

The Mechanisms and Ramifications of Outsize Prosecutorial Influence in Japan

### Abstract

This paper argues that Japanese prosecutors possess an outsize influence within the criminal justice system. Based on an analysis of the justice system, it concludes that prosecutors' powers are highly systemic because they are based on laws approved by the legislature. Prosecutors wield their power through three distinct phases within criminal justice: the investigations, charging and trials of suspects. Furthermore, the paper also addresses the consequences of large prosecutorial influence including wrongful conviction cases.

*Keywords:* prosecutors, criminal justice, Japan

### The Mechanisms and Ramifications of Outsize Prosecutorial Influence in Japan

Japan is world-renown for its safety and low crime rates. This feat is achieved in part because of the deterrence effect of the criminal justice system. Specifically, Japan's notoriously high conviction rates, exceeding 99 percent, act as a powerful deterrent against crime. Supporters of the Japanese system point to these attributes as praise-worthy. However, critics argue that such high conviction rates are the epitome of the powerful influence wielded by prosecutors. A close examination of the Japanese legal system suggests that prosecutors have an outsize influence within the Japanese legal system.

The English literature on Japanese prosecutors is fairly limited. First, Castberg (1997) gives a thorough overview of Japanese prosecutors, highlighting their independence. Johnson (2012) also provides an in-depth analysis of the entire prosecution system in Japan, focusing on how prosecutors are organized within the bureaucracy. In addition, Dando (1970) focuses exclusively on the absolute indicting powers of prosecutors. Conversely, West (1992) focuses on how the Japanese system attempts to curb prosecutorial power. These are the four major English language papers concerning Japanese prosecutors.

Prosecutors exercise their substantial influence throughout three phases of criminal justice: the investigation, charging, and trial of criminal defendants. This paper will first

examine each of these phases in detail and then discuss the ramifications of extreme prosecutorial power.

### **Mechanisms of Outsize Prosecutorial Influence**

#### **Investigations**

First, prosecutors have considerable sway over the investigation of suspects. While many factors enable prosecutors to hold sway over investigations, perhaps the largest reason is because they are allowed to detain suspects for relatively long periods of time before charges are filed. According to the *Keijisoshouhou*, or Code of Criminal Procedure (CCP), the police must transfer the suspect to prosecutors within 48 hours after arrest (Article 203). Once they have custody of the suspect, prosecutors have 24 hours to decide whether or not to indict (CCP, Article 205). This 24-hour period, however, can be extended. Under Japanese law, prosecutors can file a formal request to detain suspects for an additional ten days in order to further question the suspect and build their case (CCP, Articles 206 & 208). In addition, judges are allowed to extend this detention period for a further ten days, bringing the total maximum detention period to 23 days (CCP, Article 208). This is quite significant because prosecutors are allowed unfettered access to suspects for over three weeks, which they take full advantage of. According to Johnson (2012), “interrogations are long, thorough, and intense” (p.43), with sessions lasting for “several hours each time” (p.43). Prosecutors

also have one final trick up their sleeve to further extend this detention period, a practice called *bekken taiho*. *Bekken taiho* is when prosecutors arrest suspects for a different crime once the initial detention period has expired, which theoretically doubles the detention period. Ishimatsu (1989) provides a good example of this practice, through a case where the suspect was indicted for three counts of *kyokatsu* (threatening). Prosecutors initially arrested the suspect on July 14th, but he was arrested a second time for the second count on August 19th, and a third time on October 7th (Ishimatsu, 1989). The end result was that the suspect remained in the custody of prosecutors for “a total of about three and a half months” (Ishimatsu, 1989, p.148). This is a prime example of how the original 24 hour detention period can stretch out much longer, giving prosecutors an upper hand in the investigation with unfettered access to suspects during this period.

### **Charging**

The second phase of the criminal justice system where prosecutors exercise their substantial authority is the charging of defendants. Like most civil law jurisdictions, prosecutors in Japan hold absolute power over charging decisions (CCP, Article 247). One distinctly Japanese feature, however, is the system of *kiso-yuyo*, or suspension of prosecution. Prosecutors have explicit, codified powers that allow them to drop charges even though they can prove a defendant's guilt beyond a reasonable doubt, as per Article 248 of the CCP. This

is because prosecutors can take into account mitigating circumstances such as “the character, age and environment” of the offender, as well as the “circumstances and gravity” of the offense (Dando, 1970, p.522). Such broad powers where prosecutors can drop cases based on non-evidentiary grounds are rare in other countries. In Germany, for example, prosecutors are legally compelled to “prosecute all charges for which there is sufficient evidence to justify a conviction” (Hermann, 1974, p.468) Furthermore, prosecutors exercise the power of *kiso-yuyo* frequently. According to statistics provided by the Portal Site of Official Statistics of Japan (2018), over 90 percent of cases in 2017 where charges were dropped was because of *kiso-yuyo* (606,256 people out of 671,698 total cases dropped). What is more stunning is that 49 percent of all cases prosecutors handle, including cases brought to trial, result in *kiso-yuyo* (Portal Site of Official Statistics of Japan, 2018). This means that around half of the cases are not pursued further solely based on the discretion of prosecutors, which makes them immensely influential. We can therefore conclude that Japanese prosecutors hold broad, unique powers, which make them incredibly influential.

### **Trials**

The third part of the judicial process where prosecutors hold sway is the trial. Prosecutorial influence during trials stem from their power over evidence handling and is exercised in two distinct ways. First, prosecutors have an advantage because of preferential

rules regarding discovery. Unlike the United States for example, Japanese prosecutors are not legally obliged to disclose evidence favorable to defendants, commonly referred to as exculpatory evidence, to the defense. In other words, even if prosecutors were in possession of evidence that could acquit the defendant, they are not required to present this evidence to the defense. Castberg (1997) makes this point by writing that the Japanese prosecutor “need not disclose evidence favorable to the defendant” (p.68). In contrast, strict pretrial discovery rules in the US dictate that prosecutors must share all exculpatory evidence with the defense. This doctrine was established following the US Supreme Court decision in *Brady v. Maryland* (1963), in which the Court decided that “the suppression by the prosecution of evidence favorable to an accused upon request violates due process” (1963, p.87). A good example of the incredible power Japanese prosecutors hold in regards to evidence is the *Matsubase* case. In 1985, Koki Miyata was sentenced to 13 years in prison for “crimes including a murder” (The Mainichi, 2018). However, in 2012, after repeated requests by the defense for evidence disclosure, lawyers for Miyata discovered exculpatory evidence in the possession of prosecutors. Based on this newly-discovered evidence, the Kumamoto district court ordered a retrial in 2016, a decision which was later affirmed by the Supreme Court (The Mainichi, 2018). In the *Matsubase* case, if lawyers for the defense had not found the exculpatory evidence, an innocent man’s name would have been tarnished for his entire life.

The *Matsubase* case is a prime example of how prosecutors hold extreme influence that could alter the course of trials.

Second, prosecutors have an edge over the defense at trial because the bulk of the evidence presented is in dossiers (*chosho*) prepared by prosecutors, instead of witness testimony. According to Castberg (1997), the evidence presented by prosecutors “consists primarily, if not exclusively in most cases, of documents. The documents are usually in the form of a dossier” (p.70). These dossiers differ from simple documents such as email transcripts because they are often hearsay evidence. This is because these dossiers are drafted by prosecutors based on the interrogation of suspects. Even though prosecutors did not actually witness the crime, they are allowed to submit their version of events as evidence, which qualifies the dossiers as hearsay evidence. This is beneficial to prosecutors because the defense cannot cross-examine these dossiers, or question the prosecutors who drafted the dossiers. While many countries have strict hearsay rules which bar such documents from being introduced as evidence, the hearsay rules are relaxed considerably in Japan. Indeed, Johnson (2012) argues that “liberally interpreted exceptions to hearsay rules also allow many dossiers to be entered as evidence” (p.53). This means there is little the defense can do to undermine a prosecutor’s case because the dossiers cannot be cross-examined.

Both rules regarding evidence give prosecutors the upper hand because they can construct a narrative that fits their version of events. Johnson (2012) concurs, arguing that, “the truth that prevails at trial—and the truth that judges authoritatively pronounce—tends to be the version that prosecutors have uncovered and constructed” (p.53). A lack of evidence discovery means that prosecutors can effectively ignore any exculpatory evidence to make a strong case. Prosecutors can also create a compelling narrative of a defendant's guilt because the bulk of the evidence is in the dossiers, which are drafted by the prosecutors themselves.

### **Ramifications of Outsize Prosecutorial Influence**

The largest negative effect of outsize prosecutorial power is a disregard for the truth, which can lead to tragic consequences. The purpose of a trial should be to uncover the true version of events surrounding a crime. In Japan, however, this basic principle of justice is eroding because of the substantial influence of prosecutors. As discussed in the previous section, prosecutors are free to create a narrative that persuades judges of a defendant's guilt regardless of the actual truth. In fact, prosecutors will even go as far as fabricating evidence to secure a conviction. There have been several high-profile cases in which prosecutors presented fabricated evidence at trial. The *Hakamada* case is a good example. Iwao Hakamada was arrested in 1966 for the murder of four people and was subsequently sentenced to death. Hakamada maintained his innocence throughout trial, claiming that he

was forced to sign a confession under extreme duress. Regardless of this claim, the courts still condemned him to death. In 2014, however, the Shizuoka District Court granted the Hakamada's motion for a retrial because the court recognized that prosecutors had most likely fabricated key evidence. McCurry (2014), citing the court's opinion, reported that, "There is a possibility that [key pieces of] evidence have been fabricated by investigative bodies". The *Hakamada* case is not a lone example, as most wrongful convictions are also a result of bloated prosecutorial power. Indeed, Johnson (2012) analyzes that, "miscarriages of justice stems from [...] the absence of checks on official power in the interrogation room" (p.62). A prosecutor's large influence, coupled with a lack of checks on their authority makes Japan a hotbed for wrongful conviction cases.

### **Conclusion**

Prosecutors in Japan have overwhelming powers based on explicit statutory approval, which they exercise during the investigation, charging, and trial of defendants. Prosecutors benefit from a relatively long detention period of suspects during investigations. The system of *kiso-yuyo* gives prosecutors absolute authority over charging decisions. Finally, prosecutors hold sway over trials because of a lack of evidence discovery and relaxed hearsay rules. All of these powers face little third-party oversight, which can lead to tragic wrongful conviction cases.

It is undeniable that the Japanese criminal system is highly effective as a means to deter crime. Yet if this effect is achieved at the expense of individual defense rights, the very independence and strength of the justice system, one of the primary institutions in a democracy, will come under question. While the state must have a strong authority to maintain the rule of law, individuals should have robust legal protections to prevent rampant abuse of state power. Perhaps the time is ripe to revise the balance between the power of the state and the rights of individuals in Japan.

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