trial Conference Procedures [Kohanmae Seiri Tetsuzuki]*

The JSRC proposed the introduction of a new pre-trial conference procedure "in order to sort out the contested issues and to fix a clear plan for the proceedings in advance of the first trial date."<sup>121</sup> The recommendation also stated the importance of introducing a discovery procedure, suggesting that "rules regarding the timing and the scope of the disclosure of evidence should be clearly set forth by law, and... the need for the disclosure of evidence should be introduced as part of the new preparatory procedure."<sup>122</sup>

Despite a seemingly smooth and seamless transition from inquisitorial legal proceedings to an open adversarial trial, the introduction of a pre-trial conference procedure seemed to have become one of the significant drawbacks that prevented the smooth disposition of a large number of expected citizen judge trials. The total number of *Saiban-in* trials for the first year, for example, failed to reach the desired goal set by the Japanese government, which initially expected to hold around 3,000 quasi-jury trials annually.<sup>123</sup> In the first year of the operation, the actual number of quasi-jury trials was approximately forty percent less than the anticipated numbers, and the number of completed jury trials was a fraction of the total number of criminal cases originally assigned to lay adjudication by the Japanese government.<sup>124</sup> Thus, in order to process a large number of *Saiban-in* trials, it may be necessary to set up an efficient system of pre-trial conference procedures.

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120. Keiji Jiken, 2011 nen-do [Criminal Cases in 2011], Dai 15 hyo: Reijo Jiken no Kekka [Results of Arrest Warrant], available at <http://www.courts.go.jp/sihotokei/nenpo/pdf/B23DKEI15~16.pdf>. There were 119,110 detention requests and 1,727 of them were denied.

121. JSRC REPORT *supra* note 1, Ch. II, Pt. 2 (1) (1) ("Introduction of New Preparatory Procedure").

122. *Id.*

123. Japanese Court Office, *Saiban-in Seido no Taisho to Naru Jiken no Kazu, 2008* [Criminal Cases Qualified for the Quasi-Jury Trial, 2008] (Aug. 26, 2008), <http://www.saibanin.courts.go.jp/shiryo/pdf/03.pdf>.

124. A total of 554 cases were completed by the end of May 2010.

Prior to the passage of the pre-trial conference procedure law in 2004,<sup>125</sup> Japan's discovery laws only required that prosecutors disclose materials or statements that they planned to introduce into evidence at trial.<sup>126</sup> Thus, Japanese prosecutors had not been required to disclose contradictory statements or confessions from defendants or witnesses that might reveal weaknesses in their cases.<sup>127</sup>

The newly introduced pre-trial conference forced the prosecution to disclose much broader evidence to defense lawyers, and courts also showed a tendency to support extensive evidence discovery - demanding greater prosecutorial disclosure of records and information, including discretionary work used for issuing indictments against criminal defendants.<sup>128</sup> While the new pre-trial conference was also introduced with the intention of saving time by narrowing case-specific issues at trial and facilitating the speedy trial process, the retrial procedure also forced both parties to clarify the charges and applicable laws, define allegations and contested issues, delineate greater disclosures of facts and evidence, establish objections related to evidence, address the use of experts if any, and finally determine hearing and trial dates.<sup>129</sup> As a result, the preparation phase of the new mandatory pre-trial arrangement procedure began to take many months.

For instance, during the first year of its operation, the average length of a pre-trial conference procedure was 4.2 months (4.0 months for non-contested cases and 4.8 months for contested cases).<sup>130</sup> After three years of operation, the average length of pre-

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125. KEIJI SOSHIO Ho [CODE OF CRIMINAL PROCEDURE] art. 316-2.

126. JOHNSON, *supra* note 4, at 40-41.

127. *Id.*

128. Ibusuki, *supra* note 24, at 56 & n.90 ("The recent Supreme Court's judgments suggest the disclosure to be favorable for the defense"). The expansive discovery requests in the pre-trial conference were also noted by the JFBA's report, resulting in a long waiting period. Nonetheless, despite the long waiting list for *Saiban-in* trials, the JFBA supports the thorough pre-trial procedures, including greater disclosure of evidence. See JFBA, *Comment on the 1st Anniversary of the Saiban-in System* (May 21, 2010), <http://www.nichibenren.or.jp/activity/document/statement/year/2010/100521.html>. ("a [more] sufficient period of [pre-trial conference] time must be secured for preparation of a defense").

129. KEIJI SOSHIO Ho art. 316-5.

130. JAPANESE COURT OFFICE, *Saiban-in Saiban no Jisshi Jokyo ni Tsuite: Tokubetsu Shukei Shiryo* [Implementation of the Quasi-Jury Trial: Special Statistical Summaries]

trial conference was extended to 5.7 months overall, with 4.7 months for non-contested cases and 7.1 month for contested cases.<sup>131</sup>

Only a quarter of pre-trial procedures lasted more than four months (28.8%) in the first year.<sup>132</sup> After three years, 64% of pre-trial conference lasted four months or beyond.<sup>133</sup> For the contested cases, nearly half of them required more than four months to complete the pre-trial arrangement procedure (45.8%) in the first year.<sup>134</sup> But, after three years of operation, 83.1% of contested cases needed the pre-trial conference of four months and longer.<sup>135</sup>

The procedural disparity is also reflected on the number of procedural meetings that the pre-trial conference required. The average pre-trial conference required 3.7 meetings, i.e., 3.3 meetings for non-contested and 4.5 meetings for contested cases.<sup>136</sup> After three years of operation, the average meetings extended to four times overall, with 3.5 for non-contested cases and 4.8 times for contested cases.<sup>137</sup>

The lengthy pre-trial conference procedure also affected the overall facilitation of the lay justice process. For instance, the average procedural period from the initial indictment to judgment was approximately 6 months, i.e., 5.8 months in non-contested cases and 6.8 months in contested cases.<sup>138</sup> Out of the 308 cases examined by the Supreme Court Office, two-thirds of them (206 or 67%) completed the entire criminal process from indictment to the judgment within six months.<sup>139</sup> Nonetheless, the remaining one third took more than six months, including some criminal cases

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[hereinafter *Statistics-2010*] (Apr. 2010), [http://www.courts.go.jp/saikosai/about/iinkai/saibanin\\_kondan/siryo\\_07/pdf/siryo\\_5.pdf](http://www.courts.go.jp/saikosai/about/iinkai/saibanin_kondan/siryo_07/pdf/siryo_5.pdf).

131. JAPANESE COURT OFFICE, *Saiban-in Saiban no Jisshi Jokyo ni Tsuite: Tokubetsu Shukei Shiryo* [Implementation of the Quasi-Jury Trial: Special Statistical Summaries] [hereinafter *Statistics-2012*] (Mar. 2012), available at [http://www.saibanin.courts.go.jp/topics/pdf/saibanin\\_kekka.pdf](http://www.saibanin.courts.go.jp/topics/pdf/saibanin_kekka.pdf).

132. *Id.* at Table 9.

133. *Id.*

134. Statistics-2010, *supra* note 130, at Table 9.

135. Statistics-2012, *supra* note 131, at Table 9.

136. Statistics-2010, *supra* note 130, at Table 10.

137. Statistics-2012, *supra* note 131, at Table 10.

138. *Id.* at Table 11 (1).

139. *Id.*

which required more than a year to complete.<sup>140</sup>

These figures suggest that, for the first year, in the average of six months from the indictment to the judgment, four months (two-thirds) were spent on the pre-trial conference procedure alone. Once the lengthy pre-trial conference is over, the criminal case itself was expedited to complete within two months to reach a final judgment by the *Saiban-in* panel.

Hence, in order to process a large number of the *Saiban-in* trials as projected by the Japanese government and to provide participatory opportunities to many Japanese citizens, it may be necessary to shorten the lengthy preparatory period of the pre-trial conference procedure. At present, this lengthy pre-trial preparation has contributed to a significant delay in the overall adjudication of criminal trials. While the pre-trial conference arrangement may be able to prevent an innocent person from unnecessary prosecution and provide him/her with much needed legal protection, a more elaborate, yet efficient system needs to be adopted in the future operation of the *Saiban-in* trial.

#### *G. Institution of the National Public Defender System and Japan Legal Support Center*

The JSRC emphasized in 2001 that a new legal support organization had to be created in order to "manage the public defense system [which] should be fair and independent, and public money should be introduced for [the] operation of the system through a proper mechanism."<sup>141</sup>

The Japan Legal Support Center (JLSC) was established on April 10, 2006 and began its operation on October 2, 2006. The National Public Defender System (NPDS) was also established within the JLSC in October 2006 and provides legal services related to the court-appointed defense lawyers. At the first phase of introducing the national public defender system, the criminal cases available to the NPDS only included the most serious and violent offenses that were under consideration of the death penalty.<sup>142</sup> In

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140. *Id.*

141. JSRC REPORT, *supra* note 1, Ch. II, Pt. 2, (1) (b) ("How the Concrete System Should be Introduced").

142. Ministry of Justice, Higisha Kokusen Bengo Seido no Gaiyo [Summary of the National Public Defender System], available at <http://www.moj.go.jp/content>

May 2010, applicable cases were extended to other crimes with punishment of three years' incarceration or more.<sup>143</sup>

According to David T. Johnson, approximately two-thirds of criminal defendants in Japan were represented by state-appointed defense lawyers.<sup>144</sup> While the number of court-appointed defense lawyers in 2006 was 10,733, use of the system increased exponentially so that that number reached nearly 20,000 in 2010 (i.e., 19,566).<sup>145</sup> The number of requests for national public defender services by criminal defendants in the post-indictment stage also increased accordingly from 37,717 in 2006 to 69,634 in 2010, and the number of requests for legal representation in the pre-indictment stage multiplied from a mere 3,436 in 2006 to 70, 917 in 2010, more than a 20-fold increase in just four years.<sup>146</sup>

The number of regional centers that provide legal services also increased from 6 in 2006 to 29 in 2010, simultaneously adding more staff attorneys from 24 in 2006 to 217 in 2010, as part of executing the JFBA's stated mission of providing competent legal services to people in remote areas in Japan.<sup>147</sup> The salary of the court-appointed defense lawyers also increased substantially following the introduction of the National Public Defender System in 2006. Attorney Shunsuke Marushima who served as Senior Staff of the JSRC Secretariat stated that demands for higher attorney fees and more rewarding salary structures proposed by the JFBA for the National Public Defender System were accepted by the Ministry of Finance after careful research by the bar association.<sup>148</sup>

The JFBA suggested that the court-appointed defense lawyer be paid 365,800 yen (approximately \$4,570)<sup>149</sup> for defending one

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/000100781.pdf.

143. *Id.*

144. Johnson, *supra* note 14 ("About two-thirds of criminal defendants in Japan are represented by state-appointed attorneys [*kokusen bengonin*]").

145. JFBA, *Hosojinko Seisaku ni Kansuru Kinkyu Teigen* [Urgent Suggestions to the Changes in Legal Professionals] (Mar. 17, 2011), [http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327\\_shiryou.pdf](http://www.nichibenren.or.jp/library/ja/opinion/report/data/110327_shiryou.pdf).

146. *Id.*

147. THE JAPAN LEGAL SUPPORT CENTER (JLSC), HO TERASU TOKEI NENHO: HEISEI 22-NENDOBAN [THE JLSC ANNUAL REPORT: THE YEAR 2010], 54 (2011), available at [www.houterasu.or.jp/cont/100453223.pdf](http://www.houterasu.or.jp/cont/100453223.pdf).

148. Marushima, *supra* note 5.

149. The dollar conversion is based on the ratio of one dollar being equivalent to approximately 80 Japanese yen.

defendant in a *Saiban-in* trial with two pre-trial conference hearings and seven hours of trial work over three days in court. The national public defender will now be paid for the basic salary of four pre-trial conference hearings for 170,000 yen (\$2,100) and 240,000 (\$3,000) yen for uncontested and contested cases respectively. When there are two or more defendants, the fees for the defendant who untested their criminal charges reduced to 190,000 yen (\$2,300).<sup>150</sup>

The original JFBA guideline also suggested 773,000 yen (\$9600) for five pre-trial conference hearings and twenty hours over five days of trial, while the government suggested that 300,000 yen (\$3700) for pretrial hearings of 5 to 7 attendance with a trial of three days or more. There are other considerations as to the content and extent of services that defense attorneys are legally able to provide to the defendant, which would improve the monetary rewards for the court-appointed defense lawyers.<sup>151</sup> Nonetheless, the job of criminal defense still falls far short of being financially lucrative given the amount of labor it requires, especially compared with other civil service and consulting work. Overall, the JSRC recommendations aimed to establish an effective legal service organization and to provide legal counseling services at both the pre- and post-indictment stages of criminal justice process. The number of trial attorneys willing to work as court-appointed defense counsels also increased exponentially after the introduction of the American-style law schools in 2004 and implementation of the *Saiban-in* trial in 2009, and the new and more rewarding salary structure for court-appointed defense lawyers in the *Saiban-in* trial and other criminal cases laid out the stable economic foundation to a large group of young and new practicing attorneys in Japan.<sup>152</sup>

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150. JLSC, *supra* note 147, at 46.

151. *Id.*

152. Kenji Utsunomiya, Speech for SIL Session at ABA in San Francisco: Changes of Role of Lawyers Over the Past Ten Years, at 2-3 (Aug. 6, 2010), available at <http://www2.americanbar.org/calendar/section-of-international-law-2010-annual-meeting-san-francisco-ca/Documents/Utsunomiya%20Speech.pdf> (in recognizing that "the unprecedented rapid increase in the lawyer population has led to the problem of young lawyers having difficulty finding jobs," JFBA President Utsunomiya stated that "[A]ccess to court-appointed attorneys has now has [sic] been expanded . . . [and] over 50% of the attorneys throughout the country have registered in the rolls for court-appointed defense attorneys"). For the establishment of Japan's law school system and its impact on legal profession, see Mayumi Saegusa, *Why the Japanese law school system was Established: Co-Optation as a*

### ***H. Victim Participation Programs***

The JSRC recommendation emphasized the importance of extending legal protection to crime victims, as well as the creation of a liaison conference between crime victims and related government agencies.<sup>153</sup> The JSRC recommendation also pointed out that public prosecutors are obliged to take into consideration "the feeling of victims of crime" in their investigative process of rape and other sexually explicit or sensitive cases.<sup>154</sup>

Since December 2008, victims and their families have been allowed to participate in criminal proceedings, following the implementation of a revised Code of Criminal Procedure (CCP).<sup>155</sup> Victim participation became available for cases of intentional crimes such as indecent assault and rape, or ones that result in the death of a person or serious bodily injury or death through negligent conduct in breach of duty of care or in automobile operation, arrest and confinement, or kidnapping and human trafficking.<sup>156</sup>

Historically, crime victims and their families were only allowed to watch the trial from the gallery seats, but the new law positioned them as active participants of the prosecutorial processes, allowing them opportunities to express their opinions about the facts concerned and the application of law, examine and question witnesses and the accused if necessary, submit their recommended sentences, and offer supplemental closing arguments in addition to those of the prosecutor.<sup>157</sup>

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*Defensive Tactic in the Face of Global Pressure*, 34 LAW & SOC. INQUIRY 365 (2009).

153. JSRC REPORT, *supra* note 1, Ch. II, Pt. 2 (5).

154. JSRC REPORT, *supra* note 1, Ch. III, Pt. 4 (1) ("Elevation of the Quality and Ability Demanded of Public Prosecutors").

155. For detailed historical analyses of the emergence of Japan's recent victim participation program, see Setsuo Miyazawa, *The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy*, 10 PUNISHMENT & SOC'Y 47 (2008). See also Masahiko Saeki, *Victim Participation in Criminal Trials in Japan*, 38 INT'L J.L., CRIM., & JUST. 149 (2010).

156. See Toshihiro Kawaide, *Victim's Participation in the Criminal Trial in Japan*, 10 J. JAPAN-NETHERLANDS INST. 48 (2010).

157. See Koichi Hamai & Tom Ellis, *Genbatsuka: Growing Penal Populism and the Changing Role of Public Prosecutors in Japan?*, 33 JAPANESE J. SOC. CRIMINOLOGY 67 (2008), available at <http://www.port.ac.uk/departments/academic/icjs/staff/documentation/filetownload,86506,en.pdf>. See also JAPANESE CABINET OFFICE, Column: *Support for Crime Victims From the Japanese Legal Support Center* (2009), available at <http://www8.cao.go.jp/hanzai/whitepaper/english/2009/pdf/p26-30.pdf>.

Today the JLSC provides systemic assistance to crime victims and their families in multiple ways, mainly through their victim participation system. The center also provides attorney candidates for victim participants and designates and notifies the court of the candidates of court-appointed lawyers based on the requests of victim participants. The court is then required to select a lawyer for victim participants since many of them have limited financial resources.<sup>158</sup>

There are three major problems with Japan's victim participation system when applied to *Saiban-in* trials. First, victims themselves are not independent from the criminal justice process, and as a result, are required to work collaboratively with Japanese prosecutors. When victims' opinions and strategies of their trial participation do not comply with those of prosecutorial strategies and trial process, they may not be presented in court at all.<sup>159</sup> In comparison to the victim participation system in Germany which civil law system became the bedrock of Japan's legal foundation,<sup>160</sup> the Japanese counterpart has largely failed to exert its judicial independence and authority from the influence of prosecutors. For example, German victim participants are given the equal legal status as those of prosecutors and defendants and are allowed to appeal prosecutorial decisions, if necessary.<sup>161</sup>

Active trial participation by crime victims in Japan is also problematic because the guilt of the defendant of an accused crime has yet to be established at the conviction phase of the criminal trial. Because of the legal uncertainty that the defendant may or may not be the true perpetrator of the alleged crime, participation of crime victims in the conviction phase of the trial violates the precept of the presumed innocence in the criminal process, and victims' expressed condemnation and explosion of emotive sentiments in the

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158. JAPANESE CABINET OFFICE, *supra* note 157 (suggesting that the requirement for applying for victim participation is that their total wealth must not exceed 1.5 million yen (\$18,700)).

159. Junko Komatsu, *Higaisha Sanka Seido no Mondai-ten to Kadai* [Victim Participation Systems, Their Problems, and Challenges], FACULTY OF LAW, KEIO U. (Oct. 19, 2010), available at <http://www.clb.law.mita.keio.ac.jp/ohta/openzemi2.pdf>.

160. Shigenori Matsui, *Turbulence Ahead: The Future of Law Schools in Japan*, 62 J. LEGAL EDUC. 1, 3 (2012) ("the legal system in Japan was almost entirely based on the German civil law system").

161. *Id.*

courtroom certainly has the potential to tip the scale of justice toward conviction of the defendants.

Secondly, Japan's victims were barred from participating in criminal cases where prosecutors decided not to indict. This is contrary to the German system where victims can use legal means to mount a private prosecution of criminal cases.<sup>162</sup> The only venue left for Japan's crime victims is to file a complaint to the local PRC, hoping that its review may result in a forced prosecution of criminal suspects.

Another problem of crime victim participation is victim participants' use of the compensation of damage order system [*Songai Baisho Meirei Seido*]. Once guilt is established in court, the JLSC assists victims in their application for the compensation of damages, enabling the court to order perpetrator reparations for damages and making it possible to reduce the necessary time or financial and mental burden through the initiation of a civil suit against criminal defendants. While defendants can appeal the court's compensatory order, this quasi-civil system of the victim participation program prevents the traditional avenue for out-of-court settlements between crime victims and crime perpetrators. Ibaragi Bar Association President Yundo Adachi once pointed out that victim participation often exposes the negativity of criminal offenses and accentuates the excessive malice engaged in by the perpetrators, thereby reducing the possible cooperation and collaboration required to reach equitable settlements by both parties.<sup>163</sup> While the defense is allowed to appeal the court decision on the compensatory order, the damage order system often becomes detrimental to reconciliatory negotiations necessary to reach out-of-court settlements that economically strapped crime victims often desperately desire.

### *I. Voices of Lay Participants on Crime Victim Participation*

Active participation of crime victims in *Saiban-in* trials also introduced many ambiguities and increased doubts about the

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162. *Id.*

163. Yundo Adachi, *Higaisha Sanka Seido Oyobi Songai Baisho Meirei Seido Do-nyu ni Hantaisuru Kaicho Seimeい* [Presidential Announcement Against the Introduction of the Victim Participation and Compensation of Damage Order Systems] Apr. 19, 2007 (on file with the author).

program's deliberative merits among lay participants themselves. In the Supreme Court Report on the *Saiban-in* trials in 2011, one lay judge complained that "there was a discrepancy in the statements made by the defendant and the victim . . . We, the lay judges, felt that there was not sufficient amount of evidence in both quality and quantity."<sup>164</sup> Another lay participant stated that there was clear "contradiction in statement between the victim and defendant. [There was also] a lack of evidence and we were unable to make a fair decision."<sup>165</sup>

Another participant decried that "this system [of crime victim participation] tends to place much greater emphasis on the feeling of crime victims, creating a tendency [among us] to impose harsher sentences upon the defendant. In order for us to make a fair decision, much improvement must be made to this existing system."<sup>166</sup> While one *Saiban-in* judge said that "the experience was heartbreaking, after facing both family members of both the defendant and crime victim,"<sup>167</sup> another stated that "I did not know what was proper to believe between the crime victim and the defendant, including their families. I try not to think deeply and let it drag down later on."<sup>168</sup>

One lay participant said that trial participation of victims and their families had a long-lasting impact, adding that "I felt the applicative limit of law, shared nuances of utter mortification of crime victims, wondering what is just and fair throughout the trial. Even I returned home, I was so stressed psychologically that I had to cry often."<sup>169</sup>

Conversely, some called for the increase in active victim participation because the prosecutors often resorted to reciting the statement made by victims without letting them to speak in person during the trial, and thus there was "not sufficient materials of

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164. JAPAN SUPREME COURT, *Saiban-in to Keikensha ni Taisuru Anke-to: Chosa Kekka Hokoku-sho: Heisei 23-nendo* [Survey on Quasi-Jury Participants: Report of Analytic Results for the Year 2011] [herein after 2011 Survey], 144 (Mar. 2012), available at [http://www.saibanin.courts.go.jp/topics/pdf/09\\_12\\_05-10jissi\\_jyoukyou/h23\\_q1.pdf](http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/h23_q1.pdf).

165. *Id.* at 172.

166. *Id.* at 165.

167. *Id.* at 159.

168. *Id.* at 160.

169. *Id.* at 163.

evidence both in quantity and quality. We heard direct testimony of defendants, but for crime victims, it was only investigative materials and statements [introduced in trial] and it was difficult [for us] to understand the true feeling of crime victims. I wish we heard direct testimony from the victims.”<sup>170</sup> In 2009, another lay participant made a similar comment on victim participation that “I wanted to know more about the daily activities of both the victim and defendant, their life experience, and personal characters, which were not presented in the trial.”<sup>171</sup> Another lay judge emphasized the necessity of direct participation of related parties, including crime victims, stating that “there was no chance to directly communicate with defendant, victim, or prosecutors, or defense attorney [to have a better understanding of the trial].”<sup>172</sup>

One lay judge said that victim participation was important because “I had a profound feeling and thought about the crime, its background and motives. It gave me an opportunity to share the feeling of a defendant and victim.”<sup>173</sup> Another participant said that both crime victim participation and defendant testimony deepened the understanding of the trial process, stating that “I have always looked at the case from the victim’s perspective, but now I know multitudes of reasons and complex backgrounds also exist on the side of defendants as well.”<sup>174</sup>

After having said that he/she developed a better understanding of the situation of crime victims, one lay judge added, “even if it were a temporal experience, I experienced something I never did before, including the [understanding of] life history of the defendant, and an opportunity to think about feelings of crime victims.”<sup>175</sup> Another lay participant summarized the experience with testimony made by both a defendant and victim, stating that “I felt a tremendous relief once my duty was over, and our decision was

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170. *Id.* at 172.

171. JAPAN SUPREME COURT, *Saiban-in to Keikensha ni Taisuru Anke-to: Chosa Kekka Hokokusho: Heisei 21-nendo* [Survey on Quasi-Jury Participants: Report of Analytic Results for the Year 2011] [hereinafter 2009 Survey], 126 (Mar. 2010), available at [http://www.saibanin.courts.go.jp/topics/pdf/09\\_12\\_05-10jissi\\_jyoukyou/03-1.pdf](http://www.saibanin.courts.go.jp/topics/pdf/09_12_05-10jissi_jyoukyou/03-1.pdf).

172. *Id.* at 160.

173. *Id.*

174. *Id.* at 141.

175. 2011 Survey, *supra* note 164, at 182.

something reasonable for both a victim and defendant. [The decision is] something people in our society could accept. Or perhaps some other decision may have been proper, but all these feelings are integrated together inside [our decision]."<sup>176</sup>

Lastly, some lay judges were initially reluctant to participate in the *Saiban-in* trial specifically because they did not want to become emotionally involved with crime victims or defendants. In particular, one lay judge, who originally did not want to serve in a trial because he/she did not want to be involved in cases related to crimes or anything that can endanger one's life or body or safety, said "It is burdensome to pass on a judgment based on my personal feeling, and I also felt that it is also a heavy responsibility to have some kind of connection with the defendant and/or crime victims and other people affected by the crime."<sup>177</sup>

While the JSRC's suggestion was important for extending participatory rights of crime victims within the justice system, the victim participation program seemed to pose multitudes of problems especially with respect to the ambiguities and confusions among lay participants who pointed out significant discrepancies in the testimonies given by defendants and crime victims, which likely affect the content of discussions in the deliberation. The 2010 defense lawyer survey in Yokohama also indicated that, in trials where the defendants disputed the crime, "the testimony by crime victims failed to match or even make any reasonable sense against the testimony given by defendants. [Victim testimony] does not even corroborate with arguments presented by prosecutors or the court."<sup>178</sup> Legal scholar Shinichi Ishizuka also pointed out that crime victim participation in the *Saiban-in* trial dilutes a clear separation of the conviction and sentencing phases of judicial decision-making, and victim participation became the prosecutors' effective instrument and procedural tool to help convict criminal defendants by exploiting the emotive outrage of victims against defendants. Thus, Ishizuka warns against the use of the victim

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176. *Id.* at 186.

177. 2009 Survey, *supra* note 171, at 141.

178. HIRONORI TAKEUCHI, HIGAISHA SANKA ANKE-TO NO KEKKA HOKOKU [REPORT ON THE RESULTS ON CRIME VICTIM PARTICIPATION SURVEY] 1 (2011), available at [http://www.nichibenren.or.jp/library/ja/committee/list/data/higaisha\\_enquete.pdf](http://www.nichibenren.or.jp/library/ja/committee/list/data/higaisha_enquete.pdf).

participation programs in the *Saiban-in* trial, suggesting that the final trial rendering must be strictly based on investigative materials, forensic evidence, and/or credible testimonies given by related parties only, thereby excluding crime victims and their families.<sup>179</sup>

#### IV. Collateral Impact of Two Systems of Lay Adjudication

##### A. *Citizen Adjudication of Military Crimes in Saiban-in Trials*

The twin systems of lay adjudication, namely the *Saiban-in* trial and revised Prosecution Review Commissions (PRC), have had significant socio-political ramifications for many Japanese citizens who have long felt vulnerable and helpless against policies of the government and predatory business practices of powerful corporations. The first significant, collateral impact of the introduction of the *Saiban-in* trial was the lay adjudication of military crimes committed by U.S. Armed Forces personnel stationed in Japan. In May 2010, a 19-year old American soldier in Okinawa was tried for robbery and injuring a cab driver.<sup>180</sup> A judicial panel of five female and one male lay judges and three professional judges convicted and sentenced the soldier to three to four years in a Japanese prison.<sup>181</sup> One lay judge, in a post-verdict interview, said that he hopes the sentence "would serve as a deterrence" to American military personnel who often commit crimes in Okinawa.<sup>182</sup> The written judgment by the court also echoed the importance of having severe sentences acting as an effective deterrence against pervasive military personnel's crimes against Japanese citizens in Okinawa, stating that the trial outcome "cannot ignore deterrent effects against similar crimes from being committed in the future."<sup>183</sup> This *Saiban-in* trial became the first ever trial of an American serviceman in Japan's lay court.

The second *Saiban-in* trial commenced in Okinawa in December 2010, when another American soldier was adjudicated by the lay

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179. Shin'ichi Ishizuka, *Keiji Saiban ni Okeru Higaisha no Yakuwari* [The Role of Crime Victims in Criminal Trials], 36 GENDAI SHIHO 92 (2008).

180. For this trial, see Fukurai, *supra* note 8.

181. *Id.*

182. *Id.* at 797.

183. Hanketsu Shushi [Final Judgment], at 3 (May 27, 2010).

judges for sexual assaults.<sup>184</sup> After three days of trial, the panel of lay and professional judges found the American defendant guilty and sentenced him to three years and six months in a Japanese prison.<sup>185</sup>

Why are so many crimes committed by American military personnel in Okinawa? It is important to note that Okinawa was once an independent kingdom before Japan annexed it as part of the jurisdictional territory by the modern Japanese state in 1879. The new Japanese government then treated the Okinawa islands as a de-facto advance military outpost for the defense of main Japanese islands, as well as a strategic forwarding base to project its colonial policies in the rest of Southeast Asia. As a result, from the first days of the Asian-Pacific War with the Allied Forces, the Islands of Okinawa were fortified to serve as key strategic locations for airbases and bastions of defense for Japan's main islands.

In the Battle of Okinawa in 1945, more than ten thousand American soldiers, ninety thousand Japanese troops, and more than one hundred thousand Okinawans, which is nearly one-third of Okinawa's prefectural population at the time of war, died over a nearly ninety day battle in Okinawa.<sup>186</sup> After Japan lost the war in 1945, the U.S. and Japan signed the San Francisco Peace Treaty in 1951, and the U.S. government declared Okinawa as its main military colony, and from then on has used it as an important strategic military outpost for the wars in Korea and Vietnam.<sup>187</sup>

Today, Japan serves as a strategic home for the U.S. Third Marine Division, the U.S. Seventh Fleet, and the U.S. Forces Japan,<sup>188</sup> and three quarters of American military facilities in Japan

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184. David Allen & Chiyomi Sumida, *Marine Indicted on Sexual Assault and Trespassing Charges on Okinawa*, STARS & STRIPES (Aug. 25, 2010), <http://www.stripes.com/news/pacific/okinawa/marine-indicted-on-sexual-assault-and-trespassing-charges-on-okinawa-1.115882>.

185. *Kyosei Waisetsu Chisho Beihei no Koso Kikyaku* [Denial of Appeal by American Soldier Convicted of Sexual Assault], OKINAWA TIMES, May 11, 2011.

186. Fukurai, *supra* note 27, at 794-95.

187. *Id.*

188. See U.S. DEP'T OF DEFENSE, *Base Structure Report Fiscal Year 2011 Baseline: A summary of DoD's Real Property Inventory 7* [hereinafter Base Structure] (2011), available at <http://www.acq.osd.mil/ie/download/bsr/bsr2011baseline.pdf>. See also U.S. DEP'T OF DEFENSE, *Active Duty Military Personnel Strength by Regional Area and by Country* 3 (Mar. 31, 2011), available at <http://www.globalsecurity.org/military/library/report/2011/hst1103.pdf>. See

are located on the island of Okinawa.<sup>189</sup> The Japanese government reports that between 1952 and 2004, American soldiers, military employees, and dependents committed crimes or caused accidents in a total of 201,481 cases that resulted in the death of 1,076 civilians.<sup>190</sup> The data, however, excludes crimes or accidents on the Island of Okinawa from 1945 to 1972, during which Okinawa remained under U.S. military jurisdiction. Despite the widespread victimization of local residents by military personnel and dependents, there had never been a lay trial in Japan against foreign soldiers, their dependents, or civic military employees. Direct citizen participation in *Saiban-in* trials thus became the first important legal mechanism against the culture of impunity shared among many American soldiers toward residents in Okinawa and other Japanese islands with large U.S. military bases.

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

A unique feature of the new Prosecutorial Review Commissions (PRC) is its ability to extend the investigative jurisdiction beyond criminal cases to possible civil and administrative matters such as malfeasance, misfeasance, or nonfeasance against public officers and/or corporate elites. With the PRC's new ability to issue legally binding prosecutorial decisions, it has now become the single-most important institution of civic oversight over the allegation of corporate predation and governmental abuse of power.

Immediately after the implementation of the new PRC Act in 2009, all-citizen panels issued the forced indictment for the Deputy Police Chief of the Akashi Police Station in the Hyogo Prefecture in January,<sup>191</sup> and three past presidents of JR-West, one of Japan's

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also CHALMERS JOHNSON, NEMESIS 178 (2008) (using various governmental data, Johnson stated that "the United States had stationed some 36,365 uniformed military personnel in Japan, not counting 11,887 sailors attached to the Seventh Fleet at its bases at Yokosuka (Kanagawa Prefecture) and Sasebo (Nagasaki Prefecture.").

189. Johnson, *supra* note 188, at 179.

190. Hiroshi Hayashi, *Higashi Ajia no Beigunkichi to Seibaibai, Seihanbai [American Military Bases in East Asia, Prostitution and Sexual Crime]*, 29 AMERICA-SHI KENKYU 1 (2006), available at <http://www.geocities.jp/hhhirofumi/paper75.pdf> (referring to crime statistics provided by the Japanese Defense Facilities Administration Agency, on July 1, 2005).

191. *Akashi Hodokyo Jiko: Naze Koredake Jikanga Kakattanoka – Izoku Kaiken [Akashi*

largest and most powerful corporations, in March 2010.<sup>192</sup>

Despite numerous calls for the prosecution of the Akashi Deputy Police Chief for his failure to institute effective police oversight to prevent a deadly stampede incident in Akashi City in 2001, the Japanese prosecution refused to initiate an official criminal investigation on numerous occasions.<sup>193</sup> The deadly stampede resulted in the injuries of 274 people and deaths of nine children, ranging from five months to nine years of age, who were crushed to death in a crowded pedestrian bridge.<sup>194</sup> Upon the receipt of a civic complaint to the Hyogo Prosecutorial Review Commission, the civic panel deliberated the case on numerous occasions, deciding each time that the officer be indicted and prosecuted, but local prosecutors continued to ignore the PRC recommendations.<sup>195</sup> The prosecutors' disregard for the PRC's decisions continued until 2009, when the families of the victim resubmitted their complaint to the PRC once again to recommend that the officer be indicted and prosecuted.<sup>196</sup> The second PRC decision finally forced the local prosecutors to indict and prosecute the police officer.<sup>197</sup>

After setting a new precedent on the forcible indictment against the deputy police chief, the PRC in the same prefecture went on to deliberate on a corporate malfeasance case involving a train derailment incident, which killed 107 and injured 555 others.<sup>198</sup> After a brief investigation, the Japanese prosecutors decided not to indict the three former presidents of the JR-West, indicating that they were not directly responsible for the failure to install the Automatic Train Stop (ATP) system, which could have halted the speeding train from slamming itself into a multi-story parking garage in the ground

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*Pedestrian Incidents: Why Did It Take This Long? – Testimony of Victims' Families*] [hereinafter *Akashi*], SANKEI NEWS (Jan. 27, 2010), <http://sankei.jp.msn.com/affairs/trial/100127/tr1001272216017-n1.htm>.

192. JR Nishi Rekidai 3 Shacho, Kyoseikisoe: Kobe Daiichi Kensatsu ga Kiso Giketsu [Kobe PRC Decides on Indictment Against Three JR-West Presidents] [hereinafter *JR Nishi*], SANKEI NEWS (Mar. 26, 2010), <http://sankei.jp.msn.com/affairs/crime/100326/crm1003261636020-n1.htm>.

193. Fukurai, *supra* note 2, at 345-47.

194. *Id.*

195. *Id.*

196. *Id.*

197. Akashi, *supra* note 191.

198. JR West, Victims' Relatives Mark Amagasaki Crash, JAPAN TIMES (Oct. 26, 2005), <http://search.japantimes.co.jp/cgi-bin/nn20051026a4.html>.

floor of the nearby apartment building.<sup>199</sup> The Hyogo PRC decided that the leading cause of the deadly accident was the company's mismanagement and administrative policy that favored its profit motives over the safety of their customers.<sup>200</sup> In March 2010, the PRC decided for the second time that the three former JR-West presidents be indicted for professional negligence resulting in injuries and deaths.<sup>201</sup>

The recent forced prosecution of corporate and government elites also demonstrated that the PRC's investigative authority might be easily extended to crimes committed by other social groups that Japanese prosecutors have been historically reluctant to prosecute. This includes the American Armed Forces personnel stationed in Japan. In January 2011, a vehicle driven by a 24-year-old American military employee killed a 19-year-old Japanese driver in Okinawa.<sup>202</sup> Okinawa prosecutors decided not to indict the military employee because they determined that the accident took place while he was on duty, and the U.S.-Japan Status of Forces Agreement (SOFA) grants the U.S. military the right to exercise primary jurisdiction over on-duty crimes or incidents.<sup>203</sup> In April, a mother of a deceased youth filed a complaint with the Naha PRC to review the Okinawa prosecutors' non-indictment decision.<sup>204</sup> Meanwhile, further investigations into the cause of the traffic accident revealed that the American driver consumed alcohol at an official party at the U.S. military base prior to the accident.<sup>205</sup> In

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199. *Id.*

200. *JR West's Actions Show Lack of Remorse, Resolve*, DAILY YOMIURI, Oct. 24, 2009, at 4

201. JR Nishi, *supra* note 191.

202. *Japanese Man Dies After Vehicle Collision with AAFES Employee on Okinawa*, STARS & STRIPES (Jan. 13, 2011), <http://www.stripes.com/news/pacific/Okinawa-japanese-man-dies-after-vehicle-collision-with-aafes-employee-on-okinawa-1.131710>.

203. *Beigunzoku, Kisotsoto Chiikyotei ga Hikokusekini* ["Indictment is Proper" for Military Employee: SOFA is on Defendant's Seat] [hereinafter *Beigunzoku, Kisotsoto*], OKINAWA TIMES (May 29, 2011), [http://www.okinawa-times.co.jp/article/2011-05-29\\_18467](http://www.okinawa-times.co.jp/article/2011-05-29_18467).

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

205. *Drinking at U.S.F 'Official Event' Is Regarded as Part of 'Official Duty'*, JAPAN PRESS WEEKLY, (Apr. 24 & 26, 2011), <http://www.japan-press.co.jp/modules>

May, the Naha PRC chose to reverse the prosecutors' non-indictment decision, stating that the indictment was proper for the given case.<sup>206</sup>

After the PRC announced its decision to prosecute the individual, the U.S. and Japanese governments decided to begin a round of discussions on new rules that may allow civilian workers in American military bases to be tried in Japanese court for incidents that occur while on-duty, and in November, a bilateral governmental committee finally agreed on a new interpretation of the SOFA guidelines, in which the U.S. military still retains primary jurisdiction in cases involving military personal who are on official business. However, if the U.S. military declines to prosecute a civilian component of military personnel, Japan has thirty days to formally request permission to try the case in its own court system.<sup>207</sup> Two days after both governments reached the agreement, the Naha prosecutors indicted the American military employee and a Japanese court convicted and sentenced him to eighteen months in Japanese prison.<sup>208</sup> The sentence of incarceration was a stark contrast to the previous year's U.S. military decision to simply punish the defendant by revoking his driving privilege for five years.<sup>209</sup>

For three years from 2008 and 2010, Japanese prosecutors had decided not to indict fifty-two American military employees because of the SOFA provision.<sup>210</sup> The PRC forced the bilateral discussion on the legality of the SOFA jurisdiction over on-duty crimes or accidents caused by American military personnel and made possible the forced prosecution of civilian components of U.S.

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/news/index.php?id=1784.

206. Beigunzoku, Kisotsu, *supra* note 203.

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

208. Travis J. Tritten & Chiyomi Sumida, *American on Okinawa Gets 18 Months in Prison for Vehicular Manslaughter*, STARS & STRIPES (Feb. 22, 2012), <http://www.stripes.com/news/pacific/okinawa/american-on-okinawa-gets-18-months-in-prison-for-vehicular-manslaughter-1.169343>.

209. *Id.*

210. *Beigunzoku no Hanzai, Sabakarezu 06-nen Kara Saibanken ni Kuhaku [Non-Prosecution of Crimes Committed by Military Employees: Lack of Jurisdiction Since 2006]*, ASAHI SHIMBUN, (Nov. 13, 2011), <http://www.asahi.com/national/update/1112/TKY201111120625.html>.

Armed Forces personnel. Its very existence provides effective civic oversight of the conduct and activities of American military personnel in Okinawa and other prefectures in the main islands that have U.S. military bases and facilities.

## V. Possible Applications of *Saiban-in* Trials to Civil and Administrative Litigation<sup>211</sup>

The next step to further democratize Japan's legal system is to consider the application of *Saiban-in* trials in civil and administrative matters, beyond just criminal cases. The possible adoption of lay adjudication in civil disputes sheds further critical insight into the JSRC's report, which originally suggested a possible expansion of citizen participation into certain civil cases. Nonetheless, the investigation committee created by the Reform Promotion Office to implement the JSRC recommendation had failed to propose any substantive model of citizen participation in civil law.

### A. Application of Quasi-Jury Trials to Civil Disputes

With respect to citizen participation in civil justice, the JSRC report emphasized the importance of introducing citizen participation into "litigation procedures as expert commissioners . . . [and citizens are to be] involved in all or part of trials and support[ing] judges from the standpoint of their own specialized expertise."<sup>212</sup> The JSRC report also anticipated a broader civic participatory model in other areas in the near future, stating that "a new system [of a mixed tribunal] should be introduced, *for the time being in criminal proceedings*, enabling the broad general public to cooperate with judges by sharing responsibilities, and to take part autonomously and meaningfully in deciding trials [emphasis

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211. Professor Matthew J. Wilson at the University of Wyoming College of Law discussed the importance of extending lay adjudication into the area of civil disputes. See Matthew J. Wilson, *Prime Time to Take Another Step Forward: Expanding Lay Participation in Japan from Serious Criminal Trials to Civil Trials* 2012), 46 AKRON L. REV. \_\_\_\_ (2013) (publication forthcoming), available at [http://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2063269](http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2063269). This section extends his discussions and examines the application of lay adjudication into specific areas of civic and administrative disputes in Japan.

212. JSRC REPORT, *supra* note 1, Ch. IV, Pt. 1 (2) (1) ("Expansion of Participation Systems in Other Fields (1) Civil justice System").

added]."<sup>213</sup>

Since the Japanese government was required to review the system of the *Saiban-in* trial on the third year of its operation in 2012, any discussion on the possible adoption of lay adjudication in civil or even administrative disputes will have tremendous socio-legal ramifications in today's Japanese society.

For example, the *Saiban-in* trial may be adopted in civil cases involving radiation victims of the Fukushima nuclear disasters. In March 2011, the meltdown of the Fukushima Daiichi Nuclear Power Plant spewed high radioactive particles into the atmosphere and contaminating hundreds of thousands of residents in Fukushima Prefecture and adjacent areas.<sup>214</sup> An independent Diet commission that investigated the Fukushima catastrophe concluded in July 2012 that the crisis at the Fukushima nuclear plant was "man-made and not a natural disaster, fundamentally [as] the result of a long-corrupt regulatory system that allowed Tokyo Electric Power Co. (TEPCO) to put off critical safety measures."<sup>215</sup> Nonetheless, the Japanese court so far has repeatedly refused civil damage claims to TEPCO brought by its stockholders, radiation victims, and their families.<sup>216</sup>

Citizen participation in civil and administrative matters related to the victims of the Fukushima nuclear disaster will allow the

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213. JSRC REPORT, *supra* note 1, Ch. IV, Pt. 1 (1) ("Introduction of New Participation System in Criminal Proceedings").

214. *Japanese Nuclear Crisis: Year Later, Uncertainties Remain*, HOUSTON CHRONICLE, Mar. 10, 2012, at A19.

215. Kazuaki Nagata, *Nuclear Crisis Man-Made: Diet Panel*, JAPAN TIMES, Jul. 6, 2012.

216. *Toden no Menseki Hitei wa Tekiho, Kabunushi no Baisho Seikyu o Kyakka [TEPCO's Immunity to Responsibility is Lawful: Court's Denial to Compensatory Liability by Stockholders]*, SANKEI NEWS (Jul. 19, 2012), <http://sankei.jp.msn.com/affairs/news/120719/trl12071916250005-n1.htm>; *Tadano Jisatsu ni Shitakunai: Genpatsujiko ni Jisatsu, Izokura Toden Teiso [Refuse to Treat it as Mere Suicide: Bereaved Family Sued TEPCO for Suicide After Nuclear Accident]*, SANKEI NEWS (May 18, 2012), <http://sankei.jp.msn.com/affairs/news/120518/trl12051818250003-n1.htm>; *Toden ni Baisho Motome Teiso, Iwate de Hatsu, Kome Seisan-hojin [First Time, Rice Producers in Iwate Prefecture Filed Lawsuit to Seek Compensation for TEPCO]*, KYODO (May 2, 2012), <http://www.47news.jp/feature/kyodo/news05/2012/05/post-5530.html>; Kazuaki Nagata, *Protest Rally Against Noda, Oi Restarts Intensifies*, JAPAN TIMES, Jun. 30, 2012 (stating that the class-action lawsuit was filed by "42 shareholders of Tokyo Electric Power Co. . . . [to] pay 5.5 trillion [yen] in total damages to TEPCO").

deeper consideration and discussion on the protection of the rights of the victims and to help secure their rightful claim to economic redress for damages created by the nuclear power plant owned and operated by TEPCO. Radiation victims also claim compensation against the Japanese government which granted TEPCO the continuous operation of nuclear plants despite prior records on the systematic violation of safety regulations and numerous falsifications of inspection records at the Fukushima power plant.<sup>217</sup>

University of Wyoming Law Professor Matthew Wilson provides the following two important rationales for extending the application of *Saiban-in* trials to civil disputes: (1) participation in civil disputes would strengthen, educate, and empower the general citizenry; and (2) lay adjudication will also promote better reflection of societal values and policy.<sup>218</sup> Professor Wilson further suggested that "extending the lay judge system to . . . civil trials is consistent with . . . [the JSRC] reforms. . . . Japan should take advantage of the current environment and seriously explore the possibility of integrating citizen participation into the civil justice system."<sup>219</sup> Lay adjudication in future civil disputes involving TEPCO and government liabilities certainly creates a space where people's sentiments and sense of civil justice will be introduced into the deliberation of future civil cases.

### *B. Application of Quasi-Jury Trials to Administrative Cases*

The JSRC recommendation suggested a possible application of lay adjudication in civil areas. Nonetheless, the JSRC failed to make specific suggestions on the implementation of lay participation in administrative disputes.

Attorney Shunsuke Marushima, a keynote speaker in the UC Hastings symposium on the impact of the JSRC reform, stated that the number of administrative litigation cases brought to Japanese court has been historically very low – only 1,400 cases were filed in

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217. Hiroshi Fukurai, *The Embracement of the Atomic Energy Program in Japan: The U.S. Government, Japanese Nuclear Ambition, and Corporate Profitization on the Nuclear Energy Programs*, a paper presented at the Second East Asian Law and Society Conference in Seoul, South Korea, Oct. 1, 2011 (unpublished manuscript) (on file with the author).

218. Wilson, *supra* note 211, at 19-21.

219. *Id.* at 25.

2000.<sup>220</sup> The rate of rejection was about 20%, and Japanese courts ruled in favor of the plaintiff in only 10% to 15% of administrative cases.<sup>221</sup> And although the number of administrative litigation has somewhat increased to 2,100 in 2010, a total number of cases still remain extremely low in comparison to administrative litigation in other countries.<sup>222</sup> Attorney Marushima suggested that that administrative litigation was a form of legal procedure that has been extremely difficult for citizens to use in settling disputes, and in the majority of administrative cases, Japanese courts ruled in favor of the government or public institutions over citizens.<sup>223</sup> And that was one of the major factors why the number of Japan's administrative cases has been relatively very small.<sup>224</sup>

The JSRC report helped to initiate extended discussions on how to strengthen the checking function of administrative litigation by the judiciary; it also helped to pass the first revision of the Administrative Litigation Act.<sup>225</sup> The first revision of the act contained a provision toward expanding one's legal standing to file a lawsuit, mandating litigation injunction, and extending the statute of limitations for filing cases.<sup>226</sup> Nonetheless, many unresolved challenges still remain, as the second phase of the review for revisions was scheduled to commence in five years.<sup>227</sup> And even as the Administrative Appeal Act and the freedom of information system have been enacted, Attorney Marushima indicated that there has been little political interest for reform in the second phase of the planned reviews.<sup>228</sup>

If the adjudication of administrative cases was given in the hands of *Saiban-in* participants, not in the collegial bench of professional judges, many plaintiffs may find it advantageous to file administrative lawsuits against the government or other public institutions. There should be serious discussions on determining

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220. Marushima, *supra* note 97.

221. *Id.*

222. *Id.*

223. *Id.*

224. *Id.*

225. *Id.*

226. *Id.*

227. *Id.*

228. *Id.*

the mitigated requirements for mandatory litigation injunction and provisional relief for the plaintiffs, strengthening the review of administrative discretion, and establishing planned litigation and litigations involving court orders.<sup>229</sup> Such reforms must target all appropriate administrative agencies or affected groups of citizens to initiate significant changes in Japan's adjudication of administrative cases and advance the substantive administrative law in Japan.

## VI. Conclusions

On September 7<sup>th</sup> and 8<sup>th</sup> 2012, the UC Hastings conference assembled a group of socio-legal scholars to examine the extent of the implementation of the judicial reforms suggested in the JSRC's 2001 report. This article then examined the ramification of the proposed judicial reforms in the area of criminal justice and lay participation in legal decision-making.

The establishment of the National Public Defender System and the Japan Legal Support Center in 2006 provided vital legal resources and services to criminal suspects and defendants at both the pre- and post-indictment stages of the criminal process. Both institutions also helped eliminate many regions and areas that previously had very limited access to lawyers and legal experts. On the other hand, little to no significant changes were made to discriminatory police investigative procedures. The JSRC recommendations failed to eliminate some of the important key factors that led to wrongful convictions and violations of criminal defendants' rights, including the use of police detention centers as substitute prisons for interrogating criminal suspects and extracting forced confessions. The police and prosecution continue to conduct interrogation activities without the use of an audio and visual recording device during interrogation. The investigation committee (LAMPIC) also failed to implement a pre-indictment bail system; a criminal suspect in Japan is still unable to obtain his or her release from police custody at the pre-indictment stage of the criminal process.

Despite these shortcomings, perhaps the greatest achievement of the JSRC was the creation of the *Saiban-in* system where citizens participate in determining trial outcomes and sentences. It is

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229. *Id.*

monumental considering that it took more than six decades to introduce a new system of lay adjudication after Japan's military government suspended the jury system in 1943. The JSRC recommendation also made a significant procedural improvement on the PRC by giving its decisions legally binding force in reviewing the indictment decisions of prosecutors. The twin systems of lay adjudication were at the forefront of instigating the prosecution of previously highly "protected" groups, including prominent politicians, government bureaucrats, corporate elites, and American military personnel.

Lastly, this report explored the potential for adopting lay adjudication in civil litigation, which was previously suggested by the JSRC report. Such a consideration is significant and timely given that the Japanese government is required to review the *Saiban-in* system after the third year of its operation. After the nuclear meltdown at the Fukushima Daiichi Nuclear Power Plant in March 2011, the courts have been persistent in rejecting the lawsuits filed against TEPCO and the Japanese government by radiation victims and their families seeking proper redress. Now is the time for the Japanese government to reconsider the possible extension of lay participation into legal decision-making in civil and administrative matters.