

People's Grand Jury Panels and the State's
Inquisitorial Institutions: Prosecution Review
Commissions in Japan and People's
Supervisors in China

Hiroshi Fukurai*

Zhuoyu Wang[†]

*University of California, Santa Cruz

[†]Southwestern University of Finance and Economics, Chengdu, China

Copyright ©2014 by the authors. *Fordham International Law Journal* is produced by The Berkeley Electronic Press (bepress). <http://ir.lawnet.fordham.edu/ilj>

ARTICLE

PEOPLE'S GRAND JURY PANELS AND THE
STATE'S INQUISITORIAL INSTITUTIONS:
PROSECUTION REVIEW COMMISSIONS IN
JAPAN AND PEOPLE'S SUPERVISORS IN CHINA

Hiroshi Fukurai * & *Zhuoyu Wang* +

| | |
|--|-----|
| INTRODUCTION..... | 930 |
| I. HISTORICAL GENEALOGY OF THE PRCs IN JAPAN | 931 |
| A. The Evolution of Japan's PRC and Its Development .. | 931 |
| B. The Impact of the 2004 PRC Act and Legally Binding Authority | 936 |
| II. HISTORICAL GENEALOGY OF CHINA'S PEOPLE'S SUPERVISORS SYSTEM AND ITS DEVELOPMENT | 942 |
| A. The Evolution of China's PSS and Its Development... | 942 |
| B. The Evolution of the PSS and the Nation-Wide Implementation | 946 |
| III. CIVIC REVIEWS OF PROSECUTORS' NON- INDICTMENT DECISIONS | 949 |
| A. The PRC and Lay Adjudication of Non-Indictment Cases in Japan | 949 |
| 1. The Fukuchisen Derailment Incident | 949 |
| 2. The Killing of an Okinawa Youth by US Military Personnel..... | 952 |
| B. The People's Supervisor System and Lay Adjudication of Criminal Cases in China | 956 |
| 1. Bribery of Public Officials..... | 956 |

* Professor of sociology & legal studies at the University of California, Santa Cruz, CA. We wish to thank Professor Wendy Martina at the University of California, Santa Cruz, who read the earlier manuscript and gave us critical comments and suggestions. Our special gratitude is extended to Editor-in-Chief Zachary Cronin for his great support and encouragement.

+ Senior Lecturer at the Southwestern University of Finance and Economics, Chengdu, China.

| | |
|---|-----|
| 2. The Dereliction of Police Duties..... | 957 |
| IV. UNIQUE FEATURES OF TWO GRAND JURY SYSTEMS IN JAPAN AND CHINA..... | 960 |
| A. People’s Check on Prosecutorial Power and Authority..... | 960 |
| B. The Selection and Appointment of the PRC and People’s Supervisors | 964 |
| 1. Japan’s PRC Selection..... | 964 |
| 2. China’s People’s Supervisors Selection | 966 |
| CONCLUSION | 970 |

INTRODUCTION

A new and exciting breed of the grand jury system has emerged in East Asia: Japan introduced the revised system of Prosecution Review Commissions (“PRCs”) in 2009 and the People’s Republic of China implemented the System of People’s Supervisor in 2010. Contrary to the United States’ grand jury system, which has often been criticized as the government’s rubber stamp institution or even labeled as the “laughingstock” of US criminal procedure,¹ these two new citizen panels adopted in two of the most powerful countries in East Asia have begun to transform their legal landscape by giving ordinary people the authority to monitor and check government and corporate decisions and activities. These oversight institutions have also begun to initiate forced prosecution of unethical actions and illegal conduct of government officials, industrialists, economic elites, and even foreign soldiers stationed in the country.

The structure of this Article is as follows. Part I examines Japan’s revised PRC system and how its implementation facilitated the forced prosecution of a political powerbroker, past presidents of Japan’s powerful corporations, a government bureaucrat, and US military personnel stationed in Japan. The historical genealogy of China’s People’s Supervisor System (“PSS”) is the focus of Part II. Part III examines specific criminal cases reviewed and assessed by the grand juries in both countries. Beginning in the early 1990s, many East and Central Asian

1. Kevin K. Washburn, *Restoring the Grand Jury*, 76 *FORDHAM L. REV.*, 2333, 2352 (2008).

countries began to introduce a new system of lay participation in criminal justice procedure. Active participation of citizens in the justice system and the new civic oversight of government agencies and corporate elites can lead to even further transparency of judicial systems in East Asia. Part IV then examines the socio-political ramifications of these new systems in Japan and China and makes critical suggestions to improve the representativeness of civic panels and the quality of their deliberations.

I. HISTORICAL GENEALOGY OF THE PRCs IN JAPAN

A. *The Evolution of Japan's PRC and Its Development*

The birth of Japan's grand jury system began with the occupation of the Japanese islands by the Allied Forces immediately following the end of World War II ("WWII") in 1945. Through the joint collaborative work of the Japanese government and the Allied Forces represented by the US government, the civilian review commission was established by the passage of the Prosecutorial Review Commission Law on July 12, 1948.² The PRC is the Japanese version of a US-style grand jury system. As the leader of the office of the Supreme Commander for the Allied Powers (the "SCAP") occupying Japan after WWII, General Douglas MacArthur saw the grand jury as an important democratic institution for engaging the public whose rights had been deliberately neglected by the Japanese government until the end of WWII.

The original proposal to establish the grand jury system in Japan was specified in the Proposed Revision of Code of Criminal Procedure, written by Captain Maniscalco of the Legal Section, Public Safety Division of the SCAP in 1946.³ This proposal also included the provision to introduce the petit jury in Japan, although Japan already had its own system of jury trial

2. Kensatsu Shinsakai Ho [Prosecution Review Commission Law], Law No. 147 of 1948, art. 4 (Japan) [hereinafter PRC Law].

3. ANNA DOBROVOLSKAIA, JAPAN'S PAST EXPERIENCES WITH THE INSTITUTION OF JURY SERVICE, 48-49 n.233 (2010) (unpublished manuscript on file with East Asia Law Review) (discussing the history of revisions of implementing both the grand and petit jury system in Japan). The paper was presented at the Inaugural East Asia Law and Society Conference in Hong Kong in February 2010.

that began in 1928 but was suspended in 1943 due to the war.⁴ The second attempt to establish the grand jury system was included in the informal directive from the SCAP to the Japanese government, and the draft of the new Court Organization Law was given to the Japanese side by Alfred C. Oppler, Chief Officer of the Legal Unit, Governmental Powers Division, in 1947.⁵

Specifically, Article 227 of the proposed revised code of criminal procedure stated that:

[N]o accused shall be made to answer (stand public action) for any crime the penalty for which may be confinement for one year or more, or for life, or an indefinite period, or death, unless an indictment or presentment made by a grand jury,” followed by the note that “Rules governing selection, session etc. of grand juries should be promulgated.”⁶

Article 228 also specified, “[n]o indictment shall be found, nor shall presentment be made, without the concurrence of at least ten jurors (of a panel of 12).”⁷ However, Captain Maniscalco’s proposal was submitted to the Japanese government as a private draft, and his provisions regarding the jury system were not formally included as part of the final draft of the official SCAP recommendation.⁸

It is important to note that there was a significant difference of opinions among the various sections of the SCAP on the recommendations of civic participation systems. Legal specialist Anna Dobrovskaia indicated that Alfred C. Oppler and his associate Thomas L. Blakemore became highly critical of Maniscalco’s proposals, expressing their grave concerns about the unilateral, authoritative imposition of the US lay participation system on post-war Japan.⁹ Blakemore, in particular, had a unique perspective on Japanese legal ethos and

4. See DOBROVSKAIA, *supra* note 3, at 48 n.231.

5. *Id.* at 48 n.231.

6. *Id.* at 49.

7. *Id.*

8. *Id.* at 50 n.240.

9. *Id.* at 50 n.241 (citing NOBUYOSHI TOSHITANI, SENGU KAIKAKU TO KOKUMIN NO SHIHO SANKA [POST-WAR REFORMS AND PEOPLE’S JUSTICE [SYSTEM] PARTICIPATION], 127 (1975)) (discussing this draft as a document prepared by Captain Maniscalco in the private capacity).

culture, as he had formerly studied Japanese law in pre-war Japan at the Tokyo Imperial University. After Blakemore graduated from the University of Oklahoma, he received a grant to study in Japan and came to Tokyo in 1939 as a student of international law and language.¹⁰ After he passed the Japanese bar exam, he was also admitted to practice law with full courtroom status in Japan.¹¹

Blakemore returned to Japan as the Chief of Civil Affairs and Civil Liberties Branch, Legislation, and Justice Division, Legal Section under the SCAP. Blakemore proposed a radically different version of the US grand jury system to his Japanese counterpart.¹² As Blakemore was highly critical of Maniscalco's original proposal, his new proposal laid the foundation for the creation of the PRC, in order to check and even challenge the prosecution's discretion when it decides not to prosecute.¹³

Blakemore's proposed model radically departed from the traditional Anglo-American criminal grand jury system. Rather than relying on people's discretion to make an indictment decision based on prosecutorial evidence, the chief function of Japan's counterpart is to allow Japanese citizens to review a prosecutor's "failure" to indict criminal suspects. In other words, Japan's proposed grand jury panel was designed to function as the people's effective oversight institution for prosecutors' decisions and investigative authorities. Given the fact that nearly one hundred percent of all indictments lead to conviction in Japan,¹⁴ the PRC's ex post facto review of non-indictment decisions became quite significant in checking any potential governmental abuse and misuse of power and authority.

10. Mary F. Pols, *Thomas Blakemore Spent His Life Connecting America and Japan*, SEATTLE TIMES (Mar. 1, 1994, 12:00 AM), <http://community.seattletimes.nwsourc.com/archive/?date=19940301&slug=1897785> (recounting Blakemore's life and influence on Japan).

11. JOHN O. HALEY, *AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX* 126 n.12 (1991).

12. *Id.*

13. *Id.*

14. See J. Mark Ramseyer & Eric B. Rasmusen, *Why Is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 53 (2001) ("Conviction rates in Japan exceed 99 percent.").

Thanks to Blakemore's suggestion to create the effective civic oversight of governmental actions, the PRC became a powerful hybrid institution, which more or less mirrored the United States' civil grand jury as exercised in the State of California. The civil grand jury is empanelled every year at every county in California to examine civic complaints against government officials. The grand jury also inspects the actions and decision of public personnel and the proper management of local government offices, including the school board, the public library, the prosecutor's office, the police department, and local jails.¹⁵ Similar to the US criminal grand jury, the PRC also has influence on decisions to indict.¹⁶

Ever since the PRC was established at 201 locations throughout Japan in 1948, the PRC has deliberated on a total of 162,233 cases (as of December 31, 2012).¹⁷ Not only has the PRC deliberated on many controversial political issues, but its examination has also extended to prominent white-collar crimes and allegations of egregious governmental misconduct related to deaths, injuries, torts, and other sensitive health-related matters.¹⁸ For example, the PRC's examination has covered cases such as the Japan Airlines Flight 123 crash,¹⁹ the Snow

15. See generally Hiroshi Fukurai, *The Proposal to Establish the System of the Federal Civil Grand Jury in America* (May 29, 2008) (unpublished manuscript) (on file with author).

16. Editorial, *Keeping an Eye on Prosecution*, JAPAN TIMES, May 19, 2009, <http://www.japantimes.co.jp/opinion/2009/05/19/editorials/keeping-an-eye-on-prosecution/#.UzPOi61dXt8>.

17. Supreme Court of Japan, *Kensatsu Shinsakai no Juri Kensu: Giketsu Kensuto* [Accepted Case Total by Prosecution Review Commission and Total Number of Deliberation] (2013), available at http://www.courts.go.jp/vcms_lf/kensintoukei/H24.pdf.

18. See Hiroshi Fukurai, *The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and the Lay Participatory Experience in Japan and the U.S.*, 40 CORNELL INT'L L.J. 315, 349-53 (2007) (discussing how Japan's HIV contamination incident is historically rooted in the germ and biological warfare experiments conducted by Unit 731 military doctors during WWII, who later played prominent roles in the development of Japan's pharmaceutical industries and the formulation of health-related government policies).

19. *Showwashi Saibo-Nikko Janboki Tuiraku Jiken* [Revisit Showa's History: Japan Airline Crash], ASAHI DIGITAL (Aug. 12, 1985, 9:38 AM), <http://www.asahi.com/culture/articles/TKY201308030404.html>.

Brand mass food poisoning case,²⁰ the Minamata mercury poisoning incident, an organ transplant from a brain dead donor,²¹ thalidomide scandals,²² incidents where hemophiliacs contracted HIV from contaminated blood products,²³ drug-induced sufferings of millions of Japanese who contracted the Hepatitis C virus from unheated pharmaceutical products previously approved by the government,²⁴ and illegal campaign donations and political bribery.²⁵ The PRC also deliberated on international cases, such as a collision incident between Japan Coast Guard patrol vessels and a Chinese fishing trawler in the much-disputed territorial waters of the Senkakku Islands,²⁶ and murders of Japanese citizens by on-duty American military personnel, thereby assessing the propriety of prosecuting foreign soldiers in Japanese court.²⁷

The PRC investigates its cases and has the power to summon petitioners, their proxies, and witnesses for examination; question prosecutors, asking them for additional information when necessary; and seek special expert advice on a given case.²⁸ The investigative function only begins after a public complaint is filed against a prosecutor's decision not to indict.

20. *Prosecutors Hit in Snow Probe: Failure to Indict Execs Prompts Inquest Report Barbs*, JAPAN TIMES, Apr. 26, 2002, <http://www.japantimes.co.jp/news/2002/04/26/national/prosecutors-hit-in-snow-probe/#.U2UOQ1dUqY>.

21. Mayumi Negishi, *Legal Restrictions, Donor Card Problems Hinder Organ Transplants*, JAPAN TIMES, Oct. 13, 1998.

22. *Kensatsushinsakai ni Tsuite, 4, Kensatsu Shinsakai Toriatsukaishinsajikensū to Omona Yūmeijiken [Numbers of PRC Deliberations and Famous Cases]*, <http://www.rui.jp/ruinet.html?c=200&c=400&m=246309> (last visited Apr. 4, 2014).

23. Yukio Edano, *Yakugai Eizujiken no Kensatsu Shinsakai 'Fukisofuto' Giketsuni Kansuru Shitsumon Shuisho [Main Questions Regarding PRC's "Non-Indictment is Improper" Resolution on HIV Phytotoxicity Cases]*, SHITSUMON HONBUN JOHO [INFO. ON CONTENT OF INQUIRIES] (Dec. 17, 1996), http://www.shugiin.go.jp/Internet/itdb_shitsumona.nsf/html/shitsumon/a139007.htm.

24. Fukurai, *supra* note 18, at 349–53.

25. *Id.* at 347–49.

26. Motonari Imaseki, *The Increased Power of Committees for the Inquest of Prosecution: The Implications of 'Not Guilty' Judgments in Mandatory Indictment Cases*, YOMIURI SHIMBUN, Apr. 1, 2013, http://www.yomiuri.co.jp/adv/wol/dy/opinion/society_130401.htm.

27. Hiroshi Fukurai, *Lay Prosecution of U.S. Military Crimes in Japan by Prosecutorial Review Commissions and the Saiban-in Trial*, in *THE JAPANESE LEGAL SYSTEM: AN ERA OF TRANSITION* 131 (Tom Ginsburg & Harry Scheiber eds., 2012).

28. *Keijisoshōhōtō no ichibu o kaiseisuruhōritsu [Act to Revise the Code of Criminal Procedure]*, Law No. 62 of 2004, art. 38 (Japan) [hereinafter PRC Act], available at <http://law.e-gov.go.jp/htmldata/S23/S23HO147.html>.

Individuals and civic organizations are empowered to file these complaints to launch an investigation of prosecutorial decisions in criminal matters.

The PRC deliberates on the case and submits one of three recommendations: (1) the non-indictment is proper, supporting the prosecutor's original decision; (2) the non-indictment is improper, questioning and challenging the prosecutor's decision; or (3) the indictment is proper, reversing the prosecutor's non-indictment decision. A simple majority is needed for either of the first two decisions, while a supermajority of at least eight of the eleven votes is needed to pass the third resolution. The PRC then delivers a written recommendation to the Prosecutor's Office. In the past, because the Prosecutor's Office was the only institution with the power to indict, the PRC's recommendations were regarded as advisory. This limited legal authority was finally expanded by the 2004 Act to Revise the Code of Criminal Procedure ("PRC Act"), which made PRCs decisions legally binding.²⁹

Since nearly all indictments issued by Japanese prosecutors result in conviction, the most likely abuse of prosecutorial power lies in the exercise of the discretion not to prosecute potential suspects or criminals. The prosecutor's refusal to issue indictments may be influenced by extra-judicial pressures from prominent politicians, governmental leaders, economic elites, or other corporate leaders in the commercial and governmental establishment. The PRC's power to review and challenge the prosecutor's non-indictment decision has become a potential tool of the citizenry to ensure the proper functioning of powerful corporations, local and central government agencies, and their officials.

B. The Impact of the 2004 PRC Act and Legally Binding Authority

Ever since the Prosecution Review Commission Law ("PRC Law") was put into practice in 1948, the Japanese Federation of Bar Associations (the "JFBA") has insisted that a PRC decision be given legally binding authority, instead of treating it as a mere advisement to the Japanese prosecutor. In order to make a strong case for their recommendation, the JFBA first decided to

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

create the Internal Investigative Committee in 1973.³⁰ The Committee finally submitted its recommendation to the JFBA headquarters, which then released its report in 1975.³¹

Committee Chair Kashitaro Idei declared in his report that “citizens’ direct participation in the justice system promotes the democratization of the judiciary, and any proposal to develop and strengthen the power of the PRCs system becomes an integral part of democratic efforts.”³² Chair Idei’s report indicated that the second PRC decision to indict should be legally binding. Specifically, the recommendations indicated that after the PRC decides that “the indictment was proper” or “the non-indictment was improper,” the prosecutor is required to determine whether or not to maintain their non-indictment decision and then respond to the PRC recommendation within three months. If the prosecutor once again decided not to indict the suspect, the prosecutor is required to explain the reason for their non-indictment decision to the PRC.³³ If the PRC is not persuaded by the prosecutor’s explanation and determines that the suspect should still be indicted for the given case, its second indictment decision becomes binding.³⁴ The report concludes that prosecutors must respect the PRC decision and initiate a public action against the accused.

The committee report also included the special voting rule and suggested that a two-thirds majority was sufficient for the second indictment decision. Additionally, the report suggested a new deliberative structure for the PRC and the replacement of the quota system with a quorum rule. The PRC Law required that the deliberative forum must consist of eleven members. The forum often failed to meet its required quota for deliberation because PRC members often faced work-related obligations, transportation difficulties, economic hardship, needs of care for children or sick family members, and/or other personal difficulties. The JFBA thus recommended that the size of the

30. JAPANESE FED’N OF BAR ASS’NS, KENSATSU SHINSAKAI SEIDO NO KAISEIAN:SONO JŪJITSU KYŌKA WO MEZASHITE [THE PROPOSED AMENDMENT TO THE PROSECUTORIAL REVIEW COMMISSION: TO ENRICH AND STRENGTHEN] (1975).

31. *Id.* at 1.

32. *Id.* at “Jobun” [Introduction].

33. *Id.* at 28–29.

34. *Id.* at 29.

PRC be expanded from eleven to fifteen, and that the PRC adopt a quorum rule so that the attendance of any eleven members would constitute a quorum for full deliberative discussions and decisions.³⁵

In consideration of the three options for the PRC's final decision, the report recommended that two of them, specifically "the indictment is proper" and "the non-indictment is improper," should be treated equally, and the passage of this first PRC indictment decision should require a special two-thirds vote (i.e., at least eight of eleven votes). A second decision regarding the indictment then requires a two-thirds majority of the newly constituted fifteen members, which means that at least ten votes are needed to make the indictment legally binding.³⁶ Unfortunately, none of the JFBA's recommendations were introduced into the legislative process, and its recommendations for strengthening the PRC and its power to reverse the prosecutorial decision were not discussed until the late 1990s. A window of opportunity to revise the PRC Law came again when the Justice System Reform Council (the "JSRC") was created in 1999, and it began to discuss the introduction of another lay justice institution, the quasi-jury system, called a *Saiban-in Seido*.³⁷

It is important to note that the revision of the PRC Law was never the primary objective of the JSRC's discussions. Attorney Shunsuke Marushima, who once served as Senior Staff of the Secretariat in the JSRC, argued that many of the reforms in the criminal justice system, especially with respect to prosecution and police procedures, were expected to go through significant and perhaps unprecedented levels of procedural and administrative changes because of ordinary citizens' participation in *Saiban-in* trials, but not the PRC deliberation.³⁸ For instance, the effort to revise the PRC Law was first

35. *Id.* at 16–17.

36. *Id.* at 18–19.

37. 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, 123–24 (2010).

38. Shunsuke Marushima, *Historical Genealogy of Japan's Judicial Reform: Its Achievement and Challenges*, 36 *HASTINGS INT'L & COMP. L. REV.* 349, 357 (2013).

mentioned in the JSRC's seventh meeting in November 1999.³⁹ However, it took another year and a half to have the second discussion on the revision of the PRC Law. On April 10, 2001, the fifty-fifth meeting finally discussed the PRC reform and evaluated different strategies and proposals from the JSRC, the JFBA, the Supreme Court, and the Ministry of Justice. JSRC members proposed to make two decisions—"non-indictment is improper" and "indictment is proper"—legally binding.⁴⁰ However, the Ministry of Justice recommended that only the resolution of "indictment is proper" should be given legally binding authority, while the Supreme Court recommended that the resolution of "non-indictment is improper," should be binding when the decision is unanimous. The JFBA's proposal indicated that the PRC's indictment decision should be legally binding and subject to a two-thirds voting requirement and that the PRC deliberation should also be assisted by a practicing attorney as a legal advisor.⁴¹

The final JSRC proposal made a strong pitch for the revision of the PRC Law, stating that "a system should be introduced that grants legally binding effect to certain resolutions . . . in order to further expand the role of those Inquests [i.e., PRC], after thoroughly considering the structure, authority and procedures . . . as well as who files the indictment and conducts the prosecution at trial."⁴² The Lay Assessor/Penal Matter Investigation Committee (the "Penal Matter Committee") was soon empanelled to undertake the actual revision of the PRC Law. Committee Chairman Masahito Inoue first presented a detailed outline, suggesting that the PRC's

39. Shih9, 357 kaikaku shingikai: Dai 7 kai giji gaiy [JSRC: No. 7 Proceeding Outline] (Nov. 24 1999), *available at* <http://www.kantei.go.jp/jp/sihouseido/991126dai7.html>.

40. Shihleido kaikaku shingikai: Dai 55 kai giji gaiy [JSRC: No. 55 Proceeding Outline] (Apr. 10, 2001), *available at* <http://www.kantei.go.jp/jp/sihouseido/dai55/55gaiyou.html>.

41. Kensat sushinsakai no itteino giketsu ni taishi haishi kaishi i o fuyshi tameno hameno: Hame sansha no iken no hikaku [The Strategy to Provide a Legally Mandatory Status to a Particular Resolution by the PRC: Comparisons of Three Legal Professional Groups] (Apr. 10, 2001) [hereinafter *Strategy*], *available at* <http://www.kantei.go.jp/jp/sihouseido/dai55/55bessi2.html>.

42. Justice Sys. Reform Council, Recommendations of the Justice System Reform Council: For a Justice System to Support Japan in the 21st Century (2001), *available at* <http://japan.kantei.go.jp/judiciary/2001/0612report.html>.

decision be legally binding and that a practicing attorney be included as a legal advisor.⁴³ The PRC foreperson was then advised to specify the nature of a legal advisor's support, including the explanation of legal issues, relevant evidence, and case-specific information to be considered in the deliberation.⁴⁴

Public opinion and feedback on the Committee's proposals and guidelines were solicited in April and May 2003.⁴⁵ Many grassroots activists and concerned citizens sent their opinions and suggestions to the committee website. In July, public suggestions, concerns, and recommendations were published in a 293-page report on the government website.⁴⁶ Some citizens complained about the failure to recruit a sufficient number of lay participants for the commission to convene⁴⁷ and the PRC's automatic disqualification of vision or hearing impaired candidates.⁴⁸ A woman from Tokyo suggested the need for serious media efforts to publicize the PRC and its duty more broadly.⁴⁹ A man in his thirties from Tokyo also suggested that the legally binding authority should only be granted if another PRC panel that deliberated on the same case reached the same conclusion.⁵⁰

The institutional response was equally strong. Regional bar associations in Osaka, Kagoshima, Kyushu, Tokyo, Nagasaki, Nagasaki, Fukuoka, and Kyoto submitted their opinions, detailed proposals, and recommendations for the PRC reform.⁵¹ Other organizations sending their suggestions and proposals

43. Chairman Inouye submitted his outline for reform on November 11, 2003. *Kangaerareru Kensatsu Shinsakai Seido Kaisei no Gaiyo ni Tsuite* [The Outline on the PRC's Reform to Consider] (Nov. 11, 2003), *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai29/29siryou1.pdf>.

44. *Id.* at 2–3.

45. Office for the Promotion of Justice Sys. Reform, *Saiban-in Seido oyobi Kensatsu Shinsakai Seido ni Tsuiteno Ikenboshu no Kekka ni tsuite* [Results of Public Opinions on the Lay Assessor and PRC Systems] (July 2003), *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/siryou/0307kekka.html>.

46. *Saiban-in seido oyobi kensatsu shinsakai ni tsuiteno iken boshu no kekka gaiyo* [Resulting outlines of public opinions on the lay assessor and PRC systems] 9 (July 2003), *available at* <http://www.kantei.go.jp/jp/singi/sihou/kentoukai/saibanin/dai22/22siryou1.pdf>.

47. *Id.* at 327.

48. *Id.*

49. *Id.* at 159.

50. *Id.*

51. *Id.* at 176.

included the Tokyo Chamber of Commerce and Industry, the Japanese Housewives Association (the *Shufuren*), the *Burakumin* Liberation League (the *Buraku Kaiho Domei*), the National Consumer Groups Liaison Committee, the Tokyo Headquarters of the Women's Conference (the *Joshi Kaigi*), the Japan Broadcasting Union, the Japan Commercial Broadcasters Association, the Japan Federation of Certified Administrative Procedures Legal Specialists Associations, teachers' unions in Hiroshima and Nagasaki, the All Judicial Labor Union (the *Zenshijo Rodokumiai*), and many other powerful and prominent organizations.⁵² Legal scholars and research institutes also sent their specific suggestions and proposals, including the Research Committee in Criminal Justice at the Nippon University School of Law.⁵³ The majority of these organizations supported the granting of legally binding authority to the PRC's resolution. The JFBA and the Citizens Committee for the Creation of a Lay Assessor System, an influential civic group, opposed and criticized any proposal to impose a penalty on PRCs members for divulging case-specific information, but both strongly supported the idea that the PRCs' resolutions should be legally binding.⁵⁴ The Penal Matter Committee reviewed and incorporated the public comments and submitted its final recommendation. The PRC Law was then finally revised on May 28, 2004.⁵⁵

The revised law created a two-step process by which a PRC resolution would be made legally binding. When prosecutors issue a decision not to indict in a given case and the PRC decides that indictment is in fact appropriate, prosecutors are obliged to reconsider their non-indictment decision. If prosecutors decide for a second time not to prosecute, or if they do not indict within three months, the prosecutors will be asked to explain their inaction or non-indictment decision to the commission.⁵⁶ The PRC will then reconsider the case and if it makes a decision to indict, this decision becomes legally

52. *Id.*

53. *Id.*

54. *Id.*

55. PRC Act, *supra* note 28.

56. *Id.* art. 41(2)(2), (6)(2).

binding.⁵⁷ The court also appoints an attorney to perform the prosecution's role until a ruling is reached,⁵⁸ but the actual instruction to investigate authorities will be entrusted to prosecutors.⁵⁹

The revised law also requires that a practicing attorney is appointed as a "legal advisor" when the PRC decides that legal knowledge and advice is necessary.⁶⁰ The role of a legal advisor becomes particularly relevant in the second step of the process, when the commission may need to reevaluate the prosecutors' second refusal to issue the indictment against the accused.⁶¹ Finally, in order to streamline the operation, the PRC Law reduced the number of commissions from 201 to 165.⁶² While Japan was going through their own judicial reform and revising the PRC Law, China was undertaking similar steps to create and implement their own system of grand juries.

II. *HISTORICAL GENEALOGY OF CHINA'S PEOPLE'S SUPERVISORS SYSTEM AND ITS DEVELOPMENT*

A. The Evolution of China's PSS and Its Development

The original purpose of the PSS was to establish a system of external supervision over China's Procuratorates or prosecutors in the investigation of criminal cases in their jurisdiction. Article 3 of the Criminal Procedural Law provides that police organs shall be responsible for criminal investigation, detention, execution of arrests, and preliminary inquiry in criminal cases, while the People's Procuratorates shall be responsible for prosecutorial work such as authorizing approval of arrests and conducting criminal investigation of cases directly accepted by the Procuratorates. Under this provision, these two organs are vested with separate criminal investigative powers, while the

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

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

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

60. *Id.*

61. *Id.* art. 41(4) (requiring by law that the PRC has assistance of a legal advisor when considering the second resolution of the same case).

62. Supreme Court of Japan, Kensatsu Shisakai: Kensatsu Shinskai Seido Q&A [PRC & PRC System, Q&A] (2010), available at http://www.courts.go.jp/kensin/q_a/q3/index.html.

majority of ordinary criminal cases have been investigated by the police.

According to Article 18 of the Criminal Procedural Law, China's Procuratorates have the authority to investigate certain kinds of criminal offenses, including embezzlement and bribery, dereliction of duty committed by State functionaries, and violations of a citizen's personal rights such as illegal detention, extortion of confessions by torture, retaliation, entrapment, and illegal search.⁶³ The Procuratorates also investigate crimes involving the infringement of a citizen's democratic rights by government personnel who take advantage of their authority and power. These crimes are classified as "duty crimes." While Chinese police organs accept and investigate normal criminal cases, Procuratorates are specifically empowered to investigate these duty crime cases.

Article 8 of the Criminal Procedural Law also provides that "the Procuratorates in China shall, in accordance with law, exercise legal supervision over criminal proceedings." In accordance with this provision, the Procuratorates are empowered to supervise the overall criminal investigation. In terms of normal criminal cases investigated by police organs, the Procuratorates supervise their investigation as well. However, with respect to the investigation of duty crimes, the Procuratorates exercise the discretion to accept and investigate alleged duty crimes. The Procuratorates are then required to supervise their own investigative activities, thereby creating what

63. [The Criminal Procedure Law] (promulgated by the Standing Comm. Nat'l People's Cong., July 7, 1979, effective January 1, 1980; amended in accordance with the Decision on Revising the Criminal Procedure Law of the People's Republic of China, adopted at the Forth Session of the Eighth National People's Congress on March 17, 1996), art. 18 (China). Article 18 of the Criminal Procedure Law of China provides that crimes of embezzlement and bribery, crimes of dereliction of duty committed by State functionaries, and crimes involving violations of a citizen's personal rights such as illegal detention, extortion of confessions by torture, retaliation, frame-up, and illegal search and crimes involving infringement of a citizen's democratic rights—committed by State functionaries by taking advantage of their functions and powers—shall be placed on file for investigation by the People's Procuratorates. If cases involving other grave crimes committed by State functionaries by taking advantage of their functions and powers need be handled directly by the People's Procuratorates, they may be placed on file for investigation by the People's Procuratorates upon decision by the People's Procuratorates at or above the provincial level.

the Procuratorates of China called the “self-supervision problem.”⁶⁴

In order to eliminate this dilemma, many Procuratorates have established an internal supervisory mechanism. For example, they have created a so-called “Department of the Duty-Crime Investigation” in charge of solely examining duty crimes in its jurisdiction. Another department, named the “Investigation Supervisory Department,” then conducts the direct supervision of this department’s investigation of duty crimes, as well as other normal crimes that were also investigated by the police. This “internal supervision” of duty crime investigations in the same Procuratorate division may give rise to serious ethical concerns about the efficacy of institutional transparency and effectiveness of supervision because the power of prosecution without proper supervision may inevitably lead to misuse and abuse. The absence of an independent oversight committee has already led some prosecutorial personnel to commit various forms of misconduct during the process of criminal investigation, including illegal detention and extortion of confessions by torture.⁶⁵

In this context, the PSS was finally introduced by the Chinese government, attempting to place the Procuratorates’ criminal investigations under external supervision by a select group of citizens chosen from the local community. China’s authorities expected that the PSS could serve and function as a new normative supervisory mechanism and offer a more rigid and transparent procedure of duty crime investigations.

The 16th National Congress of the Communist Party of China in 2002 first introduced the proposal to initiate judicial reform in China. This proposal was, in part, the state’s response to extensive media attention on people’s concerns about the fairness and justice of law enforcement by the Procuratorates. A poll initiated by the Supreme People’s Procuratorate (the “SPC”) pointed to the instances of injustice and inappropriateness in the investigation of numerous duty crimes

64. Jiao Youlong, *The Supervisory Power Needs to be Supervised*, 2 PEOPLE’S CONGRESS RES. 16 (2004).

65. *Id.*

conducted by the Procuratorates.⁶⁶ At the same time, the SPC contended that some negative opinions and remarks about the Procuratorates could be attributed to the public's misunderstandings of the nature of the investigative process and procedure. The SPC then decided to introduce the PSS as an external organ to monitor the Procuratorates' duty crime investigations.⁶⁷ After reporting to the National People's Congress (the "NPC"), the Supreme Procuratorate held the "Meeting on the Experimental Work of the People's Supervisor System" in Beijing on August 29, 2003, and officially decided to introduce the PSS.⁶⁸

The PSS was thus expected to externally monitor and oversee the discretion of investigative power of prosecutorial personnel and their activity. The extensive supervision of prosecutorial conduct and decisions by a select group of citizens was expected to prevent procedural misconduct in law enforcement and even the miscarriage of justice.

Prominent scholar Liu Wei once summarized the impact and effect of the PSS in the following way. First, China's reforms of its judicial system and judicial working mechanisms unavoidably require the introduction of more public supervision over the judicial process to ensure justice. The PSS may effectively urge the Procuratorates to subordinate their work pursuant to due procedure and process. Second, the PSS becomes the inevitable creation of Chinese authorities' policies to promote active civic participation in the justice system. A number of foreign countries have recently adopted a variety of systems by which civilians are encouraged to participate in legal decision-making, thereby eradicating the professional monopoly

66. The Supreme Procuratorate of China specifically issued the so-called "Regulations Regarding the Prevention and Correction of illegal extended detention during the Procuratorial Process" in 2003, which has partially witnessed the above-named illegal detention problem; for the phenomenon of extortion of confession by torture, see high-profile cases on China's main news websites such as "The Police Officer Lei Ting's Torture Case." [*The Police Officer Lei Ting's Torture Case*], SINA.COM (Sept. 16, 2011, 6:54 AM), <http://news.sina.com.cn/s/2011-09-16/065423164313.shtml>.

67. Chen Weidong & Sun Hao, *The Research Report on the Operation of the People's Supervisor System*, 5 J. NAT'L INST. PUB. PROSECUTORS CHINA 81 (2011).

68. [*The People's Supervisor System*], BAIDU.COM, <http://baike.baidu.com/view/852736.htm> (last visited on Feb. 3, 2014).

of the judicial and prosecutorial duties.⁶⁹ The Chinese government also realized that the professionalization of the judiciary had widened the distance between the community and the judicial process and undermined the perceived credibility of China's criminal justice institutions. Not only does the PSS promote active citizen participation in the administration of justice, but it also allows the public to observe and assess the activities of Procuratorate personnel and prosecutorial decision-making processes. Third, the PSS becomes the formally established, external institution which is placed outside the influence of Procuratorate division. The PSS is solely composed of citizens chosen from local communities. Putting the prosecutorial power under people's close supervision provides an effective deterrent to the potential abuse and misuse of prosecutorial power and authority.

B. The Evolution of the PSS and the Nation-Wide Implementation

SPC Chief Prosecutor Jia Chunwang proposed the establishment of the external supervisory system over China's Procuratorates. In April 2003, the SPC decided to begin exploring the possibility of implementing the PSS.⁷⁰ On August 29, 2003, the SPC held a conference to formulate the pilot study of the PSS. In October 2003, the SPC finally began the pilot work of the PSS in ten provinces and municipalities, including Fu Jian, Sichuan, Heilongjiang, Liao Ning, Tian Jin, Inner Mongolia, Hebei, Shan Dong, Zhe Jiang, and Hu Bei.⁷¹

To facilitate the pilot study, the SPC enacted "The Regulations Regarding Implementing the PSS in Criminal Cases Directly Investigated by Procuratorates (Provisional)" on October 15, 2003 (the "Regulations 2003"). The SPC held two workshops in Beijing and Chengdu in January and May to further facilitate the pilot program through exchanging

69. See Hiroshi Fukurai, *Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy*, 86 CHI-KENT L. REV. 789 (2011); Mar Jimeno-Bulnes, *Jury Selection and Jury Trial in Spain: Between Theory and Practice*, 86 CHI-KENT L. REV. 585 (2011); Stephen Thaman, *Questions of Fact and Law in Russian Jury Trials: The Practice of the Cassational Courts Under the Jury Laws of 1864 and 1993*, 72 REVUE INTERNATIONALE DU DROIT PÉNAL 415 (2001).

70. [*The People's Supervisor System*], *supra* note 68.

71. *Id.*

information, sharing experiences, and analyzing the problems they encountered in the program.

After the workshops, the People's Supervisor Office was established under the General Office of the SPC and began to collect information and data from the pilot studies on a monthly basis, such as the selection and appointment of the people's supervisor, their performances, and the types of cases in which they participated. The People's Supervisor Office also regularly distributed reports to strengthen communications among different Procuratorates and offer the SPC's suggestions and recommendations on the PSS operation. By the end of 2004, the pilot study helped select a total of 18,962 people's supervisors to participate in the pilot program and these Chinese citizens supervised the conclusion of 3341 criminal cases.⁷²

In 2006, the Central Committee of the Communist Party of China issued "The Decision to Further Strengthen the Work of the People's Courts and the People's Procuratorates" and reaffirmed China's supreme authorities' strong commitment to the PSS. The Procuratorates in He Bei, Inner Mongolia, Heilongjiang, Jiang Su, Fu Jian, Shan Dong, Hunan, and Guangxi provinces first tried to facilitate the PSS's formal institutionalization.⁷³ The local Procuratorates in Tianjin, Hebei, Shanxi, Heilongjiang, Shandong, Hubei, Sichuan, and Yunnan also established their own People's Supervisor Office to specifically administrate the implementation of the PSS.⁷⁴ In 2006, all Procuratorates that had previously run the pilot program created the working mechanism to collect and archive information on PSS cases in order to further strengthen the effective civic supervision of prosecutorial personnel and their activities.

In 2007, the SPC conducted a series of nationwide fieldworks in order to analyze and assess the difficulties found in the pilot program.⁷⁵ In 2008, the SPC also collected feedback and suggestions from various Procuratorates with respect to the

72. STATE COUNCIL INFO. OFFICE, BUILDING OF POLITICAL DEMOCRACY IN CHINA (2005), available at <http://www.china.org.cn/english/2005/Oct/145718.htm#11> (the excerpt is found in the section, "System of people's supervisors").

73. [*The People's Supervisor System*], *supra* note 68.

74. *Id.*

75. *Id.*

selection and appointment of the people's supervisors, their performance, and supervisory activities. The State Council of China also issued a white paper titled *Building of Political Democracy in China*, which specifically commended the PSS:

People's supervisors are selected at the recommendation of various organs, groups, institutions and enterprises, with such major duties as conducting independent appraisals and submitting supervisory comments on cases the procuratorial organs have directly placed on file for prosecution but have later decided to withdraw or halt the prosecution of, and in cases of refusal to submit to arrest.⁷⁶

The white paper further extends the power of supervisors to examine duty crimes, in which the supervisors "participate, upon invitation, in other law-enforcement examination activities organized by the people's Procuratorates regarding crimes committed by civil servants, and make suggestions and comments on violations of law and discipline discovered."⁷⁷

In 2008, the Central Committee of the Communist Party of China again requested the collection of information and data from the pilot work. The purpose was to push this system's legalization, define the procedural activity of the people's supervisor, improve the administration of selection and appointment processes, and enhance the PSS's oversight functions and efficiency.⁷⁸

After seven years' worth of pilot study, the forty-fifth conference of the eleventh Procuratorial Committee of the SPC approved The Regulations Regarding the Application of the PSS of the Supreme Procuratorate of China (the "Regulations 2010") on October 26, 2010. The SPC then issued a notice to promulgate the Regulations 2010 and implemented the civic oversight institution in the whole country.⁷⁹

76. STATE COUNCIL INFO. OFFICE, *supra* note 72.

77. *Id.*

78. [*The People's Supervisor System*], *supra* note 68.

79. *Id.*

III. CIVIC REVIEWS OF PROSECUTORS' NON-INDICTMENT DECISIONS

This Section examines the civic review of prosecutors' non-indictment decisions in Japan and China. Two criminal cases reviewed by the PRC in Japan include: (1) the Fukuchiyama-Line derailment accident; and (2) the killing of an Okinawa youth by US military personnel. The criminal cases reviewed by the PSS in China include: (1) a bribery of a public official by a corporate executive; and (2) the dereliction of duties by police officers.

A. *The PRC and Lay Adjudication of Non-Indictment Cases in Japan*

1. The Fukuchisen Derailment Incident

Japan's most explosive case on the disagreement between the prosecutorial decision and the PRC's deliberative outcome involves the 2005 train derailment that killed 107 people and injured 555 others. The train derailment occurred on April 25, 2005, on the West Japan Railway ("JR West") Fukuchiyama Line in Hyogo Prefecture. The crowded morning train took a tight curve at excessive speed and slammed into a high-rise residential complex. Five of the seven cars derailed, and both the first and second cars slammed into an apartment building near the tracks. The first car crashed into a multi-story parking garage on the ground floor of the apartment and was compacted to half its original length, while the second car rammed into the building wall and was fractured into an L shape.⁸⁰

JR West operates in western Honshu, the main and largest island of Japan, and is one of Japan's largest corporations. While JR West has been listed on all major stock markets, including the Tokyo Stock Exchange, the company has also been burdened by huge debt sustained before the privatization of the Japanese National Railways ("JNR") in 1987. Its managerial team has

80. *JR West, Victims' Relatives Mark Amagasaki Crash*, JAPAN TIMES, Oct. 26, 2005, <http://www.japantimes.co.jp/news/2005/10/26/national/jr-west-victims-relatives-mark-amagasaki-crash/#.U26ksYFdWSo>.

been known to be highly aggressive and concentrated on operations, with profit making being the highest priority.⁸¹

On July 8, 2009, the prosecutors indicted the JR West President Masao Yamazaki after concluding that the tragedy could have been prevented if the curve had been equipped with the Automatic Train Stop (“ATS”) system that could have halted the train. He was indicted on charges of professional negligence resulting in deaths and injuries.⁸² Yamazaki made the announcement, on the same day of his indictment, that he would resign his post, while he continued to remain on the JR West’s Board of Directors.⁸³

The prosecutors also decided not to indict former JR West executives in charge of safety measures, three former managers, and the twenty-three-year-old driver who was killed in the wreck.⁸⁴ In August, families of victims submitted a complaint to the Kobe PRC, indicating that JR West past presidents should be indicted because of their collateral failure to install an advanced version of the ATS system at the site.⁸⁵ On October 22, the Kobe PRC decided that three past presidents of the JR West should be indicted and submitted their recommendation to the Kobe Prosecutor’s Office.⁸⁶ The Kobe PRC also determined that the major factor contributing to the accident was the company’s management policy that made profits, not the safety of its customers, the “firm’s top priority.”⁸⁷

On December 4, after brief investigative work on the case, the Kobe prosecutors announced that they would not indict

81. *JR West to Pay 44.4 Bil. Yen Under New Legislation*, HIGHBEAM BUS. (Nov. 12, 1998), <http://business.highbeam.com/435559/article-1G1-53249649/jr-west-pay-444-bil-yen-under-new-legislation>.

82. *JR West President Indicted Over Crash*, JAPAN TIMES, July 9, 2009, <http://archive.today/DTEY>.

83. He was later acquitted. See Editorial, *Former President’s Acquittal Doesn’t Lessen JR’s Responsibility for Disaster*, ASAHI SHIMBUN, Jan. 12, 2012, <http://ajw.asahi.com/article/views/editorial/AJ201201120048>.

84. *JR West President Indicted Over Crash*, *supra* note 82.

85. *Amagasaki Crash Kin Push for Charges*, JAPAN TIMES, Aug. 22, 2009, <http://www.japantimes.co.jp/news/2009/08/22/national/amagasaki-crash-kin-push-for-charges/#.U26l4IFdWSo>.

86. *Crash Inquest Panel: Indict Ex-JR West Heads*, JAPAN TIMES, Oct. 23, 2009, <http://www.japantimes.co.jp/news/2009/10/23/national/crash-inquest-panel-indict-ex-jr-west-heads/#.U26mIIFdWSo>.

87. Editorial, *JR West’s Actions Show Lack of Remorse, Resolve*, DAILY YOMIURI, Oct. 24, 2009, <http://www.istockanalyst.com/article/viewiStockNews/articleid/3576007>.

three former presidents, indicating that these presidents bear no direct responsibility for instituting an advanced version of the ATS system at the curb of the derailment.⁸⁸

In January, victims' families filed another complaint regarding the prosecutors' non-indictment decisions against the three JR West presidents.⁸⁹ On January 19, 2010, regarding the two former transportation managers, the Kobe PRC rendered a "the non-indictment is improper" decision and sent the recommendation to the prosecutors.⁹⁰ Regarding the three former JR West presidents, however, the PRC summoned victims' families and solicited their opinions on the case.⁹¹ The prosecutors were also summoned to explain the non-indictment decision and their own investigation on the case.⁹²

On March 26, 2010, the Kobe PRC decided for the second time that the three former JR West presidents should be indicted for professional negligence resulting in deaths and injuries.⁹³ On April 23, 2010, three court-appointed lawyers formally filed charges against the three presidents for their failure to take railway safety measures, thereby causing the fatal train derailment.⁹⁴

In March 2013, the trial of three past presidents began at the Kobe District Court.⁹⁵ The lawyers who acted as prosecutors

88. *JR Nishi no Rekidai 3 Shacho, Futatabi Fukisoni, Dassenjiko de Kobe Chisai* [Non-Indictment Again for Three Past JR West Presidents, on the Derailment Incident, by the Kobe Prosecutors], NIKKEI NET, Dec. 4, 2009, <http://www.nikkei.co.jp/news/main/20091204AT5C0401S04122009.html>.

89. *Fukuchiyamasen Dassenjiko: Kensatsu Shinsakai Izoku kara Ikenchoshu* [Fukuchiyama Derailment Accident: The PRC Listens to Victims' Families], EXCITEBLOG, (Feb. 25, 2010), <http://u23pbzpv.exblog.jp/10103774/> [hereinafter *Fukuchiyamasen*].

90. *Moto Unyu Bucho Fukisowa Futo* [Improper Non-Prosecution for Former Transportation Managers], JICHI TSUSHIN, Jan. 29, 2010, <http://www.jiji.com/jc/zc?k=201001/2010012900757>.

91. *Fukuchiyama-sen Jiko: JR Nishi Rekidai 3 Shacho no Kisogiketsu: Kobe Daiichi Kensatsu* [Fukuchiyama-Line Derailment Incident: Kobe PRC Decides on Indictment Against Three JR-West Presidents], MAINICHI SHIMBUN, Mar. 26, 2010, <http://mainichi.jp/select/jiken/news/20100326k0000e040081000c.html>.

92. *Id.*

93. *Id.*

94. *JR Nishi no Rekidai 3 Shacho o Kyosei Kiso*, Apr. 26, 2010, SANKEI NYUSU, <http://sankei.jp.msn.com/affairs/trial/100423/tr11004231600009-n1.htm>.

95. *Mottomo Omoi Kei o: Izokura Genkei ni Tsuyoikitai* [Heaviest Penalty, Please' Expectation for Severest Penalty by Victims' Families], SANKEI NEWS-WEST, Mar. 27, 2013, http://sankei.jp.msn.com/west/west_affairs/news/130327/waf13032712010009-n1.htm.

under the revised PRC Law sought three-year terms for each of them, arguing that the three defendants “cannot evade criminal responsibility’ for the accident because they prioritized business interests over ensuring the safety of the passengers.”⁹⁶ The testimony revealed that one of the key reasons that “the driver was speeding was because he overshot his time at the previous station and was making up for it to keep up with the pressure of the very strict timetable that JR West follows.”⁹⁷ The busy train schedules were specifically created during the terms of these three former presidents.⁹⁸ In September, the three-judge panel acquitted the three former presidents of the charge of professional negligence of their duties.⁹⁹

While the PRC’s decision condemned the company’s corporate culture and management policies that put profit as the company’s first priority, the court indicated that the driver was at fault for failing to brake at the curve and that, at the time of accident, the company was not yet required to install the computerized ATS system, and even then, derailment accidents caused by high speeds were a rare occurrence.¹⁰⁰ The court decision refused to determine corporate culpability in the accident and put the blame upon the driver, who had died in the crash.¹⁰¹

2. The Killing of an Okinawa Youth by US Military Personnel¹⁰²

In January 2011, a vehicle driven by a twenty-three-year-old US military employee, Rufus J. Ramsey III, from an Army and

96. Ida Torres, *EX-JR West Heads Could Get 3 Years in Jail for 2005 Train Crash*, JAPAN DAILY PRESS (Mar. 28, 2013), <http://japandailynews.com/ex-jr-west-heads-could-get-3-years-in-jail-for-2005-train-crash-2826009> (quoting the lawyers).

97. Ida Torres, *Ex-JR West Presidents Acquitted over 2005 Fukuchiyama Train Disaster*, JAPAN DAILY PRESS (Sep. 27, 2013), <http://japandailynews.com/ex-jr-west-presidents-acquitted-over-2005-fukuchiyama-train-disaster-2736745/>.

98. *Id.*

99. *Id.*

100. *Id.*

101. In October 2013, prosecutors filed an appeal with the Osaka High Court. See Faith Aquino, *Prosecutors Appeal Against the Acquittal of Former JR West Executives*, JAPAN DAILY PRESS (Oct. 8, 2013), <http://japandailynews.com/prosecutors-appeal-against-the-acquittal-of-former-jr-west-executives-0837311>. The high court has yet to rule on the appeal, as of January 27, 2014.

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

Air Force Exchange Service (“AAFES”) in Okinawa, swerved into oncoming traffic, striking a compact car and killing the nineteen-year-old driver Koki Yogi, who had just returned to his hometown in Okinawa to attend the official adulthood ceremony of his twentieth birthday organized by the local municipal government.¹⁰³ Ramsey was on his way home after he had consumed alcohol at an official party at the military base prior to the accident.¹⁰⁴

After the investigation by the Naha District Prosecutors Office, prosecutors announced that they would not indict Ramsey because the accident occurred while he was still on official duty, citing Article 17 of the US-Japan Status of Forces Agreement (“SOFA”) that gave the US military the primary right to exercise jurisdiction over all accidents or crimes committed while on official duty.¹⁰⁵ The US military then decided to punish Ramsey for the accident and revoked his driving privileges for five years.¹⁰⁶

Yogi’s mother soon filed a complaint with the Naha PRC in order to review the prosecutors’ non-indictment decision.¹⁰⁷ The PRC was composed of eleven citizens chosen from among Okinawa’s residents. In May, the Naha PRC reversed the Japanese prosecutors’ refusal to indict Ramsey, determining that the indictment was proper for the given case. The PRC cited the

103. 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>.

104. *Drinking at USF ‘Official Event’ Is Regarded as Part of ‘Official Duty*, JAPAN PRESS WKLY. (Apr. 24 & 26, 2011), <http://www.japan-press.co.jp/modules/news/index.php?id=1784>.

105. *See id.* The term, SOFA (or US-Japan SOFA in this Article), refers to the Agreement under Article VI of Mutual Cooperation and Security between Japan and the United States of America, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan. *See Agreement Between the United States of America and Japan Concerning New Special Measures Relating to Article XXIV of the Agreement Under Article VI of the Treaty of Mutual Cooperation and Security Between the United States of America and Japan, Regarding Facilities and Areas and the Status of United States Armed Forces in Japan*, U.S.-Japan, Jan. 25, 2008, Temp. State Dep’t No. 08-36, available at <http://www.state.gov/documents/organization/108914.pdf>.

106. *See* Tritten & Sumida, *supra* note 103.

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

1960 US Supreme Court decision that excluded the civilian employees and contractors of US military bases and dependents of military service members from military rules and regulations governed by the Uniform Code of Military Justice (the “UCMJ”), thereby excluding Ramsey from the privileges granted under the SOFA provision.¹⁰⁸ The PRC also reasoned that the NATO SOFA signed with European countries similarly extends no right for the US military to exercise its jurisdiction over civilian military employees during peacetime.¹⁰⁹ Furthermore, the US government promulgated the Military Extra-Territorial Jurisdiction Act (the “MEJA”) in 2000, specifying that the federal, not the military, court has the right to exercise its jurisdiction over military employees’ crimes during peacetime.¹¹⁰

Meanwhile, friends of the victim and grassroots organizations in Okinawa created the support group called *Yogi Koki-kun no Izoku o Sasaerukai* (the Support Group for the Survivors of Mr. Koki Yogi), collected signatures from the public, began to protest against the prosecutors’ non-indictment decision, and demanded the immediate modification of the Japan-US SOFA over the jurisdictional provision.¹¹¹

On November 23, the Japanese and US governments announced that they had reached a new agreement that allowed Japanese courts to try civilian military employees even if they

108. *Kōtsushibōjiko Beigunzoku wa Kiso-Sotō Kenshin Irei-Genkyū Chūkyōtei Kaiseio* [Traffic Accident Death: American Military Employee be Indicted: PRC’s Unusual Comments for Urging the SOFA Modification], *JIDAN-NAVI* (July 16, 2011), http://www.jidan-navi.com/jidan_news/000727.html.

109. *Beigunzoku Fukiso Jiken, ‘Nihon ni Senzokuteki Saibanken Arieru’* [American Military Employee’s Non-indictment Case: Japan Has the Rights to Exercise Its Jurisdiction], *FUKUCHI-GYOSEI JIMUSHO* (Nov. 11, 2011), <http://www.office-fukuchi.jp/article/14176861.html> (citing the article from Okinawa Times about the ruling of the Korean Supreme Court Case involving the adjudication of crimes committed by an American military employee).

110. Military Extraterritorial Jurisdiction Act (MEJA) of 2000, 18 U.S.C. §§ 3261–3267 (2012); *Chifuyu Hiyama, Gunzoku no Keiji saiban Kankatsuken* [Criminal Court’s Jurisdiction Over Military Employees] 48, REFERENCE (Apr. 2013), available at http://dl.ndl.go.jp/view/download/digidepo_8200261_po_074703.pdf?contentNo=1.

111. *Nichibei Chūkyōtei Kaisei Motome Gaimu-Daijinni Yōsei-e Izoku o Sasaeru-Kai* [Demand to Modify Japan-U.S. SOFA: Survivor’s Support Group Submit Petition to Minister of Foreign Affairs], *RYUKYU SHIMPO* (Dec. 9, 2011), <http://ryukyushimpo.jp/news/storyid-185029-storytopic-1.html>.

were on official duty at the time of a crime or accident.¹¹² Specifically, the new agreement allows US authorities to, first, determine whether or not they will bring criminal prosecution to a case and, second, notify the Japanese side of their decision. If US authorities decide not to prosecute their personnel, the Japanese authorities can then request a trial within thirty days after the US notification.¹¹³ Two days after the new agreement was reached, the Naha prosecutors' office indicted Ramsey, who worked at a supermarket inside Camp Foster.¹¹⁴ In February 2012, the Okinawa court sentenced Ramsey to eighteen months in Japanese prison for vehicular manslaughter.¹¹⁵

In this case, the prosecutor's office in Okinawa never publicly responded to the PRC's first recommendation for the prosecution. Instead, the Japanese government technically "took over" the case and began directly negotiating with the US military as to the proper disposition of the US military employee whose juridical rights were "protected" by the SOFA. If the Okinawa prosecutors had responded to the PRC decision and issued the non-prosecution decision for the second time, the deceased's mother would have certainly filed another complaint to the Naha PRC for a review, and then the Naha PRC would have issued the second and binding decision on the prosecution. This would then have led to an inevitable legal controversy over international disputes concerning the right to exercise primary jurisdiction. The bilateral discussion between the Japanese and the US governments was absolutely necessary to avoid international legal controversies and politically sensitive jurisdictional disputes over military personnel and their crimes committed overseas.

112. *Okinawa Prosec Indict US Base Employee*, HOUSE JAPAN (Nov. 25, 2011), <http://www.houseofjapan.com/local/okinawa-prosec-indict-us-base-employee>.

113. *U.S. Civilian Worker in Okinawa Indicted for Fatality*, ASAHI SHIMBUN (Nov. 25, 2011), http://ajw.asahi.com/article/behind_news/politics/AJ201111250057.

114. *Id.*

115. 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>.

B. *The People's Supervisor System and Lay Adjudication of Criminal Cases in China*

1. Bribery of Public Officials¹¹⁶

After the PSS was established in 2010, people's supervisors reviewed a variety of criminal cases. The following case involves the bribery of a government official by a corporate executive, and people's supervisors were asked to review the propriety of the prosecutor's non-prosecution decision on the case.

Zhang, the General Manager of the X Electric Company, bribed Vice-Governor Xu twice, in 2009 and 2011. In return, Xu provided the X Electric Company the electric project in an alcohol-liquor trading center in the Y Town. The local Procuratorate in Sucheng District investigated the case and concluded that Zhang had indeed bribed Xu and therefore committed a crime of bribery. According to the Criminal Law of China, both the company and individuals who conspired and committed the act of bribery should be properly punished. Article 142 of the Criminal Procedural Law of China also stipulates, "with respect to a case that is minor where the offender need not be subject to criminal punishment or may be exempted from it under the Criminal Law, the People's Procuratorate may decide not to initiate a prosecution." After their investigation, the local Procuratorate decided not to initiate a public prosecution against Zhang because the bribery committed by Zhang had been "minor" due to a number of mitigating circumstances, including: (1) the monetary benchmark for a Procuratorate to place a legal person's bribery case on file was CNY¥200,000, while the bribery in this case was CNY¥300,000, "slightly" above the benchmark; (2) this bribery case did not cause any substantial economic loss to any party involved in the illegal scheme; (3) Zhang surrendered himself on his own initiative and already confessed to his crime and thus his guilt; and (4) he returned all illegal earnings from this secret financial transaction.¹¹⁷

116. Zhu Jianzhong & Wang Yu, *The People's Supervisor Feel Cases' Pulse*, PROCURATORIAL DAILY, Sept. 23, 2013, at 7.

117. *Id.*

According to Article 17 of the Regulations 2010, if a Procuratorate decides not to initiate a prosecution, the people's supervisor will be summoned to review the case. The Administrative Office of the People's Supervisor of the Suqian City Procuratorate randomly selected a panel of three people's supervisors (Q, W, and Y) from the candidate list to examine the bribery case.

During the deliberation, the supervisor W indicated that the briber deserved a criminal punishment and that his conviction would set a good example for future lawbreakers. By contrast, the supervisor Q, who was a businessman, stated that the suspect bribed the town governor not for his own personal gain but for the sake of his company's economic welfare, and running a company has become increasingly difficult today due to severe market competitions. Taking mitigating circumstances into account, Zhang's crime, as viewed by the local Procuratorate, had been "minor" and thus leniency should be applied. The people's supervisor Y agreed with Q. Finally, the majority of the supervisory panel decided on the verdict that agreed with the local Procuratorate's decision and concluded that the non-prosecution against Zhang was a proper decision in this case.

2. The Dereliction of Police Duties¹¹⁸

On March 15, 2005, prisoner Chen, who had received a ten-year imprisonment sentence, was sent to the hospital for medical treatment of his injured hands. Two police officers, M. Wang and Y. Wang, were dispatched to watch over the prisoner. The police officers cuffed Chen's feet at the hospital, but not his injured hands. The officers then failed to follow the proper protocol to monitor and watch over Chen. In the evening of April 1, both officers left their watching position to have their dinner, leaving Chen alone in the ward of the hospital. The prisoner soon destroyed the cuff with a brick and escaped the hospital, though he was caught the next morning.

118. *The People's Supervisor Handled A Bribery Case*, JIANGNAN TIMES, Mar. 6, 2008, at 5.

Chapter IX of the Criminal Law of China for the Crime of Dereliction of Duty and Article 400 stipulates that:

a judicial officer who, due to serious negligence of his duty, causes a suspect for a crime, defendant or criminal in custody to escape shall be sentenced to a fixed-term imprisonment of not more than three years of criminal detention if a serious result is not caused; and if an especially serious result is caused, to a fixed-term imprisonment of not less than three years and not more than ten years.

The local Procuratorate initiated the criminal investigation on April 13 and ended it on May 8, and the case was forwarded to the Prosecution Department of the local Procuratorate. The Prosecution Department examined the case and held that two police officers failed to properly perform their duties and left their watching positions concurrently without proper authorization, which resulted in the prisoner's escape. However, the Prosecution Department decided not to prosecute the two suspects by classifying this case as "minor," taking into account the mitigating circumstances, including: (1) the prisoner was arrested the next day, and he did not engage in action that caused any significant societal harms; (2) the two officers reported on their own initiative about the prisoner's escape; and (3) they already admitted their guilt.

As stipulated by Article 17 of the Regulations 2010, this case was put under review by a people's supervisor panel composed of five supervisors. The prosecutorial personnel reported to people's supervisors about the facts, evidences, applicable laws of the case, information on mitigating circumstances, and evidence on any serious results related to personal injury and/or property loss in the case. After the deliberation, four supervisors made a verdict against the local Procuratorate's non-prosecution decision, while one waived his/her rights to vote on this issue. Four supervisors unanimously held that two suspects were irresponsible in failing to uphold their duties and should be prosecuted.

Article 33 of the Regulations 2010 provides that the Procuratorate handling the case shall examine the opinions and decision presented by the supervisory panel. If the chief

prosecutor disagrees with the decision of the supervisory panel, the case shall be submitted to the Procuratorial Committee of the local Procuratorate for further discussions and a final decision. In this case, the supervisor panel composed of five people's supervisors disagreed with the proposal made by the Prosecution Department of the local Procuratorate who planned not to initiate a prosecution against the two derelict police officers, while the Chief Prosecutor of the local Procuratorate disagreed with the verdict presented by the supervisory panel.

This case was thus subsequently submitted to the Procuratorial Committee of the local Procuratorate for discussion and final decision. After hearing the reports by the prosecutorial personnel and the opinions of the people's supervisors, most members of the Procuratorial Committee held that the prisoner who escaped the hospital had previously committed serious crimes and had received a ten year prison sentence, and that the irresponsible actions of the two officers who had allowed such a dangerous prisoner to escape should constitute a serious dereliction of their police duties. The Procuratorial Committee thus approved the verdict of the people's supervisors, and the local Procuratorate, under the final decision of the Procuratorial Committee, then initiated a prosecution against the two police officers.

While the three-member supervisory panel of the bribery case agreed with the Procuratorate's decision not to prosecute a business executive, the five-member supervisory panel that evaluated public servants' crimes ruled against the non-prosecution decision made by local prosecutors. Did the makeup of the supervisory panel contribute to the difference in verdicts? Did the socio-political background of people's supervisors influence the verdict patterns? How was the candidate list of people's supervisors assembled and constructed? The following Part examines some unique characteristics of grand jury systems adopted in East Asia and assesses the selection and appointment procedures as to whether or not the panel of grand jurors represents a fair cross-section of the communities, thereby influencing the nature of deliberations and thus the verdicts.

IV. *UNIQUE FEATURES OF TWO GRAND JURY SYSTEMS IN JAPAN AND CHINA*

This Part identifies and examines important features of grand jury systems adopted in Japan and China. First, we examine the ability of these civic panels to institute an effective check over prosecutorial power and authority. The second sub-section focuses on the selection of civil panels and examines their representativeness. While the candidates for Japan's PRC are required to be chosen from local electoral rolls, a candidate list of China's PSS is constructed through a series of solicitations for supervisor candidates from various governmental organs, groups, institutions, and private enterprises.¹¹⁹ The representative disparity of civic panels, if any, is the focus of the second sub-section.

A. People's Check on Prosecutorial Power and Authority

The most significant difference between the two grand jury systems adopted in Japan and China and the US-style grand jury system is that the former institutions are specifically designed to review and examine the propriety of the decisions made by the prosecutor. Specifically, the grand jurors in East Asia examine criminal cases that prosecutors have decided not to prosecute. Their verdicts can potentially challenge and even reverse the decision made by the prosecutor.

The United States' grand jury system, on the other hand, rests on the assumption that a panel of local residents is asked to make an indictment decision based on evidence presented and produced by the prosecutor. No defense attorney is present in the grand jury proceeding. Grand jurors have little to no authority to challenge or investigate the authenticity of prosecutorial evidence in terms of how it is collected and how witnesses are identified and prepared for testimony. Thus, most grand jury decisions in the United States usually result in the indictment of the accused as requested by the prosecutors. In Arizona, for example, in 1994, the federal grand juries returned

119. STATE COUNCIL INFO. OFFICE, *supra* note 72 ("People's supervisors are selected at the recommendation of various organs, groups, institutions and enterprises . . .").

indictment decisions in 99.6% of the cases.¹²⁰ In Georgia, grand jurors vote in favor of indictment in 90% of the cases.¹²¹ The high rate of indictment decisions is a reason that the grand jury in the United States has been referred to as a so-called “rubber-stamp” institution.

Two East Asian grand juries, however, pay no attention to already indicted cases, or are not involved in making an indictment decision in the first instance. Rather, their involvement concerns the critical evaluation of the prosecutor’s failure or “refusal” to issue an indictment decision. As stated earlier, nearly all indicted cases in Japan result in criminal conviction.¹²² China has a nearly identical criminal conviction rate.¹²³ In 2009, for example, one year prior to the nation-wide implementation of the PSS, China had a conviction rate of 99.9%.¹²⁴ In 2013, China convicted more than 840,000 defendants, and found 2162 defendants not guilty (99.8%).¹²⁵ Once the prosecutorial process is initiated in both countries, the conviction becomes a matter of reality for nearly all criminal suspects and defendants. The near-perfect conviction rate also implies that the potential abuse and misuse of prosecutorial power lies in the exercise of their discretion in decisions not to prosecute individuals, groups, or organizations that are suspected of criminal offenses and illegal activities. The prosecutor’s “failure” to issue an indictment or the prosecutor’s

120. A.O. Kime, *The Arizona Country Grand Jury, A Former Grand Juror’s Assessment of the Grand Jury System*, MATRIX MNEMOSYNE, http://www.matrixbookstore.biz/grand_jury.htm (last visited May 2, 2014) (“In a shocking statistical report for fiscal 1994 found the federal grand juries returned indictments in 99.6% of the cases.”).

121. *How Does the Grand Jury Work?*, SAVANNAH MORNING NEWS (Sept. 25, 2005), <http://savannahnow.com/stories/092505/3317013.shtml>.

122. Norimitsu Onishi, *Coerced Confessions: Justice Derailed in Japan*, N.Y. TIMES, May 7, 2007, <http://www.nytimes.com/2007/05/07/world/asia/07iht-japan.1.5596308.html?pagewanted=all>.

123. Jeff Chinn, *Intl. Wrongful Convictions: China Suspects Presumed Guilty Before Trial*, CAL. INNOCENCE PROJECT (May 20, 2013), <http://californiainnocenceproject.org/blog/2013/05/20/intl-wrongful-convictions-china-suspects-presumed-guilty-before-trial> (reporting the *Guardian* article, indicating that 99.9% of China’s criminal cases in 2009 ended in convictions).

124. Patrick Boehler, *Supreme People’s Court Judge Urges End to Wrongful Convictions*, SOUTH CHINA MORNING POST, Aug. 29, 2013, <http://www.scmp.com/news/china/article/1232279/supreme-peoples-court-judge-urges-end-wrongful-convictions>.

125. *Concerns Over 98% Chinese Conviction Rate*, SCOTSMAN (Jan. 25, 2014), <http://www.scotsman.com/news/world/concerns-over-98-chinese-conviction-rate-1-485728>.

“refusal” to initiate the prosecution against the suspected party may be caused by many factors, including the sheer lack of material and/or forensic evidence, the refusal of a key witness to testify, as well as extra-judicial pressures and/or political interference from private sectors, corporations, fellow prosecutors, government executives, or strong advocacy groups, i.e., public and private interest groups.

The provision of *Shobun Seikun* in Japan provides an excellent example of how political pressures from government executives affect the prosecutorial decision-making process. This legal provision, for example, allows a complete administrative “takeover” of the case by prosecutorial executives and has resulted in the dismissal of many political cases.¹²⁶ For public prosecutors to initiate any action against influential bureaucrats, political party members, or local government leaders, the Prosecutor General must receive an order from the Ministry of Justice to investigate and file a formal charge against them.¹²⁷ Thus, the Public Prosecutors Office becomes directly subject to a politician who happens to be the Minister of Justice, who is also appointed by the Prime Minister of the same political party. In political cases, partisan politics and ministerial influences and interference are inevitably present in the process of making the final indictment decision.

Despite the prosecutor’s limitation in not prosecuting government bureaucrats and party elites for political reasons, Japan’s prosecutors still have tremendous power and authority, even more than their US counterparts. Their power to investigate to prosecute covers nearly all phases of the criminal justice process and thus has the potential for abuse and misuse. For example, Japanese prosecutors have the power to terminate or initiate the prosecutorial process, without the need to go through a criminal grand jury or similar screening mechanism as required in the United States; the authority to interrogate and even extract confessions from the accused or defendant in most criminal cases; the power to lead investigations from the discovery of a crime; the power to control access to evidence by

126. DAVID T. JOHNSON, *THE JAPANESE WAY OF JUSTICE: PROSECUTING CRIME IN JAPAN* 131 (2001).

127. *Id.*

defendants and their attorneys; and the authority to appeal acquittals rendered by court or lay judges.¹²⁸

China's prosecutors similarly enjoy a wide range of unfettered power and authority. Unlike public prosecutors in the United States or other western legal jurisdictions, the Chinese Procuratorates' work is not limited to prosecutorial task or duty. Chinese Procuratorates enjoy power not only to conduct criminal investigations, but also to exercise supervision of other criminal justice managers and institutions, including the police, prisons, detention facilities, and reform-through-labor institution activities.¹²⁹ Chinese Procuratorates also hold power to supervise even the courts to ensure that their judicial activities confirm to law.¹³⁰ Chinese Procuratorates, in other words, exercise significant power and authority to supervise criminal, civil, and administrative trials.¹³¹

It is no surprise that a powerful trans-national organization, or even prominent domestic political institutions such as the United States-led SCAP in post-war Japan, and the National Congress of the Communist Party of China, the highest political organ in China, recognized the danger of potential abuse of power and authority by the prosecutors. In a sense, the emergence of two grand jury systems in Japan and China may have been the inevitable consequence of political concerns about the potential abuse of prosecutorial power and authority.

128. Kent Anderson, *The Japanese Way of Justice: An Up-Close Look at Japan's Jack McCoy: A Review of the Japanese Way of Justice: Prosecuting Crime in Japan*, 4 ASIAN-PAC. L. & POL'Y J. 169, 173 (2003).

129. [Organic Law of the People's Procuratorates] art. 5 (promulgated by the Standing Comm. of the Nat'l People's Cong., July 5, 1979, effective Jan. 1, 1980, amended by the Standing Comm. of the Nat'l People's Cong., Sept. 2, 1983); Civil Procedure Law of the People's Republic of China art. 14 (promulgated by the Standing Comm. of the Nat'l People's Cong., Oct. 28, 2007, effective Apr. 1, 2008).

130. Jingjing Liu, *China's Procuratorate in Environmental Civil Enforcement: Practice, Challenges & Implications for China's Environmental Governance*, 13 VT. J. ENVTL. L. 41, 47 (2001).

131. *Id.*

B. *The Selection and Appointment of the PRC and People's Supervisors*

1. Japan's PRC Selection

In Japan, the Prosecutorial Review Commission Office (the "PRCO"), a governmental administrative office, is responsible for the selection of PRC members. The PRCO is located in the same courthouse in which the PRC deliberation takes place. Throughout the selection process, the PRCO provides direct and indirect assistance in the procedural steps leading to the selection of the final PRC members and its foreperson. To be qualified for the PRC duty, one must be enlisted in the local electoral roll, meaning that a PRC candidate must be a Japanese citizen and over twenty years of age. The PRC Act tries to ensure that procedural methods and selection mechanisms achieve a broad and cross-sectional representation among its members.¹³²

The PRC Act specifies that the director of PRCO shall first determine an approximate number of PRC members needed for the following year and a specific allocation of prospective PRC members to be selected from each village, town, and city within the court's jurisdiction.¹³³ At the second selection stage, each allocation of PRC members is reported to the relevant local electoral administrative commission.¹³⁴ Prospective members are divided into four different reserve pools, each consisting of at least one hundred prospective jurors.¹³⁵ At this stage, based on the number of prospective PRC members for each geographical unit, the election administrative commission selects PRC candidates from their electoral register, creating "the Proposed List of PRC Candidates," and sends this list to the PRCO.¹³⁶ The selected candidates are contacted by the election administrative commission and screened for their qualifications.¹³⁷

The PRC Act stipulates that PRC members serve on the commission for six months, with about one-fourth of the eleven members being replaced every three months. In the actual selection of PRC members, the director of the PRCO randomly

132. PRC Act, *supra* note 28, art. 13(2).

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

134. *Id.*

135. *Id.* art. 9(2).

136. *Id.* art. 10(1)–(3).

137. *Id.* art. 12(4).

selects five jury candidates from the first reserve by December 28, six jury candidates from the second reserve by March 31, five candidates from the third reserve by June 30, and six candidates from the fourth reserve by September 30 of each year.¹³⁸

Once PRC members appear at the courthouse, the chief justice of the court or the superior court judge instructs them about their duties and administers an oath.¹³⁹ A PRC foreperson is then appointed to lead the deliberation.¹⁴⁰ The role of the PRC foreperson is similar to that of the American jury foreperson who acts as the leader of discussions and deliberations in criminal and civil jury trials in the United States.

Given the lengthy commitment of PRC duty and the rigorous selection procedures governing the preparation of the PRC candidate list and qualified pool, past research has shown that the composition of PRC members has failed to represent a fair cross-section of the community. In Japan, a preliminary study has found that PRC members are more likely to be male and in their forties and fifties.¹⁴¹ The overwhelming majority of them were also employed when they served. Many worked for organizations that continued to pay their salaries, including the government and large firms.¹⁴² Jury research in the United States also found that US jurors also tend to be middle-aged, white-collar workers in a stable primary labor market, and of higher income, showing similar representative disparities and social inequities on the basis of age, gender, and social class.¹⁴³

As for their political affiliation and views, the majority of PRC members indicated their support of the ruling Liberal Democratic Party (“LDP”) (53.6%).¹⁴⁴ In 2006 when the survey was conducted, the support for the LDP in Japan was a mere 38%, suggesting that many PRC members were politically

138. *Id.* art. 13(1).

139. *Id.* art. 16(1)–(4).

140. *Id.* art. 15(1).

141. Fukurai, *supra* note 18, at 334–36 (summarizing the research on civic participation in Japan).

142. *Id.*

143. HIROSHI FUKURAI ET AL., RACE AND THE JURY: RACIAL DISENFRANCHISEMENT AND THE SEARCH FOR JUSTICE 64 (1993). *See generally* HIROSHI FUKURAI & RICHARD KROOTH, RACE IN THE JURY BOX: AFFIRMATIVE ACTION IN JURY SELECTION (2003).

144. Fukurai, *supra* note 18, at 334–36.

conservative.¹⁴⁵ Indeed, nearly one half of PRC members indicated that they were also conservative in their political views (48.9%).¹⁴⁶

While there is no known study that has examined the demographics of all PRC members, there may be serious concerns about the underrepresentation of Japan's ethnic minorities such as Burakumins (Japan's so called untouchables), Ainus, Koreans, Chinese, Brazilians, and descendants of immigrant groups from Southeast Asia and the Middle East.¹⁴⁷ As the same ethnic groups make up a rather sizable segment of criminal defendants, it may be important to research the PRC's ethnic makeup and explore ethnic diversity of PRC membership.

2. China's People's Supervisors Selection

Article 4 of the Regulations 2010 provides for the qualifications of the people's supervisors, which include: (1) upholding the Constitutional Law of China; (2) having the right to vote and to be elected; (3) twenty-three-year-old or above; (4) being fair and honest and holding appropriate educational levels; and (5) being healthy. Article Five further provides that the following individuals are not qualified to serve as people's supervisors: (1) having a criminal record or being involved in a criminal procedure as a suspect; (2) having the record of indoctrination through labor; and (3) being discharged or nominally expelled from public employment. Article 6 provides that the persons below are also unsuitable for people's supervisors: (1) principals of the Party Committees, the governments and the sections thereof; (2) members of the Standing Committees of the People's Congress; (3) in-service staff of the people's law courts, the people's Procuratorates,

145. *Asahi Shimbun Emergency Opinion Poll on the Liberal Democratic Party (LDP) Presidential Election*, ASAHI SHIMBUN (Sept. 20–21), 2006, available at <http://mansfieldfdn.org/program/research-education-and-communication/asian-opinion-poll-database/listofpolls/2006-polls/asahi-shimbun-emergency-opinion-polls-on-the-liberal-democratic-party-ldp-presidential-election-06-9> (stating that 35% of citizens said that "they do not support any party").

146. Fukurai, *supra* note 18, at 334–36.

147. See generally JAPAN'S MINORITIES: THE ILLUSION OF HOMOGENEITY (Michael Weiner ed., 2d ed. 2009) (seeking, in part, to evaluate the construction of the Japanese identity and the life of minorities in contemporary Japan).

public security organs, national security organs, or judicial administrative organs; (4) practicing lawyers and people's assessors (China's jurors); and (5) any others whose posts may affect their performance of the duties of the people's supervisor.¹⁴⁸

Articles 7 through 12 of the Regulations 2010 specify the selecting method of the people's supervisor. Article 7 provides that the provincial (municipality) Procuratorate be responsible for the selection of the people's supervisors for Procuratorates of different levels in the same province (i.e., municipality). In other words, a people's supervisor for a city-level or regional-level Procuratorate will be selected and appointed by the provincial-level Procuratorate, i.e., the administratively superior Procuratorate. It was expected that the selection of the people's supervisors by the Procuratorates at a comparatively higher level would significantly enhance their authority when they serve at various local Procuratorates. This vertical selection system also creates a dilemma that "the supervisees choose supervisors to supervise the supervisees themselves."¹⁴⁹ This has become one of the most prominent problems faced by the PSS.

Article 9 of the Regulations 2010 also stipulates that candidates be identified, either by self-nomination or by nomination from governmental institutions, public organizations, enterprises, and public-service institutions, with the candidates' consent. This selection system creates a number of problems for the sufficient procurement of people's supervisors. First, this "nomination" model is premised upon the assumption that candidates are sufficiently enthusiastic to nominate themselves for civic duty and that these private and public institutions are willing to nominate their own employees or members for people's supervisors. The Regulations 2010 also established a five-year tenure for people's supervisors and allows one more extended term, if so desired. Such a long tenure (i.e., five or even ten years) may scare away potential volunteers from serving as people's supervisors. Second, it is doubtful as to

148. Regulations on the Application of the People's Supervisor System (promulgated by the Supreme Procuratorate of China, Oct. 26, 2010), available at http://www.sx.jcy.gov.cn/rmjdy/201104/t20110429_536760.shtml.

149. Li Li, *The People's Supervisors System Has Not Avoided the Dilemma of "Self-supervision"*, LEGAL DAILY, Mar. 9, 2012.

whether self-nomination can ensure a sufficient diversity or fair representativeness for the pool of people's supervisors. In other words, a person in full employment will be less likely to nominate themselves, because once appointed, they will have to serve for five years and will have to respond to the Procuratorate's summons at any time. The role of people's supervisors appears more suitable for those without full-time employment such as pensioners, the unemployed, even the wealthy with sufficient leisure time, or civil servants who may easily ask for leave to serve on civic duty. Thirdly, in terms of employer nomination, it is unlikely that employers will be willing to lend their employees to the Procuratorates because they still have to pay their wages while they are serving as supervisors.

Governmental organizations, enterprises and public-service institutions have been so inactive in nominating candidates that there have not been sufficient numbers of candidates. The number of self-nominated candidates has also been extremely limited. An alternative solution adopted by various Procuratorates is that the Procuratorates themselves seek candidates or even "procure" candidates by trying to persuade people to serve as supervisors. Such a selection method certainly leads to the loss of randomness or lack of broader representativeness of the community members. For example, it has been reported that some Procuratorates tend to choose employees working at governmental institutions because their bosses are more likely to deem the civic services as "working for the state" and easily give their subordinates a leave permit.¹⁵⁰

The Supreme Procuratorate has not published the latest socio-demographic information about supervisors, such as their occupations, educational levels, gender, and so forth. We, therefore, can only speculate on these characteristics, based on published statistical data. According to the report published by the Supreme Procuratorate of China in 2006, 20,848 people served as supervisors in China. Among them, 12,520 were the representatives of the NPC (equivalent to the Upper House) or the Chinese People's Political Consultative Conference

150. Yang Zhi, *The Investigation Report of the People's Supervisors System—Sampling the Procuratorates in the Autonomous Region of Hong He Hani and Yi Ethnic Minorities* (May 2008) (unpublished LL.M. degree dissertation) (on file with the second author).

(“CPPCC”) (equivalent to the Lower House) (60.1%); 6958 had law diplomas or degrees (33.4%); and there were only ninety-nine workers (0.4%) and 293 farmers (1.4%).¹⁵¹

According to another report from scholar Yang Zhi in Honghe District of Yunan Province, seventy-eight served as people's supervisors in 2007. Among this pool, fifty-seven were Chinese Communist Party members (73.1%); four were politically affiliated with other parties (5.1%); and seventeen had no political affiliation (21.8%). In terms of occupation, forty-eight worked in governmental institutions (61.5%); ten came from non-governmental organizations (12.8%); sixteen were from state-owned enterprises or public-service organizations (20.5%); three were members of grass-root organizations (3.8%); and there were only two blue-collar workers (2.5%) and one farmer (1.2%). With respect to their education background and political affiliation, thirteen graduated from law schools (16.6%); five had working experience in the legal profession (6.4%); thirty-two were members of the CPPCC (41.0%); and one was the representative of the NPC (1.2%).¹⁵²

These findings suggest the following characteristics of people's supervisors: (1) the political accountability of the people's supervisors has been much emphasized, and it was evidenced by the high proportion of Communists, governmental employees, and representatives from the NPC and the CPPCC in the pool of people's supervisors; (2) law school graduates occupy a considerable proportion of the pool of supervisors, suggesting that the highly educated have been given preferential consideration in the process of people's supervisors' selection and that the people's supervisors are commissioned to supervise the legality of criminal investigations; and (3) people from comparatively lower social classes such as blue-collar workers and farmers are not welcome candidates for people's supervisors, which might be attributed to such factors as their absence of political commitment or their lack of legal knowledge required for deliberations. In general, the personnel structure of the people's supervisors in China tends to draw

151. *Id.*

152. *Id.*

those who are more likely to be senior, elitists in their professions, and government-affiliated personnel.

CONCLUSION

Both Japan and China recently introduced a new grand jury institution in their legal system. These two East Asian grand juries are designed to examine those criminal cases in which prosecutors have decided not to prosecute the suspect. In Japan and China, where nearly all of prosecuted cases result in conviction, the potential abuse and misuse of prosecutorial power and authority may lie in the exercise of the discretion not to prosecute individuals, groups, or organizations that are suspected of illegal activities.

We examined a total of four specific cases in which East Asian grand jurors reviewed and deliberated. We also identified unique features of East Asian grand juries as compared to their American counterparts. The grand juries adopted in Japan and China had problems with respect to selection and appointment procedures and we found that the grand jurors were less likely to reflect a cross-section of the general population. Unlike their American counterparts, East Asian grand jurors were not chosen on the basis of rigid randomized design. While Japan's other lay participation system, called *Saiban-in* system (a panel of three professional and six lay judges), relies on the system of random selection in identifying the jurors, the PRC has no such strong mandate regarding the use of randomized method throughout the selection of grand jurors, i.e., from the identification to the final stage of appointment at the courtroom. Both self-nomination and individual or institutional referrals have been used for the selection of China's people's supervisors. Because of the reluctance on the part of self-nominating individuals or employers to lend their employees to civic duty, the Procuratorate offices have been proactively soliciting a large number of supervisors to serve in their cases.

It is advisable to reform the selection process of the grand jury systems adopted in Japan and China in order to ensure the randomness of juror selection. If these grand jurors are primarily selected from certain gender, age, social classes or political groups, their representativeness will inevitably become unbalanced and skewed. The selection and appointment

methods adopted in Japan and China, coupled with a long serving tenure (i.e., six months for Japan's PRC members and five years for China's supervisors, whose term can be extended to a total of ten years), is apt to turn the grand jurors' service into an avocation enjoyed only by a tiny privileged number of volunteers who feel happy to be nominated, rather than ensuring a democratic right and social responsibility enjoyed and assumed by all of the citizenry.

