The Japanese Adversary System in Context: Controversies and Comparisons
Edited by Malcolm M. Feeley and Setsuo Miyazawa
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An American criminal defense attorney reading the Japanese Constitution could be forgiven a sense of familiarity with the expansive series of rights afforded to the criminal defendant. These rights, along with other aspects of the American adversarial system, were introduced in Japan after World War II. However, the procedural protections contemplated by the American drafters of the Japanese Constitution operate in a very different manner in Japan, in large part because of institutional legacies of the prewar inquisitorial system. This gap between the intentions of the constitutional drafters and the law as it operates in action provides a fruitful opportunity for comparative research.

This volume of essays, the results of a conference sponsored by the Sho Sato Fund at Boalt Hall Law School, collects a range of contributions from Japanese and American scholars exploring these issues and other aspects of Japan's criminal justice system. It focuses, appropriately enough, on the operation of the adversary system in Japan. As Miyazawa puts it in his Introduction (p. 10), the formal adoption of adversarial principles makes it worthwhile to ask how well the Japanese system is achieving its stated objectives. His answer, and those of most of the other authors, is not very well.

Under the adversary system, the judge serves as a kind of neutral referee in the criminal justice process, relying on the prosecution and defense attorneys to present evidence at trial. The judge is also charged with ensuring that the suspect is not subject to undue pressure during the investigation stage. The parties are formally equal, with no

special deference given to the state and no special relationship between judge and prosecutor. Indeed, because of an implicit recognition of the very real advantages possessed by the state, the adversary system provides a number of procedural protections to the defendant. These features stand in contrast to the inquisitorial system, particularly as it existed in prewar Japan, in which all legal actors are viewed as engaging in a common search for the truth.

The prewar Japanese criminal justice system featured a special investigating judge, did not provide for a right to counsel before indictment, and generally did not allow counsel to be present during interrogation of the defendant or witnesses (p. 43). While these institutional features have been reduced or eliminated, certain legacies persist today. Perhaps the foremost legacy of the inquisitorial system is the close relationship between the prosecutor and judge. Prosecutors and judges are trained together and share a common orientation, and the prosecutor's role can be seen as similar to that of the prewar investigating judge (p. 45). Both prosecutors and judges operate within institutional structures in which they have strong disincentives to acquit defendants (p. 3.)

Notwithstanding the nominal equality of the parties in the adversarial system, the Japanese prosecutor has a number of practical advantages. The prosecutor is not required to give up exculpatory evidence to the defendant, an adversarial-type rule that is singularly favorable to prosecutors. Hearsay evidence is allowed, and there is no practical counterpart to the exclusionary rule by which American judges automatically exclude evidence that is obtained illegally. Although Article 35 (1) of the Constitution of Japan, like the American Fourth Amendment, requires a warrant for a search or seizure,

the police in Japan seem to have much more leeway regarding admittance of evidence in violation of this rule.

The widespread practice of inducing confessions, typically drafted by detectives or prosecutors, also suggests that the Japanese system operates under different institutional structures than the American system. The frequency of confession is no doubt tied to interrogation practices. Accused persons are regularly detained for up to 23 days before indictment. During the 23-day pre-indictment detention phase, the prosecution and police have asserted that there is a "duty to submit to questioning" (p. 29) and the Supreme Court has never held otherwise (p. 42). Suspects cannot leave the room during interrogation and have no right to terminate the session. Although Article 34 of the Constitution guarantees a right to a lawyer, the courts have allowed the prosecution to impose restrictions on the time, place and manner of meetings with attorneys during preindictment detention, and interrogations can proceed without a lawyer present.

The bar is the only effective institutional counterweight to the police and prosecution, and has for years complained about many aspects of this system. The Japanese bar has set up systems in which volunteer attorneys meet with defendants free of charge, distributing work among the various lawyers in the jurisdiction. The bar has also began a "Miranda society" which encourages defendants to remain silent and refuse to cooperate with interrogations (p. 128-39). Yet these efforts have been subject to serious criticism by Ministry of Justice officials and prosecutors, including assertions that the efforts of the Miranda society are themselves illegal because they violate the duty to submit to questioning (pp. 132-33). In addition, the traditionally small size of the bar

limits its capacity to provide a true counterweight, and few Japanese lawyers can afford to specialize in criminal defense work. Daniel Foote notes that in many cases, the defense counsel plays a cooperative aspect in the process, and does not seem to engage in the kind of zealous advocacy that American defense counsel believe is needed to make the adversary system function properly (p. 31).

In short, the formal constitutional change in Japanese criminal procedure has not been accompanied by institutional reforms to ensure that the rights of the accused are sufficiently protected. The organization and values of both judges and prosecutors were relatively unaffected by postwar reforms (Murayama, p. 43). These values and the structural imbalances weighted toward the prosecution leaves the Japanese criminal defendant, in Satoru Shinomiya's effective phrase, more of a hostage than an adversary (p. 115).

The authors in this volume evaluate this situation from a variety of disciplinary perspectives. Robert A. Kagan provides an overview of some of the costs and benefits of the adversary system using his construct of "adversarial legalism," which he uses to characterize American criminal justice. Kagan is a critic of some of the excesses of adversarial legalism and notes that it is "more cumbersome, costly and inefficient than [the] bureaucratic supervision" which comprises the Japanese model (p. 22). The American system has significant inequalities in that like cases are not treated alike, with a crucial variable being the quality of lawyering one can afford. This forms a great contrast with Japan, where legal actors place paramount value on treating like cases alike. Kagan also notes that one of the consequences of excessive legalism in America has been a move to negotiated outcomes in the form of plea bargaining. He notes that many of these

excesses of American adversarial legalism result from broader aspects of political structure, and are unlikely to spread to Japan should it move in a more adversarial direction. This point resonates with Malcolm Feeley's argument that adversarialism results from a weak state structure, as illustrated by the divided and decentralized United States criminal justice system (pp. 75-86).

Hanson et al., provide empirical research on the performance of American public defenders. In contrast with widespread perceptions that public defenders are second-class attorneys, they show that on a number of dimensions public defenders perform as well as privately retained attorneys. In particular, they find that the type of counsel does not have an independent effect on the probability of incarceration (p. 109). While one might therefore conclude that Japan ought to consider adopting a system of public defenders, the Hanson study includes an important qualification that they assume that salaries are commensurate with the work, a feature not apparently found in the largely voluntary Japanese system.

The chapters focusing on Japan include Masahito Inouye's case study of witness immunity through the lens of the Lockheed bribery cases. This chapter provides an excellent overview of these crucial cases, while illuminating the institutional issue of which criminal justice actor is best able to provide immunity to witnesses. Toshikuni Murai focuses on the 1999 passage of a new wiretapping law, which he criticizes as extending wiretapping authority. Nobuyoshi Araki provides a summary of the juvenile justice system, in which adversarial principles have been compromised in Japan and elsewhere under a traditional doctrine called *parens patrie*. Araki describes the growing pressures on this system from victims' rights groups and prosecutors, and develops

nuanced recommendations calling for a qualified shift toward greater adversarialism (pp. 223-24).

Takashi Takano describes the activities of the new Miranda society, of which he is a prominent member. Richard Leo considers the impact of the famous *Miranda* warnings in the United States and asks whether such a regime would be feasible or desirable in Japan. Given the institutional structures described above, he concludes that Miranda-like warnings, alone, would likely have little effect on Japan's coercive criminal justice system. He considers an alternative reform of requiring the videotaping of all investigations. Leo believes that this reform would be neutral, favoring neither prosecution nor defense, and in fact advance the system's goal of truth finding.

One of the best chapters is David Johnson's consideration of plea bargaining, which is formally illegal in Japan. Johnson shows that, in functional rather than formal terms, Japan does have plea bargaining. Because Japan allows summary procedures for minor cases and uncontested trials which impose significantly less burdens on the prosecution, there are great pressures on defendants to choose the shortcuts. Johnson's survey and field research show that pressure to confess is rewarded with lenient treatment. Suspects who do not confess can be seen to be expressing a lack of contrition, with the correspondingly great punishment (p. 147) Just as in American plea bargaining, there may be a sentencing differential between suspects who avail themselves of their rights and are subsequently convicted. In short, Johnson demonstrates both the reality of plea bargaining in Japan and its complex structural and historical causes. His chapter is also one of the few that expand beyond the U.S.-Japan comparison to consider the German

system in his discussion of why plea bargaining appears to be more conspicuous in Japan (pp. 161-63).

Another comparative chapter, by Gordon van Kessel, discusses European developments in criminal justice that have moved toward greater adversarialism. He further notes the interesting trend toward inquisitorial systems in common law countries, and reduced reliance on the jury. Recent changes in Japan, the chapter suggests, may be part of a global trend toward convergence in criminal procedure, facilitated by international law.

This volume was prepared during a period of great change in Japan's legal system, a process less extensive that its Meiji or postwar antecedents but still significant. Beginning in the 1990s, a series of ad-hoc reforms was adopted that has made it easier to sue, expanded the size of the bar, and streamlined civil procedure. This process has accelerated under the Justice System Reform Council, which produced its final report in June 2001 and called for a number of fundamental reforms of the legal system. Relatively speaking, however, the most controversial aspects of Japan's criminal justice process remained insulated from these broader transformations. Calls to provide a system of public defenders, or end the system of *daiyo kangoku* in which police stations are used for pretrial detention, were not incorporated into the final report. However, some recommendations are bound to have a significant effect. Recommendations for an overhaul of juvenile justice received approval, as predicted by Miyazawa in the volume under review (p.6). The adoption of a system of lay participation in judicial decision-making will no doubt tend to make the criminal justice process more adversarial. Lay participation in judicial decision-making requires certain institutions, such as control of

the presentation of evidence, which put the parties in a more adversarial relationship. The judge quite naturally becomes more of a referee policing the process than an inquisitor. No doubt the Japanese system will remain its own distinctive hybrid, but there is at least the possibility of greater protection of rights under a jury or quasi-jury system. In the meantime, this volume provides a wonderful and timely overview of Japan's criminal justice system in transition.