

Who Will Watch the Watchmen? Evaluating the Prosecution Review Commission in Japan

MARGARITA AVRAMTCHEVA*

ABSTRACT

The Prosecution Review Commission (PRC) in Japan is tasked with strengthening the rule of law by acting as a counter weight to the power of the Japanese prosecutors, while simultaneously aiming at improving the public trust in the legal system as a whole. This institution has the power to force the prosecutor's hand and indict individuals and groups who might have been shielded by the prosecutors up to this point and whom thus might have been beyond the reach of justice. It is therefore faced with a difficult task of delivering this justice and gaining the public trust, without having actual legal expertise. In order to include the perspective of citizens in the legal system the new lay-participation system results in the PRC only being made up of randomly selected citizens. This article reviews whether the PRC has succeeded in reaching its two goals. Despite the PRC having successfully reached its goal of increasing public trust in the system, it still has room for improvement. When it comes to checking the prosecutors, the analysis following the statistics and case studies concerning the Commission reveals that the PRC's activity is lacking. Much is left to be desired when it comes to statistical success and influence upon the prosecutor's behaviour. There are also several 'traps' that the PRC might fall into, such as the subjective focus on public opinion and the misapplication of legal principles. Therefore, this article argues that the PRC should include legal

* B.A., Leiden University, margarit.avramtcheva@minbuza.nl. I would like to dedicate this article to Dr. Erik D. Herber* who inspired and supervised this project shortly before his untimely passing. I would also like to express my immense gratitude to Dr. Hoko Horii for her support and encouragement in writing this article.

expertise in its Committees in order to strike a balance between achieving public trust and checking the power of prosecutors in Japan.

Keywords: public prosecutors, Japan, legal reform, public trust, rule of law

I. INTRODUCTION

Two of the central aims of Japan's judicial reform in the last two decades have been to increase public trust in the judiciary and to strengthen the rule of law within the Japanese justice system. In order to achieve these objectives, the government has decided to actively involve and encourage the participation of citizens in the justice system in a process known as 'lay-participation'. This research explores the functioning of one such lay-participation organ: The Prosecution Review Commission ('*Kensatsu Shinsakai*' or "検察審査会"), henceforth the 'PRC'. Composed solely of citizens, this institution has the power to force the prosecutor's hand and indict individuals and groups who might have been shielded by the prosecutors and have remained beyond the reach of justice. The PRC is one of the few checks on the power of the prosecutors in Japan; its ability to function is, therefore, of vital importance. This article examines the influence that the PRC has had on the prosecution system and the extent to which the PRC has fulfilled its role as originally outlined in the Reform Report that created it.

Firstly, in order to adequately illustrate the context in which the PRC operates, a short history of the Japanese justice system is needed. Following this, the 2001 Reform Report is analysed, part of which specifically outlines the powers and goals of the PRC. This Report made the judgments of the PRC binding, thereby forcing prosecutors to indict a person after the PRC has reviewed the case twice. It also underlines the goal and rationale of the PRC, namely incorporating a citizen's perspective into the prosecution system. Despite emphasising the 'rule of law' as being generally of vital importance, the rule of law, or, indeed, the PRC's checking power, are never mentioned explicitly in this report; it is this curious omission that prompted this article in the first place. The Report raises the question *does the PRC succeed in checking the prosecutors?* This article will focus specifically on the PRC's role as the sole check on the power of the prosecutors, and the Commission's goal of gaining the trust of the public. The members of the PRC are faced with a difficult task of delivering this justice and gaining public trust, whilst lacking actual legal expertise and, therefore, depending solely on their experiences as a lay citizen. This article will assess their success by weighing the PRC's functioning against the overarching rule of law criteria emphasised by the Reform Report. Lastly, this article proposes the inclusion of legal expertise into the PRC in order to strike a

balance between gaining the trust of the public and checking the functioning of the prosecutors.

II. THE HISTORICAL DEVELOPMENT OF THE JAPANESE JUSTICE SYSTEM

A. SIMILARITIES WITH FOREIGN SYSTEMS

In order to fully grasp the prosecutorial culture of the Japanese legal system, a brief history and summary of the timeline to current developments is needed. The Meiji era (1868-1912) marked a turning point in the Japanese culture towards modernisation and, essentially, Westernisation.¹ During this period the legal system was reformed according to French and German models, abandoning its feudal indigenous roots. As a part of these reforms, the position of the prosecutor was introduced. Initially, the prosecutors did not have independence to investigate. However, due to significant difficulties in effectively finding evidence resulting in the acquittal of a large number of cases in 1897, the power of the prosecutor was subsequently expanded, thereby allowing more liberty and independence in their investigations. Due to the increasing number of convictions as a result of these modifications, the public confidence in the prosecutorial system grew.² After Japan's defeat in the Second World War, the legal system was transformed once more, and the prosecutors were given almost complete independence.³ Significant changes instigated by the Occupation Forces included the creation of a new constitution as well as both a new code of criminal procedure and a new penal code. Consequently, the Japanese criminal system incorporated distinctly American elements merging within its the existing European legal structure.⁴ As a result, the Japanese legal system is, on the surface, something of a mixture between Anglo-American law and continental European law.

B. PHILOSOPHICAL JAPANESE ELEMENTS IN THE JUSTICE SYSTEM

Although, *prima facie*, distinctly indigenous elements appear to have been usurped entirely in the Japanese legal system by Western characteristics, many elements of the indigenous Japanese moral philosophy in fact remain present.⁵

¹ Masaki Abe, 'The Internal Control of a Bureaucratic Judiciary: The Case of Japan' (1995) 23 *International Journal of the Sociology of Law* 303.

² A. Didrick Castberg, 'Prosecutorial Independence in Japan' (1997) 16(1) *Pacific Basin Law Journal* 38.

³ *ibid* 39.

⁴ Abe (n 1).

⁵ Mari Kita, 'Kin, Crime, and Criminal Justice in Contemporary Japan' in Liu Jianhong and Setsuo Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (Springer 2018).

When examining how the law works in practice, such Japanese legal traits form the rule rather than the exception.⁶ For example, a separate system of alternative dispute resolution has been created and is promoted by the government, entailing reconciliation through mediation rather than verdict and, potentially, incarceration through a trial.⁷ This preference for reconciliation stems from traditional Japanese values, placing particular importance on the avoidance of conflict. Another example is the strong reliance on confessions in many cases.⁸ This characteristic also finds its roots in the cultural importance placed by indigenous Japanese society upon saving one's reputation. Case law reflects the importance in Japanese society of defendants showing remorse for their actions, because this empowers a sense of morality deemed as important as the punishment itself.⁹ In fact, showing remorse has the potential to reduce a sentence, whereas doing the opposite can lead to a sentence being increased.¹⁰

Similar Japanese traits can also be found in the functioning of prosecutors. Japanese prosecutors, for example, focus more on the circumstances of defendants and what would have possibly led them to commit a crime than would usually be the case in Western countries with similar legal systems, since the latter would usually focus more on the evidence of the crime.¹¹ Furthermore, respect for authority is at the centre of Japanese culture, thereby entrusting significant individuality and discretion to prosecutors.¹² Castberg masterfully illustrates their significance in power: “[...] such independence allows Japanese prosecutors to investigate, and indict if warranted, the most powerful politicians and captains of industry, as well as suspend prosecution of those who have committed serious crimes”.¹³

⁶ Abe (n 1).

⁷ The Act on Promotion of Use of Alternative Dispute Resolution (裁判外紛争解決手続の利用の促進に関する法律) Act Number 151 of 2004.

⁸ Carl F Goodman, ‘Prosecution Review Commission, the Public Interest, and the Rights of the Accused: the Need for a “Grown Up” in the Room’ (2013) 22(1) Pacific Rim Law & Policy Journal 12; Mark A Levin, ‘Considering Japanese Criminal Justice from an Original Position’ in Liu Jianhong and Setsuo Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (Springer 2018) 175-176.

⁹ Erik Herber, ‘The (Japanese) Administration of Justice and the Will to Truth’ (2003) 31 International Journal of the Sociology of Law 111.

¹⁰ *ibid.*

¹¹ Castberg (n 2).

¹² David T Johnson, ‘Japan’s Prosecution System’ (2012) 41(1) Crime and Justice 35.

¹³ *ibid* 39-40.

This shows the responsibility that is being shouldered by the prosecutors, which is elaborated on at a later stage in this research.

C. MISCARRIAGES OF JUSTICE: INNOCENTS CONVICTED

In the 1980s, however, a series of wrongful death row convictions shook confidence in the legal system. Four inmates that had been on death row for 25 years were granted re-trials, and duly found innocent.¹⁴ The inmates had previously been found guilty through confession, which they renounced immediately prior to and during the trial. As a result, the legal system was subject to heightened scrutiny, with many scholars suggesting various types of reforms.¹⁵ The fact that four innocent men were close to their execution was as equally alarming as the subsequent report of the prosecutor's office on the issue since it did not acknowledge the mistakes of the prosecutors.¹⁶ The report, in fact, suggested the expansion of the prosecutorial powers, in order to prevent similar cases in the future.¹⁷ Foote goes even as far as stating that "the prosecutors are resistant to any fundamental changes that might reduce their authority or strengthen external checks on their activities".¹⁸ These miscarriages of justice resulted in mistrust in the judicial system among the public which caused great alarm amongst the Japanese government.

The discussions that were fuelled by these cases throughout the 1980s and 1990s resulted in the eagerness of the Japanese government to create a Reform Council that would investigate and report on how to reform the Japanese legal system.

D. THE ROLE AND POWER OF JAPANESE PROSECUTORS

According to the constitution, the police refers cases to prosecutors who decide whether to prosecute or drop the case.¹⁹ There is no obligation to prosecute; instead, the Principle of Opportunity (henceforth 'PoO') gives the prosecutors the freedom to drop any case, even if there is enough evidence to prosecute a suspect.²⁰ They may do so on the basis of "the character, age, environment, gravity of the

¹⁴ Daniel H Foote, 'From Japan's Death Row to Freedom' (1992) 11 *Pacific Rim Law & Policy* 13.

¹⁵ *ibid.*

¹⁶ David T Johnson, 'Wrongful Convictions and the Culture of Denial in Japanese Criminal Justice' (2015) 13(6) *The Asia-Pacific Journal* 4.

¹⁷ Johnson (n 12) 77.

¹⁸ *ibid* 78.

¹⁹ Outline of Criminal Procedure in Japan, 12.

²⁰ Code of Criminal Procedure of 1948, Article 248.

offense, circumstances or situation after the offence”²¹ of the suspect. Adding to the powers of public prosecutors, the Japanese criminal system has also adopted the ‘principle of discretion’, which ensures that a judge cannot exercise any authority over a case or potential suspect until the prosecutors file an indictment.²² During an investigation the police and the prosecutors work together.²³ Although there is no hierarchy between the two authorities, public prosecutors may give general instructions and even orders to the police regarding the investigation²⁴ -all of this illustrates the freedom and powers of the Japanese prosecutors.

III. THE REFORM REPORT

A. REGAINING THE PUBLIC’S TRUST: THE FUNCTIONING OF THE JAPANESE PROSECUTOR

The Japanese Justice System Reform Council published its final report containing recommendations on the reform of the justice system in 2001. Through large scale interviews, surveys, fact-finding inspections and comparative research visits to foreign countries (such as the UK, the US, Germany, and France) the Council was able to determine the weaknesses and the goals of the Japanese justice system.²⁵ Faced with issues and points of public criticism, such as the system being too distant because of its complexity making it difficult for civilians to understand how it functions, the failure to exercise the ‘check-function against administration’ and the shortage of staff in judicial institutions, the Council set out to reconstruct the justice system. One of the Report’s more specific focal points is the Council’s encouragement of civil participation in legal proceedings in order to establish public trust and a “popular base”.²⁶ In fact, two out of the three main goals of the Reform Council focused on the public: (1) Construction of a justice system responding to *public expectations*; (2) reforming the legal profession supporting the justice system and; (3) establishing a *popular base*.²⁷ Therefore, it can be safely assumed that one of the central goals of these reforms was to strengthen the public’s trust and positive

²¹ *ibid*; Stacey Steele, Carol Lawson, Mari Hariyama and David T Johnson, ‘Lay Participation in Japanese Criminal Justice: Prosecution Review Commissions, the Lay-Judge System, and Penal Institution Visiting Committees’ (2020) 7 *Asian Journal of Law and Society* 168.

²² Castberg (n 2) 43.

²³ Code of Criminal Procedure of 1948, Article 193.

²⁴ *ibid*.

²⁵ Justice System Reform Council, *Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century* (2001) 6.

²⁶ *ibid* 11.

²⁷ *ibid* 11–13.

opinion of the justice system. Hence, there was less focus on developing new legal principles.

The Reform Council chose to introduce a system of lay-participation (inclusion of citizens in the justice system) on a grand scale and in many areas of the legal system. An example of this is the introduction of the ‘lay-judges’ system,²⁸ in which a group of citizens is included during the trial phase of highly sensitive cases, similar to the jury system in common law countries.²⁹ As argued by Fukurai, this specific measure is aimed at challenging the “symbiotic power relations among three key agencies of Japan’s criminal justice system, namely the police, prosecutors’ office, and the court”.³⁰ Ideally, this measure would check the prosecutions pursued by Japanese prosecutors, while simultaneously increasing the transparency of the system and regaining the public trust in the judiciary.³¹

Why this extensive focus on public trust? A possible explanation for this shift might be the fact that the Reform Council was instigated by the Japan Business Federation in close partnership with the Liberal Democratic Party.³² The Business Federation was of the opinion that the power of individual legal professionals should be lessened and transferred to the strict application of law and towards the public.³³ Additionally, the Reform Council fell under the Cabinet, instead of the Justice Ministry, as would usually be the case.³⁴ Out of the thirteen members of the Reform Council, there was only one representative for each legal profession: judiciary, procuracy and attorneys.³⁵ Therefore, it is understandable that the proposed reforms were not focussed on the development of legal principles. In fact,

²⁸ Also referred to in the Reform Report as ‘saiban-in’ (裁判員).

²⁹ Hiroshi Fukurai and Richard Krooth, ‘What Brings People to the Courtroom? Comparative Analysis of the People’s Willingness to Serve as Jurors in Japan and the U.S.’ (2010) 38(4) *International Journal of Law, Crime and Justice* 38; Mari Hirayama, ‘A Future Prospect of Criminal Justice Policy for Sex Crimes in Japan- the Roles of the Lay Judge System There’ in Liu Jianhong and Setsuo Miyazawa (eds.), *Crime and Justice in Contemporary Japan* (Springer 2018) 203.

³⁰ Hiroshi Fukurai, ‘A Step in the Right Direction for Japan’s Judicial Reform: Impact of the Justice System Reform Council (JSRC) Recommendations on Criminal Justice and Citizen Participation in Criminal, Civil, and Administrative Litigation’ (2014) 36(2) *Hastings International & Comparative Law Review* 518.

³¹ The Justice System Reform Council (n 25) 70.

³² Setsuo Miyazawa and Mari Hirayama, ‘Introduction of the Videotaping of Interrogations and the Lessons of the Imaichi Case: A Case of Conventional Criminal Justice Policy-Making in Japan’ (2017) 27(1) *Pacific Rim Law & Policy Journal* 156.

³³ Setsuo Miyazawa, ‘Successes, Failures, and Remaining Issues of the Justice System Reform in Japan: An Introduction to the Symposium Issue’ (2013) 36(2) *Hastings International and Comparative Law Review* 315.

³⁴ The Justice System Reform Council (n 25) 156.

³⁵ Setsuo Miyazawa, ‘The Politics of Judicial Reform in Japan: The Rule of Law at Last?’ (2001) 2(2) *Asian-Pacific Law & Policy Journal* 107.

in several of his articles, Miyazawa argues that the same businesspeople that form part of the Japan Business Federation spearheading the reforms, wished to exclude members of the legal profession from the committee wherever possible, since it was the Justice Ministry itself which was put under review.³⁶ The Business Federation's new-found interest in possible legal reforms is argued by Miyazawa to have originated from the opportunity for businesses to interfere with the law. The aim of this influence is to transform the "rule *by* law" into the "rule *of* law", as Miyazawa puts it. This entails that instead of the government ruling the people through the law, the law will promote and protect people's interest from the government.³⁷

However, these reforms are put together in such a way, Miyazawa continues to argue, that it will therefore only serve the Business Federation and the Liberal Democratic Party's own interest, without improving ordinary people's access to justice.³⁸ This observation was made before the Reform Council published its final report; it is, therefore, important to analyse the report with this context in mind. The proposed reforms encompassed not only procedural and structural changes, but, moreover, they introduced a whole new philosophy behind the justice system to be adopted, to which the Report's opening chapter is dedicated. In the case of the prosecution's office, the role of the prosecutor in the Japanese society has been wholly re-defined according to the Report: the prosecutor is, first and foremost, the representative of the public.³⁹ The aforementioned inherent Japanese social principles, stemming from their innate roots, can be found in the Reform Council's description of the role and duties of the Japanese prosecutors:

“[A prosecutor must] possess abundant humanity rich in appreciation for human rights, must of course have common sense *for society*, must have deep understanding and discernment of the delicate nature and feelings of human relationships, *must fully consider the feelings and positions of the people concerned such as the suspect and the victim*, and, based on appropriate cooperation and collaboration with primary investigative organs such as the police, must always keep the attitude to sincerely and actively try to resolve the cases appropriately and fairly (emphasis added).”⁴⁰

Evidently, great emphasis is put on the feelings of those citizens involved in criminal procedure. The Reform Council wants to “enable the voices of the people

³⁶ *ibid* 106.

³⁷ The Justice System Reform Council (n 25).

³⁸ Fukurai and Krooth (n 29) 118.

³⁹ The Justice System Reform Council (n 25) 62.

⁴⁰ *ibid*.

to be heard and reflected in the management of the public prosecution offices”.⁴¹ It is understandable that the public must have faith in prosecutors, and it is also true that the proper functioning of the prosecution system greatly impacts the public’s safety. Therefore, big cases whose outcome might significantly impact the public require great legal as well as social delicacy, and knowledge of a citizen’s perspective on the prosecutor’s part. Cases such as (but not limited to) the Akashi Fireworks and the Fukushima Nuclear Disaster that have claimed many lives and whose outcome might have a great impact on public opinion of the justice system have to be prosecuted (or not) with this in mind; this goes some way to explaining why the PRC reviewed these cases.

B. SPECIFIC FOCUS: THE PROSECUTION REVIEW SYSTEM

The strengthening of the public trust in the judiciary can also be seen in the reforms aimed at the PRC. The PRC is essentially the checking organ designed to balance out the heavy weight of the prosecutorial monopoly of the Japanese prosecutors, through checking whether the non-prosecution of a case is justified.⁴² The Prosecution Review Commission consists of Committees for the Inquest of Prosecution (or ‘Committees of Inquiry’); it is a platform which allows citizens to appeal to a case that was not prosecuted by the prosecutor’s office.⁴³ These Committees consist of eleven citizens selected by lottery, each on a six-month term, who serve as a check on the PoO of prosecutors.⁴⁴ It is important to note that the only organ that has the power to check the judiciary’s non-prosecution of cases is made up of citizens who have a maximum of six months’ experience within the judicial system; there is no explanation for the lack of intrinsic legal expertise within the PRC. It might be useful for the temporarily appointed citizens of the PRC to receive some automatic guidance on the functioning of the system and on applicable legal principles in the form of the mandatory inclusion of a legal expert in the group during the initial stages of the proceedings. The importance of the inclusion of such an expert will be further discussed in Section IV.C.

When there is a petition for a review of a non-prosecution decision, a Committee is formed, investigating the records of incidents received from the public prosecutor’s office.⁴⁵ The Committee is also free to investigate a case of non-prosecution on its own

⁴¹ *ibid* 63.

⁴² Steele, Lawson, Hariyama and Johnson (n 21) 161.

⁴³ The Justice System Reform Council (n 25) 12.

⁴⁴ Act on Committee for Inquest of Prosecution (*検察審査会法*) Act Number 147 of 1948, last revised in 2006, Articles 10, 13, 14.

⁴⁵ *ibid* Article 2.

when it learns about such a case from other sources, such as newspaper articles.⁴⁶ If the Committee decides that there is reason for a prosecution, the prosecutor is obliged to review the case, therein including the report of the Committee.⁴⁷ The whole process is then repeated; if the prosecutors once again finds that the case should not be prosecuted, the Committee has the right to again review the case. The second time around, however, an examination assistant shall be appointed by the Committee to examine the case based on special legal knowledge.⁴⁸ This demonstrates that it is important to include legal expertise in this reviewing process. After this second appeal, if the Committee's final decision is to prosecute, a lawyer will be appointed to exercise the duties of the prosecutor and prosecute the suspect.⁴⁹ The specific recommendations made by the Reform Council are: (1) make the PRC's decisions binding, which strengthens the rule of law; and (2) focus more on informing the public about the PRC to gain their trust.⁵⁰

The Reform Council recommended that the reports of the Prosecution Review Commission become binding in the second phase, meaning that after the first review round the prosecutor still has the discretion to reconsider the decision to prosecute even if the PRC has already decided that a case should be prosecuted.⁵¹ If, after the second round, the PRC still maintains that the non-prosecution is still not justified, a lawyer is then appointed to exercise the duties of the prosecutor's office to prosecute the suspect. This obligation of mandatory prosecution after the second round is noticeably different from the initial advisory function that the PRC had. This is a significant change, since the PRC can exercise its checking function on the power of prosecutors more forcefully than before, thereby allowing for a much-needed, new-found balance in the prosecution system.

IV. THE FUNCTIONING OF THE PROSECUTION REVIEW COMMISSION

A. NUMBERS ON JAPAN'S CRIMINAL JUSTICE STANDING INTERNATIONALLY

In order to contextualise the environment in which the PRC operates, it is important to illustrate the (international) standing of Japan's justice system. Looking at Japan on a global scale, the 2020 Rule of Law Index placed Japan 15th in the

⁴⁶ Supreme Court of Japan, *Outline of the Prosecution Review Commission* (検察審査会の概要) (2005) https://www.courts.go.jp/links/kensin/seido_gaiyo/index.html accessed 15 November 2020.

⁴⁷ Act on Committee for Inquest of Prosecution (検察審査会法) Act No. 147 of 1948, last revised in 2006, Article 41.1.

⁴⁸ *ibid* Articles 41.2, 41.3.

⁴⁹ *ibid* Articles 41.9, 41.10.

⁵⁰ The Justice System Reform Council (n 25) 6–7, 12.

⁵¹ *ibid* 12.

world (128 States), and 4th out of 15 countries at the regional level.⁵² However, when compared to countries that are in the same income rank, Japan scores repeatedly in the lower half, notably in ‘Constrains on Governmental Powers’, ‘Open Government’ and ‘Fundamental Rights’. The 2015 Open Government Index reveals that there is significant room for improvement *vis-à-vis* the complaint mechanisms through which citizens express their concerns to the government.⁵³ The complaint handling procedure against local officials seems to be especially lacking in Japan according to the survey results, with only a 33% efficiency rate. This is a significant issue since the PRC’s main instigation method is through the receiving of citizen complaints.

On a more local scale, statistics show that the rate of successful prosecution in Japan exceeds 99%.⁵⁴ This creates a public stigma, with the assumption that if you are arrested, you are guilty, even though you have not faced trial yet.⁵⁵ This stigma places an extra responsibility on prosecutors, since they are aware of the social repercussions that might follow if they prosecute someone that is innocent.⁵⁶ Negative social stigmatisation might result in a loss of face and reputation, a loss of employment, forced resignation, issues in one’s personal life, and so on.⁵⁷ Therefore, Japanese prosecutors are very selective as to which cases to prosecute and only engage in a case when they are absolutely sure that the person is guilty.⁵⁸ Thus, it could be the case that when they dismiss a case due to lack of evidence, it does not mean that there is no evidence at all, but rather it implies that there might be a lot of evidence, be it not enough to be sure that a person is guilty beyond any doubt.⁵⁹ This is a cycle that enforces itself as seen in Table IV.1. The Reform

⁵² Editorial, ‘Japan’ (*The World Justice Project*, 2020) <https://worldjusticeproject.org/rule-of-law-index/pdfs/2020-Japan.pdf> accessed 15 November 2020.

⁵³ Editorial, ‘Japan’ (*WJP Open Government Index*, (2015) <http://data.worldjusticeproject.org/open-gov/#/groups/JPN> accessed on 15 November 2020.

⁵⁴ Erik Herber, ‘Jurymembers, Victims and the Public Prosecution Service: Reform and Continuity in the Japanese Criminal Process (*Juryleden, slachtoffers en het OM: Hervorming en continuïteit in het Japanse strafproces*)’ (2016) *Ars Aequi* 735.

⁵⁵ *ibid.*

⁵⁶ Erik Herber, ‘The 2011 Fukushima Nuclear Disaster - Japanese’s Citizens’ Role in the Pursuit of Criminal Personality’ (2016) 21 *Zeitschrift für japanisches Recht* 102–103.

⁵⁷ *ibid.*; Eric Rasmusen, ‘Stigma and Self-Fulfilling Expectations of Criminality’ (1996) 39(2) *The Journal of Law & Economics* 519–520.

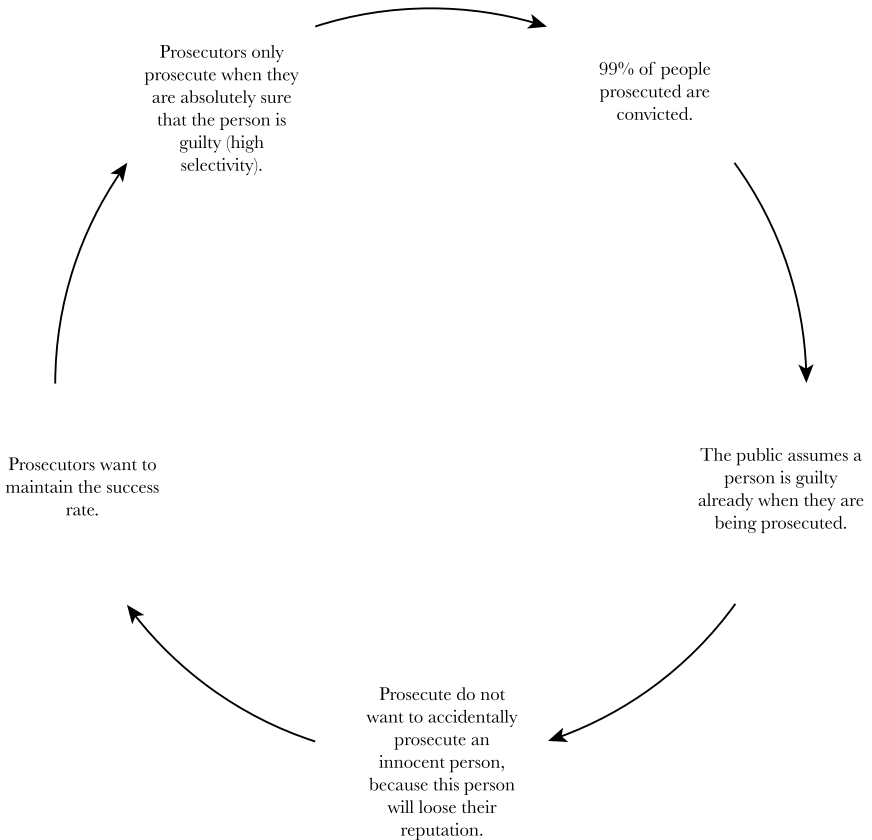
⁵⁸ Mari Hirayama and David Johnson, ‘Japan’s Reformed Prosecution Review Commission: Changes Challenges, and Lessons’ (2019) 14 *Asian Journal of Criminology* 77; Steele, Lawson, Hariyama and Johnson (n 21) 169.

⁵⁹ *ibid.* 78.

Report reinforces this stigma by strengthening the weight that cases have on public trust.

TABLE IV.1

Cycle Sustaining the 99% Success Rate of Japanese Prosecutors



B. STATISTICS ON THE ACTIVITY OF THE PROSECUTION REVIEW COMMISSION

The Japanese Prime Minister's office conducted a poll in 1990 which revealed that up to 70% of the public admitted not to be familiar with the prosecutorial review system.⁶⁰ This was 27 years ago and the public knowledge of the criminal justice system has probably improved due to the efforts of the government. Nevertheless, the PRC's Committees of Inquiry had already been functional for over forty years by that point, thus the lack of binding review in these first four decades has to be kept in mind when looking at statistics. Therefore, the results of the statistical findings are separated into two categories: pre- and post-2009 reforms. This is done in order to measure any changes that the reforms might have brought to the PRC's activity pattern. Such changes might be significant when determining the productivity of the PRC and the extent to which it has reached its goal as a checking power that facilitates public trust.

As seen in Table IV.2 below, so far, the PRC has examined approximately 177,000 cases since its commencement (1949), of which 2,422 cases resulted in prosecution, which composes around one out of every 73 cases (1.4%) that are being reviewed.⁶¹ This number has been collected over a period of at least 60 years. Between the years 1949 and 1989 (before the reform) out of every 10,000 cases of non-prosecution, the PRC reviewed 34.5 cases (0.345%).⁶²

⁶⁰ Chén Xiào (陈, 陈), 'Comment on the Current Situation of Japan Procurator Review System (日本检察官审查会制度实施现状评析)' (2014) 7 Institute of Law, Chinese Academy of Social Sciences, 69.

⁶¹ Supreme Court of Japan, Number of cases accepted by Prosecution Review Committee (检察官审查会の受理件数, 2020) <https://www.courts.go.jp/vc-files/courts/2020/R1kensintoukei.pdf> accessed 28 November 2020. Note: The figures of 2019 are preliminary figures.

⁶² *ibid.*

TABLE IV.2

Number of Cases Accepted by the Prosecution Review Committee

Year	New requests		Finished					In total	In progress
	By petition	In total	Prosecuted	Unjustified non-prosecution	Justified non-prosecution	Rejection of motion (Other reasons)			
2015	2,174	2,209	4	118	1,801	248	2,171	836	
2016	2,155	2,191	3	101	2,023	216	2,343	684	
2017	2,507	2,544	1	67	1,895	311	2,274	954	
2018	2,215	2,242	3	81	1,958	287	2,329	867	
2019	1,733	1,797	9	134	1,640	285	2,068	596	
Total since 1949			2,422				177,405		

Between 2015 and 2019 a total of approximately 11,200 cases were reviewed in the first stage of the PRC, as seen in Table IV.2 when adding up the total amount of cases of those five years, in the vertical grey row. In 2019 alone, the total amount of finished cases in the first stage amounted to 2,068 cases.

TABLE IV.3

Persons Not Prosecuted in Period 2015-2017 (By Reason)

Year	Total (100%)	Suspension of prosecution	Insufficiency of evidence	Withdrawal of complaint	Insanity	Others
2015	163,248	113,130 (69.3%)	31,712 (19.4%)	8,046 (4.9%)	551 (0.3%)	9,809 (6.0%)
2016	160,226	112,809 (70.4%)	31,668 (19.8%)	7,478 (4.7%)	507 (0.3%)	7,764 (4.8%)
2017	158,780	112,263 (70.7%)	32,169 (20.3%)	6,657 (4.2%)	501 (0.3%)	7,190 (4.5%)

Table IV.3 shows the number of cases that were not prosecuted in general.⁶³ The category ‘Suspension of Prosecution’ entails the number of cases dropped by the prosecutor despite the availability of sufficient evidence to prosecute. As mentioned above, this dismissal is possible due to the Principle of Opportunity, which gives the prosecutors the discretion to dismiss a case on the basis of the character, age, environment, gravity of the offense, circumstances or situation after the offence of the suspect.⁶⁴ The categories ‘Suspension of Prosecution’ and ‘Insufficiency of Evidence’ amount to roughly 90% of the cases. Hence, Tables IV.2 and IV.3 will be used when talking about the cases of non-prosecution in this article, since other reasons such as “insanity” and “withdrawal of complaint” are exceptions that are not encompassed into this topic. Therefore, the total amount of non-prosecuted cases, minus the withdrawal and insanity cases, was 144,432 in 2017.

If we compare the total amount of cases that were not prosecuted in 2017 in Table IV.3 (144,432 cases), with the number of reviewed cases by the PRC in 2017 in Table IV.A.2 (2274 cases), we can see that the PRC has reviewed 1.6% of all the cases that prosecutors decided not to pursue. In the time 2015-2017 period, the average review rate was also 1.6%. This is a significant improvement compared to the 0.345% reviewed cases of the total case load before the reforms, showing a sharp (and, therefore, encouraging) increase in activity, demonstrating that the reforms did have an effect here. In order for the PRC to be an effective checking power on the prosecutors and to deliver the public representation and inclusion that the Reform aimed at achieving, the PRC should have significant weight on the prosecutors, hence the question: is 1.6% enough?

C. CASE STUDIES OF THE PROSECUTION REVIEW COMMISSION

To answer this question, it is important to look not only at the quantity but also at the quality of the cases selected by the PRC. ‘Quality’, in this context, refers to the scope of influence that the PRC has as a checking power on mainly three factors: public trust, the rule of law and the functioning of the prosecutors. Since the cases reviewed by the PRC are few, they must often be high-profile cases with either many victims or important (public) figures in order to exert a significant influence on all objectives identified by Reform Report. Noticeable cases which the PRC prides itself on are the Akashi firework stampede incident, the Minamata disease case and the crash of the Nikko Jumbo Jet case.⁶⁵ Each of these cases an

⁶³ Editorial, ‘Section 2 Dispositions’ (*White Paper on Crime*, 2015, 2016 and 2017) <http://hakusyo1.moj.go.jp/en/65/nfm/n_65_2_2_2_2_0.html> accessed 28 November 2020.

⁶⁴ See Section II.D.

⁶⁵ Supreme Court of Japan, Outline of the Prosecution Review Committee (検察審査会の概要, 2005) https://www.courts.go.jp/links/kensin/seido_gaiyo/index.html accessed 15 November 2020.

immense amount of media and public attention, due to their high death tolls.⁶⁶ In addition to these cases, the following case study shows that powerful individuals and groups, who otherwise would have been shielded by the old power monopoly that the prosecutor's Principle of Opportunity provided, are no longer immune from prosecutorial indictment.⁶⁷

In his articles, Fukurai demonstrates that the PRC typically reviews high-profile cases involving, for example, politically and economically powerful individuals and groups whom otherwise would not be prosecuted and stand above the law.⁶⁸ Fukurai highlights how the cases of powerful individuals who had avoided prosecution were reviewed by the PRC due to many public complaints and petitions, which then lead to their prosecution after the PRC's investigation.⁶⁹ Fukurai gives the case of Ichiro Ozawa, who was the leader of the Liberal Democratic Party and became Prime Minister in 1972.⁷⁰ Ozawa was twice alleged to have violated the Political Fund Control Law; on both occasions, prosecutors chose not to file charges.⁷¹ The official explanation for not prosecuting Ozawa was that there was that there was insufficient evidence to file charges.⁷² Important to note in this regard is the social stigma that a prosecution would have had on Ozawa's reputation. Ozawa was a key figure on the political stage of Japan; if, therefore he was prosecuted, due to the stigma of the 99% success rate of the prosecutors, everyone would already had assumed that he was guilty, which not only would had destroyed Ozawa's career, but also would had shaken the political stage in Japan. Therefore, it follows that the prosecutors did not want to initiate prosecution without having enough proof to convict him. However, the PRC did find evidence during its subsequent investigation: A testimony of Tomohiro Ashikawa (Ozawa's former aid and Lower House member) saying that he received approval to prepare the allegedly fraudulent tax report,⁷³ which was not enough proof to convict him beyond doubt, but still was evidence.

After reviewing the case twice, the PRC enacted its mandatory prosecution powers and indicted Ozawa in 2011. Interesting to note is that alongside the original allegations against Ozawa, the PRC included an additional charge on top

⁶⁶ *ibid.*

⁶⁷ Hiroshi Fukurai, 'Japan's Quasi-Jury and Grand Jury Systems as Deliberative Agents of Social Change: De-Colonial Strategies and Deliberative Participatory Democracy' (2011) 86(2) *Chicago-Kent Law Review* 800.

⁶⁸ *ibid.* 801.

⁶⁹ *ibid.* 800.

⁷⁰ *ibid.* 799.

⁷¹ Editorial, 'Indictment of Mr. Ozawa' (*The Japan Times*, 2 February 2011) www.japantimes.co.jp/opinion/2011/02/02/editorials/indictment-of-mr-ozawa/ accessed 15 November 2020.

⁷² *ibid.*

⁷³ *ibid.*

of the original allegations.⁷⁴ The media described this as the PRC going “beyond the purview of its responsibility”, and called for expert discussions on “whether a *citizens’* legal panel may add such an item”.⁷⁵ The possibility to include a legal expert in the initial stages of the PRC process has already been mentioned in Section III.B. This option might not only aid the citizens in the PRC in navigating through the judicial process and legal principles, but it could also be a solution to the dismay of the public; if judicial expertise is included in the PRC, in the eyes of the public, the organ would not just be a mere ‘citizens’ legal panel’, but rather a group that represents the public *and* includes expertise that validates and strengthens its judgments. Therefore, the mandatory inclusion of a legal expert in the PRC could serve as reassurance to the public that the PRC will not be crossing any judicial lines.

This case shows that the PRC is the only institution that checks the power of prosecutor, hence it is the single organ that can reach high-profile individuals and groups that are otherwise beyond the reach of justice given that they are shielded by prosecutors. Needless to say, this is of vital importance within a well-functioning justice system. At the same time, this case also illustrates how the two goals of the PRC can oppose one another, where the PRC focusses too much on checking the prosecution’s power which then results in public dismay.

The PRC also has to be careful of the pendulum swinging too much the other way if it relies too much on public perceptions, as Goodman warns.⁷⁶ The goal of the inclusion of citizens within the justice system through the PRC was to (1) include a citizen’s perspective in significant cases and (2) thereby strengthen public faith in the justice system, with the inclusion of citizens bringing the public closer to the justice system. A shortcut, however, is to include public opinion in the assessment of cases. For example, a public poll showed that roughly 70% of the public wanted Ozawa to resign; therefore it would have been very easy for the PRC to achieve public trust by looking at the general opinion and act accordingly.⁷⁷ Deciding on a case by looking at whether the public favours prosecution, even when the evidence is not all-convincing, does not conform to the rule of law. The PRC has to be careful not to become a “brake on the public prosecutor’s ability

⁷⁴ *ibid.*

⁷⁵ Goodman (n 8).

⁷⁶ Editorial, ‘Indictment of Mr. Ozawa’ (*The Japan Times*, 2 February 2011) <https://www.japantimes.co.jp/opinion/2011/02/02/editorials/indictment-of-mr-ozawa/> accessed 15 November 2020. Emphasis added.

⁷⁷ Editorial, ‘Poll: Majority want Ozawa resignation’ (*United Press International*, 17 January 2010) https://www.upi.com/Top_News/World-News/2010/01/17/Poll-Majority-want-Ozawa-resignation/55131263788002/ accessed 15 November 2020.

to safeguard the unpopular but innocent”.⁷⁸ By including more legal expertise in the PRC the chance of it falling in this trap is reduced significantly, because the citizen’s point of view will not be the only relevant perspective.

Precisely because of this dichotomy, it is vital that the PRC be aware of the extent of its power and of the stigma existing within the context in which it operates. A balance must be achieved between the two goals. If there is one piece of evidence that might not be significant enough to convict a person, should this one item be reason enough to initiate prosecution, thereby bringing about the aforementioned stigma and running the risk of ruining a person’s public image and career? Should these considerations be made without the legal expertise specialising in such assessments? Admittedly, the PRC’s review has brought prosecution and subsequent justice to many cases that otherwise would have been left untouched; it is fighting impunity as we speak. However, it has to be aware of the context and stigma within which it operates. Focussing too much on either of its goals (public trust vs. checking mechanism) might cause an imbalance that could otherwise be prevented by including mandatory legal expertise from the first stage of review.

Another reason to support such a balance is the impact it can have through strengthening the PRC’s influence on the functioning of prosecutors. If more legal expertise is added to the PRC, it will stand stronger against prosecutors when it is needed, since its arguments will not only rest on morality and public opinion but will also focus on the prosecutor’s conformity with the rule of law. Keeping the Ozawa case in mind, in 2013 Goodman wrote:

“considering that all the PRC mandatory indictment cases to date either have not been, or likely will not be, successful and weighing the unsuccessful record against the almost one hundred percent conviction rate when prosecutors charge, there is a great reason to doubt that the PRC process is working as it should”.⁷⁹

Hence, the weight that the PRC has on the functioning of the prosecutors is probably not as significant as it should be.⁸⁰ From this it could be concluded that the PRC succeeds in attracting significant media and public attention, and including a citizen’s perspective in the justice system, without actually having any significant weight on the functioning of the prosecutors. The next section will strive to answer the question: has the PRC been able to check the Japanese prosecutors,

⁷⁸ Joseph Sanders, ‘A Norms Approach to Jury “Nullification:” Interests, Values and Scripts’ (2008) 30(1) *Law & Policy* 20.

⁷⁹ Goodman (n 8) 35.

⁸⁰ Kenny Yang, ‘Trust the People or Business as Usual? An Examination of Lay Participation in the Japanese Criminal Justice System’ (2017) 42 *University of Western Australia Law Review* 86.

facilitate public trust and adhere to the rule of law, as it should according to the Reform Report?

V. COMPATIBILITY OF GOALS: PUBLIC TRUST AND A CHECKING MECHANISM

Even before the reforms the PRC consisted of citizens. Thus, nothing has changed in this aspect, but the change rather lies in the purpose of the PRC. The probable reason for the PRC being composed of citizens instead of legal experts is to ensure “popular participation in the criminal proceedings-system”,⁸¹ thus turning the Committees of Inquiry into an opportunity for public scrutiny to increase popular trust, while simultaneously functioning as a system of legal review. In fact, being aware of the “attitudes and feelings of the general public” and “understanding the feelings of victims of crime” is essential in order to be a good prosecutor, according to the Reform Council.⁸² This also implies that prosecutors should be aware of the political impact of non-prosecution, since the public’s trust is valued greatly and there is immense public focus on prosecutors’ decisions. Trying to strike a balance between its checking function and obtaining public trust can prove difficult in some cases. Evidently, there is solid logic in gaining people’s trust by bringing citizens closer to the justice system; there is, in fact, nothing wrong with outreach which facilitates people’s trust in the system.

It is important to note, however, that the review of the PRC is conducted from a citizen’s perspective, without much prior knowledge of legal affairs, and only upon request for additional information can the Committee receive clarification from a lawyer regarding legal problems.⁸³ One could challenge the strict observance of the rule of law of an institution that is supposed to check prosecutors without a priori legal expertise; why does the PRC consist solely of citizens? The fact that in the second phase the appointment of a legal expert is mandatory shows the need for including such expertise in the Committee from the onset since the drafters of the law deemed it necessary to include legal expertise at this stage of procedure.

⁸¹ The Justice System Reform Council, Recommendations of the Justice System Reform Council - For a Justice System to Support Japan in the 21st Century (2001) < https://japan.kantei.go.jp/policy/sihou/singikai/990612_e.html > accessed 12 November 2020.

⁸² *ibid.*

⁸³ Act on Committee for Inquest of Prosecution (*検察審査会法*) Act No. 147 of 1948, last revised in 2006, Articles 38, 39.2.

Therefore, why does the Reform Report insist on conducting prosecutorial review purely from the citizen's point of view?⁸⁴

Yielding judicial power solely to citizens to increase public trust in the judiciary does not promote the strict rule of law. Leaving such key-functions solemnly to citizens with minimal knowledge of the law does not strengthen the law, because there is a higher chance of it being applied inappropriately. The argument made here is not one that preaches the abolition of any inclusion of citizens in the justice system, but rather it argues that the sole check on the monopolised power of prosecutors should not be solely left in the hands of citizens. Legal expertise should be included as well starting from the onset. Thus the PRC should include a legal expert in order to balance its goals of checking prosecutorial discretion and obtaining 'public trust/ a citizen's perspective'.

VI. CONCLUSION

The problems within the Japanese prosecution system, as identified in the Reform Report, are the lack of public trust and the need for a checking power to balance the monopoly of the prosecutors. The Reform Report has thus introduced and strengthened a new lay-participation system that includes the perspective of citizens. As part of this system, the PRC has fulfilled its goal of increasing public trust in the system, but in certain areas it still has room to improve. When it comes to checking prosecutors, much is left to be desired when it comes to statistical success and influence upon the prosecutor's behaviour. There are also several "traps" that the PRC might fall into, such as the focus on public opinion and the misapplication of legal principles. Therefore, this article argues that the PRC should include legal expertise in its Committees in order to strike a balance between achieving public trust and checking the power of prosecutors in Japan.

⁸⁴ Supreme Court of Japan, Outline of the Prosecution Review Commission (検察審査会の概要, 2005) https://www.courts.go.jp/links/kensin/seido_gaiyo/index.html accessed 15 November 2020.