

Saiban-in Seido (the Lay Assessor System), Kensatsu Shinsakai (Prosecutorial Review Commission (PRC)), and Okinawa's Quest for Self-Determination and Political Sovereignty

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Abstract:

Two new systems of lay participation in Japan -- Saiban-in saiban (the lay assessor trial) and new Kensatsu Shinsakai (Prosecutorial Review Commissions) -- will have a significant democratizing effect in Okinawa. Under the lay assessor system, local residents can become direct participants in criminal trials involving American military defendants. The new grand jury system (PRC) will have equally powerful impacts upon the prosecutor's use of discretion, largely because non-indictment decision made by local prosecutors against American military personnel or Japanese government officials will be critically assessed and may even be reversed by the citizen's panel. These lay justice systems may then help to restore a strong sense of social independence, political sovereignty, and cultural identity for the people in the island of Okinawa.

keywords:

Saiban-in Seido, Prosecutorial Review, Lay assessor trial, Okinawan Political Sovereignty

Introduction

On September 4th 1995, three American Navy soldiers beat and gang-raped a twelve-year-old Okinawan school girl. When requested to turn over the suspects to the Okinawa Prefectural police, the U.S. military refused immediate turnover of the suspects based on the Japan-U.S. Status of Forces Agreement (SOFA).

As a result of the incident, on November 4, 1995, Governor Masahide Ota of Okinawa Prefecture sent an official letter to U.S. President Bill Clinton to consider the possible revision of the Japanese-American SOFA. In responding to Article 17 of the SOFA, Governor Ota indicated that it should be altered to specify:

[i]n cases where Japan exercises judicial authority, Japanese authorities can, in all situations, take into custody suspects who are members of the U.S. Armed Forces or who are civilian components of the military. ... [Article 18 should also be revised to state that] when local residents are victimized by members of the U.S. Armed Forces, civilian components, or their dependents, the victim will receive appropriate compensation from the Japanese Government (which will later negotiate with the U.S. Military or the assailant on the compensation) regardless of whether or not the injury was inflicted on official duty. ¹

Hundreds of thousands of people in

Okinawa and other prefectures with American military bases participated in massive demonstrations against the presence of American military bases and demanded the dramatic revision of the Japanese-American SOFA. Significant political and social pressure was placed on the American government to become more flexible in exercising their right to maintain exclusive custody of American soldiers prior to their indictment. In February 1996, immediately after an emergency summit meeting between then President Bill Clinton and Prime Minister Ryutaro Hashimoto in Santa Monica, California, the U.S. government was finally forced to make a political concession, in which the U.S. government would give a special "sympathetic consideration" (koiteki koryo) to Japanese requests to handover American military personnel prior to an indictment, though only if he/she is suspected of an "especially heinous crime."² Since 1996, and especially in recent years, the American military began to gradually comply with Japanese requests for early pre-indictment handover of their officers who allegedly committed heinous acts.³ In less serious criminal offenses, the U.S. military still continues to refuse to handover military suspects to the Japanese authority.⁴

Change in this policy is likely, despite Japan's present limited power to exercise jurisdiction over American military personnel in Okinawa. The Japanese government's 2004 passage of both the Lay Assessor Act and the new Prosecutorial Review Commission (PRC) Act have prepared and

established important legal ground for the direct and indirect adjudication of American military felons by a judicial panel that includes Japanese citizens in Okinawa and other prefectures where U.S. military bases are stationed.

Given the fact that the Japanese public was rarely given an opportunity to present their sentiments or common sense judgments in a Japanese courtroom, the lay assessor system is designed to revitalize Japan's democratic process in criminal justice proceedings. The new grand jury system (PRC) will equally be empowered to influence the prosecutor's use of discretion in making indictments. Even the prosecutors will not be given unbridled authority. For now, the Japanese prosecutors' non-indictment decisions in criminal cases involving American military personnel can be challenged and possibly reversed by the citizen's panel. The Japanese prosecutors will then be bound by the commission's new recommendation for prosecution and must initiate the investigative process to again begin the prosecution of accused American servicemen.

The historic, political reason for insisting on lay participation has been clear: It offers important popular oversight of the judicial and political power of both the government and the conduct of governmental officers, including military personnel. The introduction of public sentiments into legal-decision making also serves as an important addition into the system of checks-and-balances. As well, lay participation in the administration of justice also promotes the notion of justice and fairness in the eyes of the public.

Japan's new lay assessor system has the potential to democratize the Japanese judiciary by transforming the purely professional, inquisitorial system into a justice system with greater transparency and accountability. The democratic effect of lay participation will become even more self-evident, once Japanese citizens are asked to adjudicate charges of heinous crimes committed by American military personnel. Historically the vast majority of crimes committed by American soldiers have gone unprosecuted. Those "unresolved" cases and incidents left Okinawan victims almost with no means to redress for their sufferings. The introduction of the new lay assessor system will likely promote a greater sense of accountability, in which charges of heinous crimes committed by American military personnel will be adjudicated by a judicial panel that includes Okinawan residents selected at random from local electoral rolls.

The lay assessor trial also has the potential to promote greater popular participation in the adjudicative process because the judicial panel is

empowered to make decisions, not only in disputed or contested criminal cases, but as well in uncontested criminal cases where the facts and issues identified by pre-trial procedure are undisputed.

The new Prosecutorial Review Commission today offers the great potential to ensure that American military personnel who commit heinous crimes against Okinawans will be fairly indicted and duly prosecuted.⁵ After the prosecutors decided not to prosecute American soldiers, a local complaint of the non-prosecution decisions made to the PRC can initiate an inquiry process by the citizens' panel to review, challenge, and possibly reverse the prosecutors' decision. Because of the new binding authority bestowed upon the commission's resolution, once the commission decides for a second time that the indictment against American military personnel is proper, the prosecution will then be obliged to initiate the prosecutorial process once the commission decides twice that the indictment against American military personnel is proper. Such a legally binding resolution becomes the important channel through which Okinawans' moral sentiment -- their sense of justice, fairness, and accountability -- will be expressed, articulated, and reflected in the deliberation of criminal cases.

The structure of this paper is as follows. Part I examines a brief history of Japan's petit jury system and analyzes the potential utility of the lay assessor (saiban-in) trial in Okinawa, particularly its ability to introduce public sentiments into the legal decision-making process. This section also reviews the Japanese-American SOFA and critically examines the legal foundation for Japan's rights to exercise jurisdictions over American soldiers who are charged with committing heinous crimes in Okinawa. Both the Japanese-American SOFA and 1996 "sympathetic consideration" agreement do not specify the adjudicative condition under which charged American military felons must be tried and adjudicated. Thus the current legal conditions specified by existing intergovernmental protocols and agreements make it possible for a judicial panel of both professional judges and ordinary Okinawans to try American servicemen and their associates who are charged with committing heinous crimes in Okinawa. The lay assessor trial, then, is designed to help create a sort of "quasi-public forum," with the opportunity to possibly reflect and offer evidence of collective sentiments and shared opinions into the critical evaluation of actions and conduct of American soldiers and their associates in Okinawa. The lay assessor system thereby can be empowered to operate as an important institution for judicial oversight of American military personnel in

Okinawa.

Part II examines a brief history of the PRC, followed by a critical assessment of its potential impact on the prosecutor's indictment decisions involving American military personnel and their associates, as well as Japanese business personnel and their political allies who engage in egregious or unethical behavior detrimental to the public interest of Okinawans. Specifically, the commission's critical review of non-indictment decisions by the prosecutor on both Japanese government officials and American military personnel can help create another "quasi-public forum," with the authority to assess and challenge prosecutorial non-indictment decisions.

The last section of the paper summarizes the social and political ramifications of these two lay justice systems in Okinawa, suggesting that they have the potential to create a greater sense of self-determination and political independence in Okinawa and among its people.

The Lay Assessor (Saiban-in) System

The introduction of the lay assessor system in 2009 marks the third time in Japan's brief modern history that Japanese citizens are allowed to directly participate in criminal trials. In 1923, the pre-war Jury Act was enacted and became operative in 1928. This twelve-member American-style jury lasted until the Japanese military government suspended it in 1943.⁶ This measure accompanied efforts to centralize state authority within Japan and to control and maintain conquered colonies, including Okinawa, using the war-time legal fiction that Japan was defending the existence of its empire, and giving the war moral justification that it was pursuing the liberation of "Great East Asia."⁷

After the war's end dismantling Japan's colonies and re-establishing British, the U.S., and French rule, faltering steps towards setting up equitable legal institutions and procedures went forward. By the signing of Article 3 of the San Francisco Peace Treaty on September 8, 1951, the U.S. government held the right to exercise its administrative, legislative, and juridical control over the Okinawa Prefecture.

On March 8, 1963, the U.S. Civil Administration of the Ryukyu Islands (USCAR) introduced both criminal petit and grand juries through two amendments to American penal and criminal administrative procedures.⁸

The first post-war petit jury trial was convened in the Island of Okinawa on May 1, 1963, and this jury panel included nine men and three women, including both Japanese and American citizens. Subsequently, other ethnic minority groups such as Filipinos and Chinese also participated in

trials as jurors. American citizens, Japanese, and/or local Okinawans were tried by the diverse pool of jurors -- until Okinawa was finally returned to Japan on May 15, 1972.⁹

Lay Assessor Trials in Okinawa

Today Japanese citizens anxiously await the beginning of yet another opportunity to participate in criminal trials. The lay assessor (saiban-in) trial holds a special meaning to residents of Okinawa Island which has one of the largest U.S. military installations in the world, including the Kadena Air Base, the largest U.S. Air Force installation in the Far East.

The island of Okinawa hosts thirty-seven of the eighty-eight American military bases in Japan, covering a total area of 233 square kilometers, representing 75% of the territory occupied by U.S. military facilities in Japan. This is despite the fact that Okinawa represents less than 1% of Japan's total land area. Highly concentrated placement of the American military establishment in Okinawa historically created all kinds of social and legal problems, including the proliferation of crimes committed by American military personnel. Indeed Okinawa residents have witnessed a long history of their own community being victimized by U.S. military personnel. The Japanese-U.S. SOFA, however, effectively shielded military felons from the extra-territorial application of Japanese law. So whether or not the lay assessor trial is able to effectively adjudicate crimes committed by American military felons still represents a very important political and legal question in Okinawa.

To answer this question requires closer examinations of the Japanese-U.S. agreements, including the security treaty, the SOFA, and a secret intergovernmental protocol. Article 6 of the Japan-U.S. Security Treaty states: "For the purpose of contributing to the security of Japan and the maintenance of international peace and security in the Far East, the United States of America is granted the use by its land, air, and naval forces of facilities and areas of Japan. The use of these facilities and areas as well as the status of the United States armed forces in Japan shall be governed by a separate agreement." The Japanese-U.S. SOFA then implements those bilateral agreements by specifying what Japan as a host nation has actually obligated itself to allow the U.S. to do.

It is important to note that the U.S. government so far has signed nearly 100 SOFAs with foreign governments in the world. All SOFAs differ in their jurisdictional scope; however, except SOFAs that the U.S. has signed with NATO nations in

Europe, most of other military agreements in non-European regions unilaterally award the primary jurisdiction to the United States if a crime was committed by one soldier against another or if a crime was committed in his or her duty. These so-called agreements were modeled after the pre-World War II provisions for juridical "extraterritoriality" imposed by imperial nations on their colonies and sphere of influence such an unequal relation ship says a great deal about legal jurisdictional matters at present U.S. military bases around the world. Only for off-duty crimes, the host nation is allowed to retain the right to exercise primary jurisdiction.

Japan is no exception to U.S. imposition of some aspects of extraterritoriality.

The Japanese-American SOFA signed in 1960 states that the U.S. retains the primary right to exercise its jurisdiction over crimes committed by American soldiers during their official duties. Article (1)(b) of the SOFA specifically states, "The authorities of Japan shall have jurisdiction over the members of the United States armed forces, the civilian component, and their dependents with respect to offences committed within the territory of Japan and punishable by the law of Japan." But Article 17(3)(c) also states, "The custody of an accused member of the United States armed forces or the civilian component over whom Japan is to exercise jurisdiction shall, if he is in the hands of the United States, remain with the United States until he is charged."

The SOFA and secret agreements were predicated on the assumption that, at least from the side of Japanese legal authority, the U.S. military itself would prosecute such offenses. However, the overwhelming majority of on-duty crimes have not been prosecuted by the American military authority. So, for instance, despite U.S. court martial attempts to rigorously maintain order in the military and reduce on-duty crimes, the disposition of those crimes has been quite lenient and the punishment against military perpetrators has been virtually non-existent. Between 1998 and 2004, 2,024 military personnel either committed crimes or caused accidents in Japan while on official duty, mostly of which occurred on the Island of Okinawa. Only one of them led to a court-martial; and U.S. commanders instead ordered administrative discipline in 318 cases, and the remaining 1,700 criminals presumably left unpunished.¹¹

While Japan has the primary right to exercise jurisdiction over off-duty crimes, a recent revelation of the secret bilateral agreements indicated that Japan has already agreed to renounce its primary right of jurisdiction in crimes committed by the American military personnel.¹² On October 28, 1953, Justice Ministry spokesman Tsuda Minoru and Lt.

Col. Alan Todd signed the agreement that Japanese renounces its jurisdiction over criminal cases, unless it is "of material importance to Japan."¹³ A similar agreement was signed to exclude from the Japanese jurisdiction some classes of off-duty crimes. The 1957 secret Japan-U.S. agreements, including one referred in a report, titled "United States Overseas Military Bases," was submitted to President Dwight David Eisenhower by Frank C. Nash, who was then Special Assistant to the President for National Security. The report indicates that, "Japan agrees that it will renounce its primary jurisdiction unless the case holds materially great significance to Japan."¹⁴ Subsequently, acts of trespassing, molestation, battery, and theft committed by U.S. personnel were excluded from the Japanese jurisdiction.¹⁵

The SOFA and secret Japanese-American agreements thus explicitly stripped Japan of sovereign rights and helped create a climate of impunity, leading to long-term discontent and public opposition to the continued presence of the American military bases in Okinawa. The SOFA also specifies that the Japanese authorities are prevented from having access to military suspects unless they were properly "charted" or indicted by the Japanese prosecutor. Furthermore, because of the intergovernmental security protocol negotiated prior to the 1960 SOFA, the Japanese side was effectively prevented from exercising its authority in non-serious criminal cases.

How will then the question of Okinawa as part of Japan and its right to self-determination be resolved when it comes to U.S. military over-reach of legal authority? As stated earlier, the 1995 rape of a twelve year old girl by three American soldiers and the massive public demonstrations in Okinawa led to the 1996 "sympathetic consideration" agreement that changed the primary jurisdiction over American soldiers who allegedly committed heinous crimes while off duty. The U.S. agreed in future criminal cases to give a special consideration to Japanese requests and made possible the pre-indictment turnover of military suspects to Japanese authorities.

The agreement, however, failed to provide the specific definition of "heinous crimes." Nevertheless, in 2001, twenty-four air force staff sergeant, Timothy Woodland, became the first military personnel to be turned over to Japanese prosecutors before his indictment.¹⁶ Even then, the military refused to turn over the defendant for over four days after he was accused of rape and sodomy of a twenty year old Okinawan woman. He was subsequently interrogated over 30 hours and a Japanese judge sentenced him to two years and eight months in prison.¹⁷

Two other rape cases illustrate the unseemly

U.S. army manipulations and different tactics used by the Okinawan prosecutors to prosecute military felons. In 2002, Major Michael J. Brown, 41 years old, was accused of an attempted rape of a forty year old Filipina woman. The military refused to turn him over to the Okinawan authorities, as the military insisted that the attempted rape was not a "heinous crime." Then the Okinawan authorities raided Brown's home in December 16, 2002 and three days later, Naha prosecutors indicted Brown.¹⁸ Soon after \$13,500 was secretly deposited into her bank account, the Filipina victim tried to withdraw her complaint. But Okinawa's three judge panel determined that the original statement was believable and Brown was subsequently given one year prison sentence suspended for three years and \$1,400 fine.¹⁹ In August 2005, Brown left Okinawa but was arrested in West Virginia for kidnapping an eighteen year old Chinese high school student, when he falsely identified himself as a federal law officer, telling her that he was investigating the sale of fraudulent coins.²⁰

Other military felons also have been turned over to Japanese authorities and adjudicated in the Japanese criminal court. In July 2005, Armando Valdez, an air force staff sergeant, molested a ten-year-old Okinawan girl on her way to Sunday school and took photos of the upper part of her naked body.²¹ In November, the Naha District Court in Okinawa sentenced him to eighteen months in prison, suspended for four years.²² In the same month, six marines from Okinawa who had been dispatched to the Philippines to train Filipino soldiers allegedly raped a twenty-two year old in a van outside the former U.S. naval base at Subic Bay.²³ In December 4, 2006, a Philippine court convicted Lance Corporal Daniel Smith guilty of raping the woman and sentenced him to 40 years in prison,²⁴ while other defendants were acquitted for lack of evidence.²⁵

In January 3, 2006, U.S. airman William Reese, a crew member of the Yokosuka-based U.S. aircraft carrier Kitty Hawk, allegedly killed Yoshie Sato, a 56-year old part-time worker outside the railroad station in Yokosuka.²⁶ An autopsy revealed that Sato was beaten so severely that her skull was nearly smashed.²⁷ This became the fourth time that a pre-indictment handover to Japan has been made of U.S. military personnel suspected of committing heinous crimes.²⁸ This case also became the first handover since the 2004 revision to the agreement that allowed U.S. military officials to be present when Japanese authorities interrogate American military personnel.²⁹ In June 2006, the Yokohama District Court sentenced him to life in prison.³⁰

The case of Olatunbosun Ugbogu of Nigerian nationality became the fifth pre-indictment

handover of the American military personnel to Japan since the 1996 "sympathetic consideration" agreement. In March 19, 2008, he allegedly killed a taxi driver with a kitchen knife while the taxi was parked on a road in Yokosuka.³¹ His credit card was found below the driver's seat in the taxi, which has been suspended by a credit card company before the murder occurred.³²

All these events and cases are indicia along the path to overturn U.S. extraterritoriality imposed on Japan's, and especially Okinawa's, emerging judicial authority. So today, once an indictment is issued, both the Japanese-American SOFA and subsequent agreement require that military felons be turned over to Japanese authorities. Those intergovernmental protocols still do not specify the adjudicative condition under which to try American military personnel. Masanori Higa, prominent Okinawa attorney, who represented Marcus Gill, a key defendant in the rape of a 12 year-old-girl in 1995, indicated that he would be "cautiously optimistic" about the possibility of a fair and just adjudication of American military personnel by a judicial panel of both professional and lay judges selected at random from local communities in Okinawa. Since the intergovernmental protocols made no specific provision for the type of adjudicative procedures to try American felons, both contested and uncontested cases involving American felons will be subject to the adjudication in the new lay assessor trial.³³

Thus, future indicted felons in "uncontested cases" similar to the three American military soldiers in the 1995 rape incident will be subject to the adjudication by a judicial panel of one professional and three lay judges to determine their sentence, thereby possibly injecting a local collective voice into the sentence determination phase of the trial. In the 1995 rape incidents, Attorney Higa disclosed that he encouraged Gill to plead guilty, because "the Japanese judicial system generally acts more leniently to those who plead guilty, admit guilt, and express their remorse."³⁴ Despite the initial insistence of his innocence, Gill later pleaded guilty to the rape charge, while other two American soldiers also pleaded guilty to conspiracy. The judge then gave Gill and another defendant seven years of incarceration. Another G.I. received six and a half years in prison. After May 2009, a group of Okinawa residents will be selected at random and participate in the sentencing phase of the lay assessor trial to determine the appropriate penalty for American military felons who have admitted their guilt after committing heinous crimes in Okinawa.

The major obstacle that may possibly

prevent the adjudication of American military felons is the expressed reluctance or inability of the Japanese prosecutors to issue an indictment against American military suspects. Since the "sympathetic agreement" failed to provide the definition of a heinous crime, the Japanese prosecutors may be unable to issue an indictment against American military personnel, depending upon the nature of the crimes committed, the extent of investigative capacities given to the Japanese authority, and/or the availability of witnesses or material and forensic evidence for a criminal investigation. The new binding power of the Prosecutorial Review Commission, however, can facilitate by its own resolution a critical examination of the prosecutors' non-indictment decision, and challenge or even reverse the prosecutors' non-indictment decision.

New Prosecutorial Review Commissions in Okinawa

In 1948, the Japanese government established a distinct system of civic legal participation, called the Prosecutorial Review commission system (PRC). While this system is virtually unknown in Japan and not much talked about in the media, more than a half million Japanese citizens have already served in the PRC. The PRC was originally created by the Allied Forces occupying Japan after WWII. Due to the American influences, the PRC became a hybrid institution, adapting the American civil and criminal grand jury functions into the Japanese cultural and legal context. Both American and Japanese systems use popular investigations to prevent abuse of prosecutorial power, and they also have important influence on indictment decisions.

The PRC's main function is similar to that of the American civil grand jury in assessing and inspecting the proper functioning of the local government, including the prosecutor's office. Also similar to the criminal grand jury, the PRC has influence over the decision to indict, as a randomly chosen group of Japanese citizens are asked to evaluate the appropriateness of the prosecutor's decisions not to prosecute. Given the fact that 99.9% of indicted cases result in conviction in Japan, the PRC's ex-post examination of the appropriateness of non-prosecution decisions is quite important in checking the potential abuse of prosecutorial discretion.

A total of 2001 commissions were originally established in each of Japan's fifty district court jurisdictions. A commission only begins the investigative process when a victim, proxy, or the commission itself brings a complaint and applies for a commission hearing. The commission is

comprised of eleven citizens chosen at random from a local electoral register, is appointed to a six-month term, and has the power to review whether or not dispositions of non-prosecution made by public prosecutors are appropriate.

The commission investigates cases in private by summoning petitioners, proxies, and witnesses for examination, questioning prosecutors, asking them for additional information when necessary, and seeking special expert advice on the case. After deliberating the case, the commission submits one of three recommendations: (1) non-indictment is proper; (2) non-indictment is improper; and (3) indictment is proper. A simple majority is needed for either of the first two resolutions, while a special majority of at least eight votes is needed to pass the third resolution. The commission then delivers a written recommendation to the prosecutor's office. Since the prosecutors have the power to indict, PRC recommendations have been regarded as merely advisory rather than legally mandatory.

In the past, prosecutors' refusal to follow the commission's recommendations has significantly undermined public trust and confidence in the lay participatory system in Japan. Because of the non-binding power of recommendations, the commission was rarely engaged. In 2000, only 0.2% of approximately 1 million non-indictments resulted in a complaint and, even when engaged, the deliberation rarely resulted in any action.³⁵ Between 1953 and 2002, for example, the commission recommended that prosecutors reconsider or indict in 12.0% of cases (16,505 out of 138,101); but in only 7.4% of those cases did prosecutors take their recommendation.³⁶

The new 2004 PRC law gave the commission the ultimate ability to force prosecution. First, when the PRC decides that prosecutors should indict, the prosecutor will be obliged to reconsider the non-indictment decision, although the commission's decision is not yet legally binding. If the prosecutor still decided not to prosecute or fails to indict within three months, the prosecutor will be invited to explain the "no-action" or non-indictment decision to the commission.³⁷ The commission will then re-evaluate the case, and if the PRC again recommends the indictment, this second recommendation becomes legally binding.³⁸ In the event of such a decision, the court must appoint a lawyer to perform the prosecution's role until a ruling is reached.³⁹ However, any actual instruction to investigate authorities will be entrusted to prosecutors.⁴⁰ The new PRC Law also created the position of a "legal advisor," who will be selected from the rank of practicing attorneys.⁴¹ A legal

advisor is appointed whenever the PRC feels that it needs advice on legal matters,⁴² including when the commission is deciding whether to issue a legally binding recommendation for indictment.⁴³

Illustrative Power of the Prosecutorial Review Commission

Until now, the prosecutors routinely ignored and paid little attention to the commission's recommendation. However, the legally binding authority given to the commission's recommendation will now influence the prosecutor's indictment decision in future criminal cases. The new power of the PRC resolution can be illustrated in the following example.

The PRC in Hyogo Prefecture had twice recommended the prosecution of both the Chief and Deputy Chief Officers of the Akashi Police Station for the injuries of 274 people and the death of nine children, ranging from five months to nine years of age, who were crushed to death in the stampede incident in Akashi city in Hyogo Prefecture. On July 21, 2001, a large crowd of 130,000 people had attended a fireworks display organized by the Akashi Municipal government. A stampede occurred shortly after 8:30 p.m. on six-meter-wide, 100-meter-long pedestrian bridge connecting a train station and seashore where a fireworks display was held. The Akashi police initially blamed the incident on youths who were allegedly sitting and watching fireworks on the bridge and had caused unexpected overcrowding that triggered the deadly stampede.⁴⁴

The report by the municipal investigative panel later found that those youths actually played a principal role in rescuing victims, by climbing on top of the bridge, pulling children up, directing the crowd to safer places, and calling for help.⁴⁵ The report also found that the Akashi Police Station, the city government, and a security firm were together responsible for the incident by being "unbelievably reckless" in their preparations for the event.⁴⁶ The disaster was foreseeable because Akashi City also held a millennium celebration in December 2000 at the same site and a similar situation resulted when nearly 3,000 people surged onto the footbridge.⁴⁷ The panel also found that top administrators of the Akashi Police Station in particular failed to place officers on the overpass or take any other measures to prevent the accident.⁴⁸

Despite the findings of the panel and investigations by prosecutors, in December 2002, the prosecutor's office decided not to indict the two officers for the incident. Four months later, the families of the victims filed an appeal of the prosecutor's decision. In April, 2004, the PRC issued an "indictment is proper" resolution and urged

prosecutors to indict the two officers.⁴⁹ The committee stated that the two officers had the lead responsibility for drawing up security and crowd control plans for the event and it was their failure to issue adequate instructions to subordinates that resulted in the fatal accident.⁵⁰

The prosecutors again decided not to indict. The families filed another review of the non-indictment decision, and in December 2005, the PRC delivered another "indictment is proper" resolution. After another brief investigation, in June 2006, the prosecutors dismissed the PRC resolution, refusing for the third time to prosecute.⁵¹ The families announced in November 2006 that they would file a third appeal of the prosecutor's non-indictment decision -- but only after May 2009, when the new PRC law will give the commission's decision legally binding status.⁵²

As well, the commission has been active in reviewing the proper conduct of Japanese government officers. For example, in March 2005, a complaint was filed to review the non-indictment decision against then Former Vice President of the Liberal Democratic Party, Taku Yamasaki, who stated that he received ¥50 million donation from the Japan Dentist Association (JDA) in a paper bag and kept it in his locker for a month.⁵³ Despite evidence of the false receipts, the admission by JDA's director general of the money delivery instructions, and Yamasaki's own admission that he personally received the money, the Tokyo District Public Prosecutors Office decided in January 2005 not to prosecute Yamasaki. A complaint was filed to review the non-indictment decision in March 2005.⁵⁴ The Second Tokyo PRC issued an "indictment is proper" resolution in July 2005.⁵⁵ While the prosecutors reopened the case against Yamasaki, they again decided not to prosecute him in less than two months.⁵⁶

Political Ramifications of New PRC Recommendations on American Military Personnel

The new PRC will review prosecutors' non-indictment decisions with legally binding power bestowed upon its resolution. The commission has the potential to exert a significant impact upon Okinawa's attempt to gain judicial and political independence, not only from Japan's political and corporate influence, but also from America's military domination in the entire island.

The prosecutors have been reluctant to prosecute American military personnel in the past, but they were also less likely to issue an indictment especially in criminal cases involving powerful politicians, their associates, and businessmen with

political clout and influence. This reluctance emerged despite the fact that investigations often reveal non-controvertible evidence that they indeed had engaged in briberies, scandalous illegal political donations, inside-trading, egregious misfeasance, bid-rigging in public construction projects, abuse of power, or other egregious conducts and unethical behavior. Many political and business elites were able to escape prosecution because prosecutors oftentimes have to make political decisions not to prosecute. The controversial "shobun seikun" (special requests for instructions on prosecutorial steps to be taken) system of responsibility within the prosecutors office, for example, has led to many political cases being dismissed. Karel von Wolferen, who wrote the *Enigma of Japanese Powers*, once stated, "Individual prosecutors ... are expected, before taking action against influential officials, ministers, Diet members or local government leaders, to write preliminary reports for their supervisors all the way up to the ministry of justice, and to wait for their consent."⁵⁷

In many politically charged cases, it takes a tremendous effort from outside the circle of the political and business establishment to force the prosecutors to issue the indictment against political heavyweights. However, there is a new and different strategy available to fight against prosecutorial "non-action," illustrated in the following example.

Many public school teachers in Tokyo have been recently dismissed by Governor Shintaro Ishihara and his officers because of their refusal to salute the rising-sun flag and to sing the national anthem at graduation and enrollment ceremonies.⁵⁸ Governor Ishihara is a famous celebrity in Japanese politics. The dismissed teachers, their families, and their lawyers filed a complaint with the prosecutor's office in December 2004, alleging official misfeasance by Governor Ishihara and his superintendents of education.⁵⁹ Section 242 of Japan's Criminal Code of Procedure does not allow the prosecutor to refuse the complaint, thereby requiring them to initiate a criminal investigation.⁶⁰

Nevertheless, the families and their lawyers had to file their complaints five more times until the prosecutors finally agreed to meet the petitioners in 2005. On December 28, 2005, the prosecutor announced that they decided not to indict Ishihara and two other officers. Soon after the non-indictment decision, the dismissed teachers and their support group then filed a complaint with the PRC in Tokyo in February 2006.⁶¹ While the commission decided in November 2006 that the non-indictment decision was proper, it issued a strong warning that "the leadership of the metropolitan board of education could be perceived to be heavy handed and it must exercise its leadership very carefully."⁶²

Despite the commission's exculpatory decision on the alleged misfeasance by political heavyweights, the above case shows that the PRC clearly has the legal authority to play a significant role in politically charged cases. The PRC will have equally powerful impact on the critical evaluation of prosecutors' non-indictment decisions involving American military personnel in Okinawa.

Okinawa & Environmental Devastations

For crimes committed by American military personnel, the non-indictment decisions by the prosecution can be critically reviewed by the Okinawa commission. As stated earlier, the commission's second resolution can ensure the criminal prosecution of alleged American felons in the Japanese court and make them subject to the adjudication by lay assessor panels. And the judicial team of both professional and lay judges can also adjudicate charges of crimes committed by American military personnel in both contested and uncontested cases.

In addition to the possible indictment of American soldiers, the PRC can also play an equally important political role in overseeing the conduct of both American military headquarters in Okinawa and Japanese governmental projects, including the possible prevention of expanded construction of American military bases in the island.

The U.S. military bases are known to have caused significant environmental damage throughout the world. Okinawa has not been an exception. For example, numerous U.S. armed forces in the Fukuchi Dam's reservoir for river-crossing exercise have polluted its water. The Fukuchi dam provides much of its water to the 1.3 million residents of the island. Recent investigations have found that the water has been polluted by grenades, flares, and hundreds of paintballs used by American military personnel in training exercises.⁶³ In 1997, the U.S. Marine also admitted using depleted uranium munitions on the islands west of Kume Island, violating the Law for the Regulation of Nuclear Power in Japan.⁶⁴

Despite significant environmental damages caused by the U.S. military, Article 6 of the Japanese-American SOFA indicates that the U.S. military does not bear any responsibility in repairing or restoring any damages to the environment, stating that "The United States is not obliged ... to restore the facilities and areas to the condition in which they were at the time they became available to the United States armed forces, or to compensate Japan in lieu of such restoration." This SOFA provision allows the U.S. military to destroy with impunity Okinawa's natural environment and tropical ecosystem.

The new construction of an offshore U.S.

military base off the coast of Henoko also endangers a unique subtropical ecosystem and biologically diverse marine life around the island of Okinawa. Henoko's surrounding reef has been home to an endangered dugong which is classified in the Washington Convention for International Trade in Endangered Species (CITES), requiring that a dugong and its habitat must be dealt with under the most strict regulations.⁶⁵

The construction of the new military base off Hekono was planned by the Japanese and U.S. governments. In April 2004, under the authority given by Naha Defense Facilities Administration Bureau (NDFAB) which is part of the Japan Defense Facility Administration Agency (DFAA), the Japanese governmental agency and local companies that were subcontracted by the agency began extensive drilling surveys of the military construction site prior to the environmental assessment as required by Japanese law. A group of Okinawa activists and civic groups protested and attempted to physically prevent governmental drilling surveys. Several underwater activists were then attacked by Japanese Self Defense Force divers. Reverend Natsume Taira, one of the protesters who tried to block underwater environmental surveys, was attacked by Japanese Self Defense Force divers who turned off the oxygen valve on his scuba air tank, and he was nearly drowned. In numerous occasions, JSDF and contracted divers also attacked other protesting divers by beating them with hammers, kicking them, and pulling off their masks.⁶⁶

The new power of the PRC resolution can provide a completely different way of organizing and creating political and legal strategies to protest and prevent governmental and corporate projects that are detriment to the social and political interest of the people of the island of Okinawa. For instance, in order to take full advantage of the Prosecutorial Review Commission and the binding authority of its resolution in Okinawa, civic activists and Okinawa residents, including protesting divers, may be encouraged to file complaints with the local prosecutor's office, alleging criminal conduct and dangerous behavior of DFAA drivers who are supported by the DFAA, the NDFAB, and private firms contracted to provide logistical assistance in a drilling survey of the coral reef. After the complaint is filed, the Japanese prosecutors will be forced to make a decision whether or not to file charges against the governmental agencies and contractors.

The politically motivated prosecutors may end up rejecting such arguments and return a non-indictment decision. The citizen's complaint then can be filed with the PRC for a commission hearing. The PRC must then call for a hearing, summoning

witnesses, activists, government officers, contractors, and even divers who have been attacked by JSDF divers. They can also question prosecutors and ask them for any additional information if necessary. The judicial panel of eleven Okinawa residents from the local community will then determine whether or not the non-indictment decision by the prosecutors was proper. If the commission determines twice that the prosecution is proper, the commission's resolution will become legally binding and force the prosecutors to reverse its previous non-indictment decision. The second recommendation also forces the prosecution to begin the criminal prosecution against DFAA divers and other support agencies, including private firms contracted to provide the logistical assistance to the underwater environmental surveys.

Conclusions

Given the long colonial history of Okinawa which lost its sovereign rights to Japan hundreds of years ago and still remains an "occupied territory" under the Japanese-American SOFA and other intergovernmental protocols, legitimizing the Japanese-American domination of the island of Okinawa, two newly emergent judicial institutions can potentially serve as very powerful vehicles to alter people's perception and conception about social independence and political sovereignty.

The new lay justice systems — Saiban-in Seido and the new Kensatsu Shinsakai — have the potential to alter the nature of the political and legal relationship between the Okinawa and the Japanese and American governments. First, heinous crimes committed by American soldiers in Okinawa will be adjudicated by a judicial panel of both professional and lay judges. Lay participation promises to create a wonderful opportunity for Okinawan residents to introduce and insert their sense of justice and sentiments into the critical evaluation of crimes committed by American servicemen and their associates in Okinawa. Second, the new lay justice system will thus operate as effective judicial oversight of American military personnel in the island. Third, the active engagement of citizens in the deliberative process in the saiban-in court will energize Okinawa residents and create a sense of self-determination, self-autonomy, and social independence.

The PRC also has other important potential ramifications in Okinawa. Civic activists and residents, when appropriate, should be encouraged to file a complaint with the prosecutors' office, alleging egregious activities and criminal conduct of American military personnel, Japanese governmental

officials, politicians, and even businessmen. Although politically motivated prosecutors may not decide to indict them, Okinawan residents can bring a complaint and apply for a commission hearing. The complaint will then allow the citizen's panel to review the appropriateness of the prosecutors' non-indictment decision. The commission's second recommendation can reverse the non-indictment decision and force the prosecutors to criminally prosecute American and Japanese defendants. Similar to the lay assessor system, the PRC thus plays an important watchdog function to review, monitor, and supervise the activities of the Japanese government and the American military in the island of Okinawa.

Lay participation in Okinawa thus serves to advance egalitarian and democratic principles, so that every Okinawan resident will be treated equally and considered an able, trusted member of the society in which he or she lives. In the future, active lay participation promises to promote the ideals of direct democracy, so that every Okinawan resident is being considered to be capable of making fair and just decisions in criminal cases and contributing to the judicial governance and political independence of Okinawa.

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¹ Masahide Ota. 1995. "Re: Revision of the Japan-U.S. Status of Forces Agreement," available at <http://library.thinkquest.org/19981/data/text/chii-minaoshi-e.htm?tqskip1=1&tqtime=0508>

² Thom Shanker, 2001, "U.S. and Japan Discuss Transfer of American Rape Suspect," *New York Times*, July 6.

³ See the subsequent discussions of recent criminal cases and an increase of pre-indictment handovers of military suspects to the Japanese authority. The Japanese government's response to the SOFA revision has been extremely slow. In July 2001, despite demands from Okinawa administrators for the change and revision of the SOFA, particularly on the right to exercise jurisdictions over American military suspects, the Japanese government finally stated that they decided not to seek revisions to the SOFA. See "Gov't to stay put over Japan-US military agreement," 2001. *Mainichi Shimbun*, July 6.

⁴ Generally see Chalmers Johnson, 2008, *Nemesis*:

The Last Days of the American Republic. NY: Holt Paperbacks..

⁵ The PRC will have the potential to influence the prosecutorial decisions despite the recent discovery of the secret Status of Forces Agreement (SOFA) that has been signed between the Japanese and American governments. Japanese historian Shoji Niihara discovered the 1957 secret agreement between both governments, in which the Japanese government renounced the jurisdiction over certain criminal offenses committed by military personnel. According to Niihara, such a bilateral agreement forced the Japanese prosecutors from making indictment decisions in many serious crimes committed by U.S. servicemen in the past.

⁶ Baishin-ho, Law No. 50/1923, as amended by Law No. 51/1929 and Law No. 62/1941, suspended by Law No. 88/1943.

⁷ Helen Mears, 2948, *Mirror for Americans: Japan*. Boston: Houghton Mifflin Company.

⁸ Code of Penal Procedure, Civil Administration Ordinance No. 144.1955, as amended on 8 March 1963, and U.S. Civil Administration Criminal Courts, Civil Administration Proclamation No. 8/1958, as amended by Civil Administration Proclamation No. 18/1963. For detailed analyses of Okinawa jury trials, see Anna Dobrovolskaia, "An All-Laymen Jury System Instead of the Lay Assessor (Saiban-in) System for Japan? Anglo-American-Style Jury Trials in Okinawa under the U.S. Occupation," *J. of Japanese L.* 57-80 (2007)

⁹ Id, Dobrovolskaia , 68-69.

¹⁰ The full text of the security treaty is available at <http://www.mofa.go.jp/region/n-america/us/q&a/ref/1.html>

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²⁰ David Allen, 2005, "Convicted on Okinawa, Marine Brown in Trouble in States," *Stars & Stripes*, October 9.

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²² *Id.*

²³ "6 US Marines Want Out," *Philippine Daily Inquirer*, November 10, 2005.

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²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.*

³⁰ "U.S. Sailor Given Life Jail over murder of Woman in Kanagawa," *Japan Economic Newswire*, June 2, 2006.

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³² *Id.*

³³ Personal telephone interview with Attorney Masanori Higa on March 4, 2009 (interview records on file with the author).

³⁴ Personal interview at Okinawa-shi, Okinawa. July 9, 2008 (interview records on file with the author)

³⁵ Heisei 12 nen ni okeru keiji jiken no gaikyo (jo) [General Situation of Criminal Cases in 2001 (Part 1)], available at <http://www.kaitei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai2/.03.pdf>.

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