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Justice on Trial: Japanese Prosecutors Under Fire□□裁かれる司法ーー日本の検察への攻撃

Jeff Kingston

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Japanese prosecutors find themselves in the dock for abuses of power involving a number of high profile cases that have drawn considerable media attention in recent years. More than ever, the Japanese public is aware of the extent of prosecutors' power and how this jeopardizes justice. Until recently, prosecutors' post-WWII public reputation was relatively positive, and they were widely viewed as paragons of trust and propriety who had largely overcome the negative images stemming from their wartime role as tools of state oppression against critics and dissidents. This does not mean that Japan's procuracy has lacked critics both at home and abroad, but only recently has the positive public image come under sustained fire. The media is drawing unprecedented public attention to the ways and means of prosecutors and detailing their resort to unscrupulous methods in order to maintain their chilling 99% conviction rate.

The 2010 case of Muraki Atsuko, a senior civil servant in the Ministry of Health, Labor and Welfare, put the prosecution in the limelight when an "ace" prosecutor acknowledged he tampered with evidence in an ill-fated effort to secure her conviction. Moreover, it is alleged that his supervisors in the Osaka prosecutor's office were aware of his evidence tampering and engaged in a cover-up. In the past, such transgressions were explained in terms of rogue prosecutors, but this recent case suggests the problem is more systemic. Too much unaccountable, unchecked discretionary power facilitates abuses that are more common than is generally acknowledged or tolerable in the eyes of the Japanese media and public. This situation arises from prosecutors' arbitrary suppression of citizens' constitutional rights, and protections in the Criminal Code of Procedure (CCP), aided and abetted by a compliant judiciary.[1]



Muraki Atsuko in 2009 prior to her arrest

(Kyodo News photo)

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There have long been allegations and evidence of prosecutorial abuses, and here and there some cases come to light, with most critical attention focused on prosecutors' heavy reliance on "confessions" and the high conviction rate. Japan's 99% conviction rate is sometimes misleadingly depicted as cut and dried evidence of injustice. Experts, however, point out that this high batting average reflects careful screening by prosecutors who avoid trying cases that they are not certain of winning. The flip-side of this is that some offenders walk because the prosecutors can't build a convincing case and are unable to secure a confession. In the absence of a confession, the so-called "king of evidence", prosecution is rare. According to David Johnson, confessions are the cornerstone of Japanese justice and prosecutors rely on them because they can and because they increase investigators' "efficiency".[2] In addition, confessions are a way of nudging criminals towards expressing remorse and "uncovering and clarifying" the truth. Confessions are also seen as crucial to the emphasis on rehabilitation of criminals in Japan, uncovering the truth, understanding the motive and offering leniency in exchange for genuine contrition; and hating the crime not the criminal. Wilson notes, however, that, "…other factors fuel the incessant prosecutorial quest for a confession including, among others, the need to prevail, fear of professional demotion or career failure, media pressure, and the public's desire to quickly solves crimes."[3] He also reminds us that, "…it is difficult to adequately explain a conviction rate that nears perfection in any criminal system. In fact, it begs the question of whether such perfection can be justified, or whether due process and defendants' rights are being sacrificed in the name of perfection."[4] As discussed below, the emphasis on securing confessions is an important factor in the prolonged detention of suspects, intensive grilling and infliction of abuses. More than 90% of suspects do confess, suggesting the efficacy of the interrogation methods while also raising questions about respect for their constitutional and human rights.

Daniel Foote draws attention to the central problem of judicial policymaking and how judges have played a key role in empowering prosecutors and not exercising their powers of oversight to restrain them. He argues that judges have been, "… granting broad authority to the prosecution and limiting rights and protections for suspects and defendants, often in the face of rather explicit language in the Constitution."[5] Foote, among others, finds that judges' systematic deference to prosecutors has been a key factor in the accumulation of prosecutors' unchecked powers that have stacked the deck against the accused. He contends that the narrow interpretation of the Constitution embraced by the judiciary constitutes judicial policymaking that has resulted in the constitutional rights of the accused being routinely disregarded. The judiciary has acquiesced in strict limits set by prosecutors on the constitutional right to immediate legal counsel for the accused, allowing prosecutors broad discretion to deny and determine such access. Judges also virtually always grant prosecutors' requests to continue interrogations of suspects for up to 23 days of detention. Moreover, suspects may be kept in detention purgatory for unlimited subsequent periods of 23 days provided the prosecutors file new charges for each detention.[6] In practice, it is extremely rare for a judge not to grant the prosecutors' requests for detention, and extensions before suspects are indicted.

In order to uncover the truth, judges assume that prosecutors will act responsibly and need time to conduct thorough interrogations. As Weber argues, "Japanese judges exercise their warrant-granting authority and interpret the Constitution in ways that render procedural protections moot."[7] This lax oversight by judges has given prosecutors a powerful weapon

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–endless detention – to extract confessions by coercion and intimidation, essentially making detainees' release contingent on the accused signing a confession drawn up by the prosecutor. The fact that confessions obtained under such dubious circumstances have been routinely accepted as credible evidence by judges indicates the extent to which the system is biased in favor of prosecutors.

This tilting of the playing field and extensive reliance on confessions, more correctly summary statements drawn up by prosecutors ostensibly based on interrogations, or affidavits drawn up by prosecutors that are signed by witnesses, also runs counter to the Criminal Code of Procedure (CCP) that stipulates trials centered on oral testimony in open court and cross-examination in order to verify the reliability and credibility of testimony. Moreover, like the Fifth Amendment to the US Constitution, Article 38 of the Japanese Constitution provides that, 'No person shall be compelled to testify against himself'. In practice, Foote notes that judges have been overly deferential to prosecutors, allowing them to exploit loopholes to evade this constitutional protection to the extent that self-incriminating confessions are central and vital to prosecutions. Soldwedell concurs, noting that, "The Japanese constitution provides broad protections for those accused of crimes. Unfortunately, the most striking aspect of these provisions is that they are routinely ignored."[8]

Unlike the Miranda rule in the US, requiring police to immediately inform suspects that they have the right to remain silent and that any statement they make can be used against them in court, the Japanese court has taken a narrow view of the right to silence enshrined in the Japanese constitution. In 1950 it ruled, "that failure to notify a suspect of this right to silence is not a constitutional violation and does not render a subsequent confession either involuntary or inadmissible."[9] Moreover, courts have adopted loose standards for judging whether confessions are voluntary and reliable, rarely challenging prosecutors even when there are serious doubts about the validity of a confession.

Defendants are also disadvantaged by court decisions that have curtailed "discovery", meaning that prosecutors have been under no obligation to disclose all relevant evidence to defense counsel before the trial begins; recent improvements in discovery rules and practices are thus welcome. Weber attributes this improvement to the introduction of the lay judge system, arguing that, "As part of the current judicial reform movement, prosecutors must now disclose all the information they uncovered during their investigation if they plan to present it at trial, even if it was excluded from the official dossier. This change was necessary for the purpose of saiban-in (lay judge) trials. In bench trials, hearings relied on written documents and were staggered over several months. Lay participation requires short trial periods and live testimony. As a result, defense attorneys need to be as thoroughly prepared on the first day of the trial as prosecutors."[10] In order to expedite the hearings to minimize the disruption of lay judges' lives, the CCP was amended to require pretrial consultation between defense counsel and the prosecution. Wilson explains, "Among other things, the pretrial arrangement proceedings are intended to clarify the charges and applicable law, define the allegations and contested issues, disclose disputed facts and evidence, establish objections related to evidence, address the use of experts, and establish hearing and trial dates."[11] But he is concerned that, "…the government seems more concerned with shortening the trial process than the defendant's right to a fair and complete trial."[12]

The post-WWII emergence of a judicial system that is systematically biased in favor of prosecutors and against defendants is clearly at odds with American reformist intentions during

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the US Occupation (1945-52). Grafting US judicial principles onto the Japanese judiciary has not been effective in establishing a robust adversarial system because, as Foote argues, the courts have allowed prosecutors to bypass the reforms. As a result, the rights of suspects have been sacrificed in favor of prosecutorial powers. Why this has happened is a matter for speculation, but in Foote's view, the judiciary bears ultimate responsibility for this turn of events because it has stood aside or sided with prosecutors in allowing contravention of relatively explicit constitutional and statutory provisions.[13] This has created a judicial system vulnerable to the prosecutorial abuses discussed below. While most specialists emphasize that overall the Japanese judicial system delivers a high quality of justice, many also voice deep reservations about an inquisitorial investigative process and trials where there is scant scope for defense.[14] As Weber points out, "More than any other actor in the Japanese justice system, prosecutors determine the fates of reported suspects. Japanese prosecutors exercise a near perfect monopoly on prosecutorial power. In sum, prosecutors do not merely prosecute cases; they determine outcomes. It is for this reason Japanese justice is often called "prosecutorial justice."[15]

There is an adage in Japan that a prosecutor's career can survive one acquittal, but a second may have detrimental consequences.[16] Of course this is not a hard and fast rule, but such scuttlebutt is suggestive of the pressures that prosecutors face to get a confession or not indict.[17] In general, prosecutors are reluctant to try any but "slam dunk" cases. Takai Yasuyuki, a former prosecutor notes, "When Japanese prosecutors have even a little anxiety over securing guilty verdicts, they do not indict suspects."[18] But once indicted, the pressure to convict is high, so much so that in the Muraki case discussed below, the prosecutor doctored the evidence to frame the suspect.

While there is a gap between the low acquittal rate in Japan and the US, Johnson finds that it is not quite the yawning chasm it seems if one controls for differences in procedures such as the high rate of guilty pleas in the US that bypass trials and influence trial conviction rates. Nonetheless, Japan remains what Johnson terms a "paradise for a prosecutor" because they have carte blanche to 'make' cases and obtain information.[19] He qualifies this statement by pointing out that this paradise applies only to ordinary crimes, but not "for corruption and other white-collar offenses, {where} the law disables prosecutor interests by forbidding or restricting practices that prosecutors in other countries…consider essential."[20] For example, grants of immunity, subpoenas and undercover operations are prohibited and wiretapping was not authorized until 2000.[21] Johnson is pessimistic about the prospects for reform of the prosecutorial system, writing, "…the current system places so much power in the procuracy's hands that only a colossal abrogation of those prerogatives seems likely to produce significant change in the balance of advantage."[22]

Developments over the past two decades in terms of public support for greater transparency, enabling legislation for information disclosure and a spate of judicial reforms has raised public expectations and stimulated media interest, creating a climate that is making it increasingly difficult to maintain this prosecutor's paradise. Certainly, Japan does seem to have a far less quiescent and supportive political context than Johnson describes, and there has been an erosion of deferential attitudes among Japanese towards authorities, one that has been accelerated by the prosecutorial abuses described below.[23]

The Muraki case is especially damning as this mild-mannered bureaucrat won considerable public sympathy following her acquittal in 2010 and revelations by witnesses that they were forced to implicate her and, above all, the

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stunning admission by the prosecutor that he had doctored the evidence against her. Her steadfast refusal to sign a confession despite 163 days of detention and grilling demonstrated just how much hardship a suspect faces once in the maws of the justice system. Not many can hold out so long despite being innocent against interrogators who don't take no for an answer.

We now turn to examine some other prominent cases that demonstrate the dangers of an absence of checks and balances, before returning to the Muraki case.

Trail of Crime

In June 2009, Sugaya Toshikazu was released from prison after serving 17 years of a life sentence when more accurate DNA testing confirmed his innocence in the 1990 murder of a 4-year-old girl. As in many cases that have been overturned in the US in recent years, Sugaya had been convicted on the strength of dubious DNA testing that matched his semen to that found on the victim's body. The prosecutors used this false test result to browbeat Sugaya into signing a confession after a thirteen- hour interrogation. After he was released, Sugaya told reporters that, "I confessed out of despair. The detective seemed to think I'd done it because I cried…But in fact I cried because I was upset they wouldn't listen no matter how many times I told them I didn't do it." Prosecutors and police refused to apologize at the subsequent retrial where he was exonerated for his wrongful conviction, appearing arrogant and unremorseful about trampling Sugaya's rights and unjustly incarcerating him for nearly two decades.



Sugaya Toshikazu on release

There have been other celebrated cases of judicial misconduct such as that involving Yanagihara Hiroshi, a Toyama man sentenced to three years for rape and attempted rape in 2002. His conviction was overturned in 2007 only after the real perpetrator confessed, but he had already served his sentence. He had been found guilty even though he had an alibi and his footprints didn't match those found at the crime scene. After three days of intense questioning, however, he admitted to the crime, later claiming that his confession was coerced.

In the wake of these cases and other acquittals on the ground of inappropriate police questioning, new guidelines were drawn up to supervise and monitor interrogations. The guidelines include prohibiting interrogators from making physical contact with suspects, using words and actions that make suspects feel anxious or compromise their dignity, and making promises for some kind of favor. The new guidelines reflect concerns that such actions in the past led to forced confessions by defendants, but these guidelines may prove little more than ornamental due to lax enforcement, oversight and the absence of full recording of interrogations.

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The problem of railroading suspects is explored in Box Hakamada Jiken (2010), a film that dramatizes the saga of Hakamada Iwao, a former pro boxer, who was found guilty of stabbing a family of four to death in 1966. He has been on death row since 1968, and two appeals have failed while petitions for retrial have been rejected three times, most recently in 2008. The film focuses on the intimidating and relentless interrogations by the police in extracting a confession and also exposes flaws in the physical evidence. This was a case full of holes: the bloody clothes prosecutors claim he wore during the murder didn't fit, the knife the prosecutors said he used was too small to inflict the wounds and showed no signs of any damage that would normally occur if actually used in multiple stabbings; there were forty stab wounds on the four victims. In addition, the film alleges that police planted evidence to salvage the conviction after one of the judges raised questions about the veracity and voluntariness of the confession. Hakamada recanted his confession during his trial, claiming innocence and accusing the police of coercion. Hakamada said he never read the confession, but, "I wanted silence and had a headache so just wrote down my name and put my head down on the table."



Hakamada in his boxing days

In 2007, one of the three judges involved in the case, Kumamoto Norimichi, went public with his doubts about Hakamada's guilt asserting that he was persuaded by Hakamada's testimony and had even prepared a lengthy "not guilty" ruling, but the other two judges ordered him to rewrite the ruling and convict Hakamada. The film depicts the judge's growing skepticism as the case dragged on, especially after he examined logs of the interrogations and learned how often and at what length the defendant had been interrogated. It also became apparent that the prosecution was concocting various scenarios of the crime for Hakamada to confess to during his 22 days of detention in a police cell. In fact, he was interrogated for 264 hours over 23 days, the longest session lasting 16 hours and

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20 minutes, and was denied water or bathroom visits during the interrogations.

Pursuing his own forensic investigation at the time of the trial, the judge discovered that the prosecution had railroaded Hakamada based solely on a confession made under duress. While held in the police detention center he was clubbed and beaten repeatedly until he signed the confession.

The Hakamada case, and the unprecedented admission by Judge Kumamoto, has drawn back the veil of the justice system and exposed inhumane aspects of Japanese law enforcement. The reliance on ruthless and lengthy interrogations casts a long shadow over the confessions that are frequently the basis for convictions.

"I wanted someone in the Supreme Court to hear me just once at the end of my life," the retired Kumamoto said. "I'm glad I spoke up. I wish I had said it earlier, and maybe something might have changed. " He added,

> ”I knew right away that something was wrong with the confession…I have always regretted that I couldn’t persuade the chief judge to acquit. He was older than me, and I thought because he had experienced the era when freedoms were taken or oppressed that he would understand what had happened to Hakamada.”[24]

Only four death-row inmates have won acquittal on retrial since World War II, the last in 1989. One waited 33 years and four months before being exonerated in 1983. Such retrials and acquittals are very rare precisely because they entail admitting a mistake was made. This raises uncomfortable questions about the death penalty that the Justice Ministry wants to avoid as potentially putting wind in the sails of abolitionists. Hakamada’s prospects thus do not seem good. Back in 1983 Hakamada wrote a letter to his son, stating that, "I will prove to you that your dad never killed anybody, and it is the police who know it best and it is the judges who feel sorry. I will break this iron chain and return to you."

Taking Down the Poster Boys: Ezoe and Horie

The Recruit scandal of the late 1980s brought down a government, tarnished the reputations of the powerful, and left the public convinced that government was rotten to the core. By some counts it was a misunderstanding, blown out of proportion by a rabid media. Ezoe Hiromasa, 74, contends that his actions were legal and the case against him was based on moral outrage rather than the law. He lays out his case in his recent book, offering a compelling, if often self-serving, story that shifts blame to the media and details prosecutorial abuses.[25] However, after a thirteen-year trial he was found guilty. The suspended sentence, and his summary of the judge’s ruling, lends credence to Ezoe’s contention that the prosecution failed to prove its case; the guilty verdict saved the prosecution’s face while suspending the sentence was a nod towards justice.

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Ezoe Hiromasa

Recruit, a Tokyo-based human resources and employment company, distributed pre-flotation shares in a real estate subsidiary, Cosmos, to lawmakers and prominent figures in the business world in the mid-1980s. When Cosmos subsequently went public, its share-price rocketed, enriching those in on the scheme — allegedly including then Prime Minister Takeshita Noboru, former Prime Minister Nakasone Yasuhiro and future prime ministers Miyazawa Kiichi and Mori Yoshiro among several other politicians from across the political spectrum. In many cases, it was the political secretaries who received the shares, providing a barely plausible cover.[26]

The Yokohama bureau of the Asahi newspaper broke the story in June 1988. At the time nobody, least of all Ezoe, imagined that the original story about a deputy mayor of Kawasaki receiving shares in exchange for favors would snowball into such a massive scandal reverberating throughout the corridors of power, toppling the Takeshita cabinet and dominating the news through the end of the 1980s. One of the lingering mysteries is who leaked the list of recipients of the pre-flotation shares handled by Daiwa Securities. Questions about who and why still gnaw at Ezoe. He contends that the scandal might have been avoided if not for Tanaka Tatsumi, a senior manager who came up with the idea of bribing Diet member Narazaki Yanosuke to buy his silence. Given that Tanaka touted himself as a specialist in risk management, his advice was taken. The bribe offer was covertly videotaped and aired on TV, providing unambiguous evidence that Recruit was involved in a cover-up and guilty of trying to suborn a lawmaker. This was the smoking gun that convinced everyone that Ezoe was guilty, but he maintains that he was not involved with the bribe scheme and blames Tanaka.

He states, “Mr. Narazaki, a member of Shakai-Minshu-Rengo (Socialist Democratic Federation), a very minor party, had no influence at all in the Diet. Recruit did not approach him. Rather, he came to Recruit over and over again to request the list of individuals who had purchased shares of Recruit Cosmos, and finally the executive secretary decided to offer some money. In addition, this incident happened when I resigned from Recruit and was in the hospital, which was the only place I could find to hide from media attacks. So, I had nothing to do with this incident.”[27] Instead of bribing this nobody, Ezoe suggests it was a case of being shaken down.

Ezoe indicts the media and prosecutors for wrongfully prosecuting him and subjecting him to a lengthy and excruciating ordeal. He is especially critical of how the media convicted him through innuendo and faulty assumptions, jumping to conclusions not merited by the evidence and failing to distinguish between legal and moral wrongdoing.

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Ezoe explains, "I was an example of the proverbial nail sticking up ready to be hammered. I think I appeared in various media too often – even in daytime tabloid TV shows. In addition, although I was brought up in a poor family, Recruit, the information company I founded, performed far better than other media companies including major newspaper companies and TV stations in terms of sales and profits. I think that is why I became a target of their attacks. In Japanese society, it is a tradition that those who were brought up in a family of pedigree are more respected than those who are not."

Ezoe is unrepentant, but confesses, "As for my spreading pre-flotation shares in Recruit Cosmos to influential people, I think it was moral wrongdoing, and I regret it now. I supported politicians too much and was too eager to cultivate friends. I was wrong to do so. That is my moral wrongdoing. I crossed the line of what is acceptable and my actions were judged not on the law, but on moral norms…the commonsense of Japanese could not accept my actions and at the time I failed to understand that. So in that sense I bear moral responsibility." He argues, however, "I did not think that I was "buying" the way to the core of the power but believed that I was only supporting talented politicians' activities. In retrospect, as the power of media is far stronger than that of politicians after all, I think that what I did had little value, and I regret it. " Despite claims of supporting "talented" politicians, the list of recipients, including many powerbrokers and fixers, belies assertions of pure motives.

Ezoe claims, "Many people think that when I distributed the shares that I expected something in return…that it was to buy influence and get favorable policy decisions. But that was not my intention. I had no expectation of a reward, but this was not understood by the public and the media sensationalized it." The public, the media, and the courts will draw their own conclusions.

Ezoe says he decided to fight the prosecutors because he was angry at being coerced to sign inaccurate statements that unjustly implicated him and others. In seeking vindication, he defied social expectations. He points out that, "Since old times in Japan there is an expectation that the accused will apologize and show remorse for his actions and then will be forgiven. But instead I chose to fight and thus I was never forgiven." Although he could have avoided judicial purgatory if he had plead guilty and apologized, Ezoe insists it was worth fighting the charges because he was innocent and had to defend himself at all costs.

Understandably, Ezoe has a largely negative opinion of the legal system and the reliance on coerced confessions. Curiously, in light of his travails, Ezoe does not oppose the death penalty. Rather than focus on wrongfully convicted people being put to death, Ezoe says it is imperative to abolish the investigative practices and coerced confessions that lead to wrongful convictions. To this end he favors complete videotaping of interrogations, but holds out little hope that this will happen because the Ministry of Justice opposes this reform and does not want to tie the hands of investigators. Ezoe believes that the obsession with maintaining the 99% conviction rate encourages abuses and coerced confessions.

Ezoe blames the media for his legal troubles, but does not see any prospects for reform because social norms support the press and the public is not aware of how the media systematically colludes on how to present the news, abuses its power and otherwise acts irresponsibly.

But is Ezoe innocent? Even though the distribution of stock may not have been illegal and did not involve an explicit quid pro quo, in Japan one can hardly ignore implicit expectations and obligations. The moral outrage targeting him was apparently triggered

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by jealous envy over his wealth, his personification of excessive materialism during the Bubble and what appeared to be too clever exploitation of grey areas in the law. His actions offended social mores, as he manipulated the system and blatantly doled out favors, anticipating that powerful recipients would find themselves in a position to reciprocate in some way and would do so. Ezoe insists this is untrue, but doubts linger. In the end, Ezoe ruefully recognizes that he has not put to rest the broader doubts and recriminations about rigging the system and about his conduct, lawful or not. Indeed, the media struck back. In the Bungei Shunju magazine, journalist Sakagami Ryo cites a list detailing Recruit's cash payments to politicians approved by Ezoe.[28]

Perhaps the greatest impact of Ezoe's book is the detailed account of interrogations, browbeating and the insistence that he implicate others in scenarios prepared by the prosecutors that draws on a diary he kept in detention. One can understand how a detained person would eventually admit guilt and sign anything in order to win release.

Horie Takafumi was another brash entrepreneur who challenged social and business norms with his flamboyant lifestyle and aggressive methods. He was the poster boy for the dot.com boom at the turn of the century, launching Livedoor, a popular Internet portal. Livedoor stock skyrocketed, buoyed by frothy optimism and, it turns out, inflated profit reports. Horie gained notoriety when he launched a hostile takeover bid against Fuji Television, an established media conglomerate. In the media, the hostile takeover bid was portrayed as a battle between fusty, sclerotic Japan and youthful dynamism, between Japanese and western-style business practices. To many Japanese he was a hero, representing what Japan needed more of to regain its mojo. His celebrity lifestyle with flashy cars, expensive residences and reports of wild partying convinced others that he represented what Japan needed to avoid. In 2005 his world fell apart as prosecutors arrested him over accounting violations and manipulation of stock prices, keeping him in detention for ninety-five days. Like Ezoe, Horie was the proverbial nail waiting to get hammered. In the end he was convicted of securities fraud in 2007 and lost his appeal. In one of Japan's biggest white-collar crime cases, he was sentenced to two and one-half years in prison, an unusually long term given that most white-collar criminals receive suspended sentences.[29] Also like Ezoe, Horie maintained his innocence, remained unapologetic and came out with a defiant book, in which he maintains he was unaware of the accounting violations and was mistreated by prosecutors.[30] Ambitious prosecutors found him a tempting target because, as with Ezoe, he was a high profile culprit who had committed moral wrongs by violating the norms of Japanese corporate culture and conducting himself in a manner deemed unseemly and ostentatious. Horie may have been guilty of wrongdoing, his denials are barely plausible, but since such financial shenanigans were hardly rare, it does seem that making an example of him was the point.

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Horie in 2005

Horie maintains, "Ezoe was targeted when he rose to the highest point of his career. So was I. The prosecutors like to do such a thing (to show off their power)."[31]

Ezoe and Horie did not conform to the implicit code of conduct for business leaders and were too much in the limelight for their own good. They were crass newcomers who brazenly challenged established ways and came to symbolize excessive materialism in their respective eras. For these transgressions, and then not demonstrating the requisite contrition, prosecutors hounded them. Whether or not they broke laws, they were targeted because they trampled on conventions and propriety in a society where both are esteemed highly. Prosecutors no doubt contend that they were merely enforcing the law, but in selecting these individuals, and not others, it seems they were also responding to implicit expectations and the more explicit pressures generated by the media.

Muraki Affair

Muraki Atsuko was arrested in mid-2009 on suspicion of ordering a subordinate to forge a document in 2004 that enabled an unqualified organization to take advantage of a special postage discount system for the disabled. As corruption cases go, this alleged instance of postal fraud was small fry, but prosecutors were trying to link her with a Democratic Party of Japan (DPJ) politician and arrested her in the run up to the 2009 Diet elections. At the time, the DPJ was claiming to be the party of reform, promising to hit the reset button on politics as usual, meaning it stood against corruption. The DPJ was also running against the bureaucrats, blaming them for what ailed Japan. Thus linking the DPJ to a corruption case involving a high level bureaucrat might have influenced the elections. There is no evidence that prosecutors were politically motivated or were trying to influence the outcome of the elections in favor of the ruling Liberal Democratic Party (LDP), and bagging a powerful bureaucrat may have been enough of a temptation, one that would play well in the court of public opinion given the prevailing anti-bureaucrat discourse. But craving kudos, and desperate for conviction, the prosecutor tampered with evidence and manipulated testimony. When these transgressions came to light amid signs of a concerted cover-up, suddenly the procuracy found itself in the dock, accused of malfeasance and betraying the public trust. Muraki may have been a convenient target, but she was an even better victim, the picture of rectitude, a mother and dedicated civil servant who refused to wilt under the third degree.

Muraki's trial began in January 2010 and the prosecution's case unraveled immediately after the star witness, Kamimura Tsutomu, her subordinate at the ministry, retracted his statement implicating her. He went on to charge that he had been pressured by the prosecutor to implicate her. Under these circumstances, the judge refused to accept his

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statement as evidence and rejected many other incriminating depositions, stating that there was a high probability that witnesses had been coerced. And, since the prosecution had failed to get Muraki to confess even after detaining for 163 days, on September 10, 2010, the court acquitted Muraki and left the prosecutors with a very visible black eye.

The evidence tampering came to light when Maeda Tsunehiko, the "ace" prosecutor in the case, admitted to a colleague in early 2010 on the eve of the trial that he had altered a computer floppy disk that had been confiscated as evidence. He changed the dates on a document saved on the disk in order to fit the prosecution's scenario regarding allegations that Muraki had illegally extended discount postal benefits to an organization ineligible for such benefits.

The falsification of data and attempts to cover-up this egregious misconduct first came to light in the Asahi Shimbun on September 21st, 2010, prompting Maeda's arrest by the Supreme Public Prosecutor's Office. Subsequently his supervisors were also arrested on suspicion of conspiring to cover up the tampering. Maeda's attempt to frame Muraki alarmed the public and raised questions about the essential fairness of the justice system. Prosecutor misconduct is not only a problem in Japan, but deferential attitudes towards authority draw on a faith in public servants that has been shaken to the core.[32] The arrest of his supervisors and allegations that they pressured him to convict Muraki and then covered-up his misdeeds, reinforce negative public attitudes towards the prosecutors.

Reap What You Sow

At the end of 2010 the Supreme Public Prosecutor's Office (SPPO) tried to draw a line under the case, issuing a report chastising overzealous prosecutors, calling for greater oversight of "special units" implicated in the case, and apologizing for the abuses. Responding to the growing clamor for full videotaping of all interrogations of suspects and witnesses, SPPO promised to issue guidelines for recording interrogations conducted by the special units, and said that they will be placed under tighter supervision. Special units are teams of prosecutors charged with investigating major crimes who do not regularly rotate their duties as is common practice among other prosecutors. Such units have become a hotbed of misconduct. Why Muraki's alleged postal fraud was considered a major crime remains unexplained. SPPO also asserts lamely that it will try to reeducate prosecutors and try to change the institutional culture that prevents them from retreating in cases like Muraki's where it becomes clear that the suspect is innocent. Gohara Nobuo, a former public prosecutor who is now a professor at Meijo University in Nagoya, says that once the special investigation unit takes on a case, and,"... where an arrest has made a big impact on society — especially when the investigations go on to cover high-ranking figures, such as the incumbent bureau chief of the welfare ministry like this time — it is almost inconceivable for prosecutors to retreat."[33]

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This culture of conviction among prosecutors is powerfully satirized in I Just Didn't Do it (*Sore Demo Boku Wa Yatenai*, 2007), a nightmarish film directed by Suo Masayuki about a young man falsely accused of groping a high school girl on a commuter train. Based on a true story, the film highlights how high the odds are stacked against the accused and how defendants who insist on their innocence and vindicating themselves pay a high price. Unlike in real life, however, where the protagonist was acquitted after a five-year legal battle, in the film he is convicted. The film explores the great lengths the prosecution goes to ignore, disqualify or discredit exonerating evidence and testimony, and even manages to replace the judge after he shows signs of doubting the prosecution's case and the defendant's guilt. In the end, viewers learn that the judicial system is choreographed by prosecutors who never back down or admit a mistake while securing a conviction trumps serving justice.

The 2010 SPPO internal probe did not quell public concerns and drew a swift rebuke from the media for not going far enough. Specifically, there is growing media support for recording all interrogations of suspects in their entirety. As the *Japan Times* pointed out, "If only partial recordings are allowed, it is very likely that prosecutors will record only those parts of interrogations that are advantageous to their version of the crime scenario."[34] Countering bizarre prosecution claims that recording interrogations will prevent them from developing a trustful relationship with suspects— not much seems at risk here-—the *Japan Times* went on to argue that prosecutors should introduce a plea bargaining system and accept recording of the entire interrogation process, proposals that are anathema to the Justice Ministry. While the SPPO tried to engage in damage control, the media has called for much more drastic reforms.

At the end of January 2011, Muraki slammed the December SPPO report, saying,

> "I'm extremely dissatisfied. I was terrified by the fact that prosecutors as a team created a number of depositions that conflicted with objective facts. I was even led to wonder if I was the only person suffering from a loss of memory. Two questions came up in my mind after my trial was over -- why were depositions that falsely showed my involvement in the case created, and why did they make up a story that I masterminded the postal abuse case and uphold the storyline in the trial."[35]

She also blasted the SPPO for not interviewing her and called for full recording of all interrogations to restore faith in the system and to prevent similar abuses: "Transparency of

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questioning is necessary to secure the legitimacy of depositions. When I was being questioned, I felt as if I was fighting a boxing match between an amateur (Muraki) and a professional (prosecutor) in a ring in the absence of a referee or a corner man. " Calling for the presence of lawyers during interrogations, she adds, "It's hard to win such a match without the help of lawyers."

One would like to imagine that things could not get much worse for prosecutors, but in January, 2011 the media reported a case of a mentally impaired man who was held for ten months and induced to confess to committing arson. In this deplorable breach of ethics it turns out that even partial recording of the interrogation made it clear that prosecutors asked leading questions and stooped to prompting the suspect into admitting the crime. The thirty-minute recording prepared for presentation to a lay judge panel inadvertently highlighted prosecutors' dubious interrogation methods. The case was dropped and the man released for lack of evidence. Shamelessly taking advantage of a mentally impaired person and coaching him to confess provided further proof of need for systemic reforms, greater oversight and unedited recording of interrogations in their entirety in order to protect citizens from prosecutors run amok. Without a hint of contrition, the prosecutor admitted the interrogation was flawed, but defended the indictment.

The Unfinished Business of Judicial Reform

There is no overstating the damage that the Muraki case, in the context of so many other examples of prosecutorial excess, has done to the reputation and standing of prosecutors, and the Japanese justice system overall. The *Asahi Shimbun* described the SPPO report of Dec. 24, 2010 as,

> "…a chilling glimpse of a prosecutor setting aside his profession's most sacred duty, which is to get at the truth, and putting higher priority on his superiors' evaluation of his performance, his relations with colleagues, and his reputation within the organization. This case cannot be blamed on the prosecutors' personal qualities and abilities. It must be viewed as a manifestation of ills within the organizations traditions and culture."[36]

The editorial went on to assert that, "the prosecution authorities are grossly mistaken if they think the proposed partial video-recording of interrogations, which could be implemented in a way convenient for prosecutors, will restore public trust in their profession."

In February 2011 the SPPO issued new guidelines, announcing that audio and video recording of interrogations conducted by prosecutors in special investigative units will commence on March 18, 2011 on an experimental basis. This bid to respond to calls for greater transparency falls well short of Muraki's demands because what gets recorded is left to the discretion of the prosecutors involved in the interrogations. According to the *Mainichi Shimbun*, "The Supreme Public Prosecutors Office says that interrogations will not be taped if suspects object to recording, or if prosecutors determine that making a recording would undermine their ability to uncover the truth or protect the privacy of those involved."[37] Doubts about depositions prepared from interrogations will linger because there are no objective criteria concerning what might constitute undermining prosecutors' ability to uncover the truth. Moreover, the extent of recording is entirely up to prosecutors' judgment, an intangible quality the public has lost faith in for the very good

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reasons discussed in this paper. According to the Mainichi, the SPPO proposal on limited recording is also inadequate because it only covers suspects, not witnesses. This is problematic because, "It is not uncommon for aggressive witness interrogation to become an issue in special investigative cases."

The *Mainichi* editorial also warns,

> "… fair criminal procedures cannot be realized merely through transparency. It is crucial to collect objective evidence that does not depend on testimony. The ethics code that prohibits prosecutors from suppressing evidence that may benefit defendants is of utmost importance.… What we seek first and foremost from this trial process is a change in mentality among prosecutors. The Supreme Public Prosecutors Office has promised to advise prosecutors to proactively record interrogations, but it is meaningless if those on the job do not comply."

The introduction of a lay judge system in 2009 has implications for the prevailing "prosecution by confession" system in that non-professional judicial actors do not share the same training and common experience as do judges, prosecutors and lawyers that helps explain why judges and lawyers have been overly deferential attitudes to prosecutors. Lay judges may not be as likely to accept prosecutors assurances at face value and perhaps more likely to entertain doubts raised by defense lawyers concerning whether confessions have been voluntary and/or are reliable in the absence of corroborating evidence such as full video recordings.[38] They have the right to directly question defendants and can initiate examination of evidence. Legal professionals expect that there is likely to be more rejections of confessions, and depositions by other witnesses, because of doubts concerning voluntariness.[39] In addition, a Supreme Court decision in 2007 upheld the Tokyo High Court ruling that the prosecution must disclose all pertinent information, including police reports, to ascertain whether a confession is voluntary.[40] This move towards greater transparency supportive of "discovery" and due process is in line with larger changes in Japan involving information disclosure and transparency.[41] The logic of the lay judge system also suggests having witnesses testify in court rather than relying on affidavits that cannot be cross-examined.

Yet as revolutionary as the introduction of the new lay judge system has been, experts believe that further reforms are crucial to overcome its flaws. Wilson argues,

> "If the new lay judge system is going to achieve the pronounced objectives of transparency, public education, enhanced credibility of the criminal justice system, and reliability with respect to the preservation of rights, then Japan needs to turn its attention to several additional reforms. Namely, the lay judge system would benefit from (1) increased transparency by eliminating punitive measures against citizen judges desiring to freely speak about the trial proceedings or deliberation process once the trial is complete; (2) improved access to the interrogation of detained suspects and defendants; and (3) limited victim participation in trials until a post-verdict phase in the proceedings."[42]

Wilson goes on to warn,

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> "Unless these steps are taken, not only will the lay judge system fail to attain its full potential, but Japanese criminal justice will remain shrouded in secretive doubt and the rights of the accused will continue to be endangered. Japan should take these specific measures in tandem with its scheduled review of the lay judge system in 2012, if not before."[43]

The immense resources expended to introduce this new system are justified in terms of promoting public understanding of the judicial system and enhancing public trust. The consequent media scrutiny has in some ways helped achieve these goals, but opening the door to such a significant reform has also generated interest in other problems in the judicial system.

The lay judge system is a step towards an adversarial system that is inconsistent, in key respects, with the existing inquisitorial system. For example, defense counsel now has greater incentive to advise clients to not cooperate with prosecutors, a standard procedure in an adversarial system that will make it more difficult for interrogators to extract confessions.

More than 90% of suspects in Japan confess, making it possible to rely on them to make prosecutors' cases, but if there is an increase in the number of accused who refuse to confess, the prosecution is in trouble.[44] The solution lies not in tougher interrogations, but in fairer investigations.

The problems of interrogation are tied up with the right of police to detain and grill suspects for periods of 23 days with no restrictions on length of interrogation. As Wilson points out, "Interrogators take full advantage of the lack of restrictions."[45] In addition, during detention suspects' access to counsel is limited, at the discretion of prosecutors and in practice, state-appointed counsel is not provided to indigent detainees. To the extent that confessions are dethroned as the "king of evidence", prosecutors and police will need to reconsider their methods and investigative techniques in line with changing norms and values.

Charting the reform agenda remains a huge challenge and suggests the need for political parties to play a leadership role. To a limited extent they have. Responding to public pressures, and seeking electoral support, politicians have acted resolutely on victim's rights, passing the Crime Victim Act of 2004 and amending the CCP in 2007 to allow victims and/or relatives to participate in criminal trials. The court has broad discretion about how victims participate in the proceedings and experts are concerned that their presence may bias proceedings. As Wilson argues, the court can,

> "permit the victim to sit nearby the prosecution at trial, question witnesses to challenge the credibility of statements related to mitigating circumstances, question the defendant, and state opinions about matters of fact or law after the prosecutor's closing statement. In essence, the victim's participation does not relate to fact-finding or evidence, but rather it relates to personal opinions and mitigating circumstances. Notably, this active participation occurs before the tribunal reaches its determination of guilt or innocence."[46]

Wilson suggests that the verdict and sentencing phases should be separated and that victims should only be allowed to participate in the sentencing phase of the trial to avoid prejudicing verdicts. In his view,

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> "...victims should maintain the ability to ask questions or express opinions if these activities are directed at convicted defendants, and not the accused, during the post-verdict phase of the trial. It is important that subjective statements by victims do not interfere with the objective determination of innocence or guilt. The presumption of innocence and rights afforded to the accused should not be sacrificed. Rather, victim participation should focus on a convicted defendant, and not on the accused."[47]

The victims' movement gained momentum in the 1990s due to public concerns about rising levels of crime and media coverage of some especially heinous crimes. Victims' desire to confront perpetrators, receive compensation and exact more punitive sentencing resonated in the halls of power.[48] Politicians from the LDP and DPJ jumped on this bandwagon of penal populism, joining counterparts in other nations who find that acting tough on crime plays well at the polls. This penal populism, driven by public anxiety about public security, constitutes a powerful countervailing wind to advocates of greater transparency and protection of defendants' rights. In this climate of fear, stoked by the police and sensationalist media reporting, people might wonder why police and prosecutors have to fight crime with one-armed tied behind their back.

This countervailing wind may explain why politicians have not acted to promote full recording of interrogations or presence of defense counsel during interrogations despite strong public and media support. While campaigning during the Lower House elections in 2009, the DPJ pledged to implement full recording of interrogations, but as with many of its promises, this one has dropped by the wayside. Enhancing transparency by mandating full recording of interrogations would remove doubts about interrogation procedures and whether a confession is accurate and voluntary, restoring faith in the "king of evidence". Full recording of interrogations also enjoys considerable public support. The Japan Federation of Bar Associations submitted petitions with 1.1 million signatures to the Diet in 2009 in support of this reform.[49] Especially in trials where defendants recant their confessions, a full recording would make it relatively easy to determine if they have been coerced. Requiring the presence of defense counsel during interrogations would further erase doubts about interrogation methods and coercion that have tarnished the reputation of Japan's procuracy. Given Japan's political gridlock, and the absence of political will on criminal justice reform in the Diet, however, prospects for progress currently seem limited.

Since penal populism and transparency are both popular with the public, one can speculate that the lack of support for the latter in judicial and police circles may explain the different outcomes. In addition, the crime victims' movement was well organized, assertive in policymaking and effectively mobilized support by drawing on sympathy for bereaved families.[50]

As Miyazawa notes, police reports and media coverage have increased the public's sense that security has worsened in recent years.[51] He reports a 2004 survey showing that 62% of respondents believed public security had deteriorated even though crime had actually declined in that year. Other surveys he cites also show growing public anxiety about public security that are similarly out of sync with actual crime. He attributes this cognitive dissonance to the concept of public security (*taikan chian*), "...which was invented by police to seek better performance internally and to seek more resources externally, [which] has

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been adopted by the public and incorporated into general views about social reality."[52] In this manufactured climate of fear, constraints on the police can be depicted as part of the problem.

Curiously, given the central role of police in the detention and interrogation process where suspects are vulnerable to the abuses described above, this institution has remained off the judicial reform radar screen. The public may be worried about defendant's rights, and support transparency, but such concerns might conceivably be trumped by anxieties regarding personal safety and the menace that crime poses to society. In Japan's aging society, the elderly are anxious about many issues, but certainly threats to personal safety must rank high. The media is not above sensational coverage of crimes targeting the elderly and politicians, knowing that voting rates of senior citizens are double those of younger voters, calculate that cracking down on crime is a winning proposition. Meanwhile, the police keep citizens scared by hyping threats to public security, but also reassured that criminals are getting their due.

Until the police are also influenced by the trend towards greater transparency and accountability central to the judicial reform process, however, it will be difficult to improve protection of defendant's rights. As Johnson argues,

> "In Japan, criminal justice is even more a matter of `justice without trial` than it is in the United States. Indeed, the vast majority of trials in Japan are little more than `rituals` for `ratifying` police and prosecutor decisions. The `real substance of criminal procedure` and the `truly distinctive character` of Japan`s criminal process lie in the inquisitorial investigative stages that are dominated by the police."[53]

Johnson also notes that police performance has been suspect and points to declining and low clearance rates, pervasive corruption, and frequent resort to brutality and deception in interrogation of suspects. Since police play a crucial role in confessions, and confessions are key to Japan's high conviction rate, this latter assertion is particularly germane to the problems detailed here. He states, "Much of the most disturbing police behavior stems from two connected facts: the system`s overwhelming dependence on admissions of guilt, and the absence of checks on police power in the interrogation room."[54] It would seem obvious that reducing the reliance on confessions would mitigate the problems, but Johnson makes a convincing case that this is easier said than done. Johnson suggests that the solution is full recording of all interrogations, pointing out with eloquent brevity that, "There is no good reason to oppose taping."[55]

The police, however, are unaccountable and seldom penalized for wrongdoing even in egregious cases much less in day-to-day transgressions. Rather than restraining the police, judicial authorities are inclined to legitimize their behavior such that they are, practically speaking, above the law to a remarkable extent. While a lack of transparency is a general problem affecting the public image of the judicial system, the police remain a black box, a power unto themselves largely free from scrutiny. The "success" of the police in terms of judicial reform has been the ability to slip under the radar screen of judicial reform discourse. Ramping up public fear has been an effective tactic to remain untethered and shift attention away from imposing constraints on police behavior that would improve transparency and enhance accountability. One need not be a fan of the TV series CSI to understand the value of

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establishing state of the art forensic laboratories with real independence from investigating authorities. Moreover, continued reliance on blunt methods will not be effective in dealing with the proliferation of cybercrime and increasingly sophisticated financial scams, often involving organized crime. The police need to move on from the 3rd degree and join the 21st century.

The cascade of appalling revelations about prosecutorial abuses serve as a poignant reminder that in far too many cases the balance between serving justice and respecting suspects' human and constitutional rights has gone awry. Greater transparency and accountability are key to restoring the Japanese prosecutors' tarnished reputation and improving the judicial system.

As in other countries, Japanese prosecutors are largely immune from accountability. To regain public trust the judiciary no longer has the luxury of remaining heedless to systemic breaches of trust as in the Muraki case. The SPPO seems to lack a sense of urgency, proposing fine-tuning the system rather than contemplating, much less implementing, significant reforms. This grudging, minimalist approach has not passed muster with the media or indeed Ms. Muraki, ensuring continued criticism and further erosion of public trust in the workings of the courts. In the court of public opinion, the procuracy will remain guilty and undeserving of trust until it goes well beyond damage control.

Restoring faith in confessions can be achieved by instituting video recording of entire interrogations. This would "solve" the problem of determining whether confessions are accurate and if they have been coerced, but this is not seen as a viable solution by prosecutors because their powers and methods would be subject to constraints and oversight that would, in their view, jeopardize the effectiveness of their investigations. Instead, the Ministry of Justice has introduced partial videotaping that does nothing to address doubts about interrogation methods. The only taping currently allowed is at the time the accused signs the confessions drawn up by the prosecution when they are given an opportunity to confirm that their confession is voluntary and accurate. This inadequate gesture does little to dispel concerns that the prosecutors indeed have something to hide. The lack of transparency has sullied the credibility of prosecutors and undermined trust in them.

Safeguarding the constitutional rights of the accused and adhering to the CCP is trumped by the imperative of securing confessions and maintaining the 99% conviction rate. This conviction rate has become a talismanic symbol in Japan that crime does not pay and those who step out of line will get what's coming to them.

Conclusion

In some ways the outer moat of the judicial system has been breached by the lay judge system, but the inner moats and ramparts remain heavily defended and shrouded in secrecy. The resistance to full recording of interrogations is emblematic of judicial resistance to transparency and inadequate concern for defendants' rights. For many legal experts and other observers, fastidious concern over defendants' rights constitutes a frontier fence between fair and unfair, and in some key respects Japan's justice system lies on the other side. But it is well to recall Daniel Foote's point that the abuses detailed above result from ignoring various protections and rights enshrined in Japan's Constitution and Criminal Code of Procedure, a consequence of judges' abnegation of robust supervision over prosecutors. The SPPO has proposed reeducating prosecutors and partial recording of interrogations. This is inadequate. In recalibrating the scales of justice in Japan, and regaining public trust in the judicial system,

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judges also must vigorously embrace their oversight role and be held accountable for failing to do so. It is equally crucial that police become more accountable while instituting comprehensive videotaping of interrogations in the presence of defense counsel and ending the system of endless detention. This ambitious reform agenda will remain elusive, however, as long as politicians remain AWOL. Alas there are few signs of hope in the Diet where debate was recently dismissed by the media as little more than flatulent outbursts.

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Notes

[1] These points are made by Daniel Foote, "Policymaking by the Japanese Judiciary in the Criminal Justice Field", Paper presented at the General Symposium: Who is the Leading Actor in Criminal Justice? Judges, Prosecutors or Participating Citizens. 2010.

[2] David Johnson, *The Japanese Way of Justice* (Oxford, 2002),

[3] Matthew Wilson, "Japan's New Criminal Jury Trial System: In Need of More Transparency, More Access, and More Time", *Fordham International Law Journal*, 33: 487 (2010), p. 7. Retrieved from LexisNexis Feb. 28, 2011.

[4] Ibid., 6.

[5] Ibid., p. 16.

[6] This 23 day detention breaks down as follows: within twenty-four hours of detention prosecutors must ask a judge to approve up to ten days of additional detention beyond the initial seventy-two hours that any suspect may be detained at the police or prosecutor's discretion, and this detention may be extended for an additional ten days.

[7] Ingram Weber, "The New Japanese Jury System: Empowering the Public, Preserving Continental Justice," *East Asia Law Review* (125) 2009. p. 6. Retrieved from LexisNexis 2/28/11.

[8] Arne Soldwedell, "Testing Japan's Convictions: The Lay Judge System and the Rights of Criminal Defendants," *Vanderbilt Journal of Transnational Law*, 41, 1417, (November, 2008), p. 4. Retrieved from LexisNexis 2/28/11.

[9] Foote, op.cit., 24.

[10] Weber, op.cit., p.8. The lay judge system that includes citizen judges and professional judges was introduced in Japan in 2009, chiefly as a way for the judiciary to regain public trust and respond to social changes in Japan. It is important to bear in mind that lay judges participate only in the first, lower-court trials involving crimes for which the penalty upon conviction is death, life imprisonment or imprisonment for a fixed term, or crimes in which the perpetrators' deliberate acts cause someone's death, including murder, acts of arson and dangerous driving. For a discussion of goals and consequences of the lay judge system see, Zachary Corey and Valerie Hans, " Japan's New Lay Judge System: Deliberative Democracy in Action." *Asian-Pacific Law and Policy*, 12:72, (2010) 1-21.

[11] Wilson, op.cit., p. 10.

[12] ibid., p. 10.

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[13] Foote, op.cit., p.16.

[14] Johnson, op.cit., p 7.

[15] Weber, op.cit., p. 6.

[16] Judges also face pressure to convict. Weber, op.cit., p 6.

[17] Ibid., p. 7.

[18] "Prosecutor offices flawed: experts," *Japan Times*, Oct. 2, 2010. Link.

[19] Johnson, op.cit., chp 1, pp. 21-49.

[20] ibid., p. 48.

[21] According to media reports, the use of wiretapping has expanded considerably since then. In 2010, 47 people were arrested based on evidence gathered from eavesdropping and the number of warrants issued by courts, 34, was the highest since the law came into effect. Cases in 2010 included drug smuggling, a gangland murder and gun possession. Under the law, wiretapping is limited to illegal guns, gun possession, human smuggling and gang-related murder, not typical white collar crimes.

[22] ibid., 49.

[23] See Jeff Kingston, *Japan's Quiet Transformation* (Routlege, 2004), pp. 56-65.

[24] Quotes regarding the Hakamada case are drawn from here and here.

[25] Ezoe Hiromasa, *Where is the Justice? Media Attacks, Prosecutorial Abuse, and My 13 Years in Japanese Court*. Kodansha International: Tokyo, 2010.

[26] For discussion of why corruption cases are difficult to prosecute with reference to the Recruit case see, David T. Johnson Why the Wicked Sleep: The Prosecution of Political Corruption in Postwar Japan, *JPRI Working Paper* No. 34: June 1997.

[27] This and subsequent Ezoe quotes draw on author interview with Ezoe August 27,2010.

[28] Sakagami Ryo, *Bungei Shunju*, October 2010, pp. 346-61.

[29] Takai Yasayuki, Horie's lawyer and a former prosecutor, argued that Horie was framed and that the evidence was weak. According to him traditional customs and expectations often defy true justice. *Japan Times*, Sept., 8, 2006.

[30] Takafumi Horie, *Tetei Kosen* (Total Resistance) Shueisha, 2009.

[31] *Online Gendai Business* (8/19/2010) Tahara Soichiro's interview of Horie. Tahara, a prominent journalist, wrote a book on Ezoe's Recruit scandal (Seigino Wana, *Justice Trap*: Shogakukan, 2007), in which he argues Ezoe was unjustly prosecuted.

[32] David Johnson, "US is No Role Model for Prosecutor Reform", *Japan Times*, 10/20/10.

[33] *Japan Times* 10/2/2010. Link.

[34] Editorial, *Japan Times*, 1/3/2011, p.12.

[35] "Official acquitted over postal scandal calls for greater investigation transparency" *Mainichi Daily News*, January 28, 2011. Link.

[36] Editorial, *Asahi Shimbun*, 12/25/2010.

[37] "Prosecutors' move toward interrogation transparency a small first step", link.

[38] In general, six lay judges adjudicate cases and determine sentences working with three professional judges. For details on the lay judge system see David Johnson, "Early Returns from Japan's New Criminal Trials," *The Asia-Pacific Journal*, Vol 36-3-09. September 7, 2009.

[39] See Weber, op.cit., 12-16; Foote, op.cit., p. 35.

[40] Foote, p. 36.

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[41] On transparency see Kingston, op. cit., 42-69 and 85-94. On due process see, Noriho Urabe, "Rule of Law and Due Process: A Comparative View of the United States and Japan", *Law and Contemporary Problems*, vol. 53, no. 1 (Winter 1990), 61-72.

[42] Wilson, op.cit., 2.

[43] ibid., 2.

[44] On confession rate see Weber, op.cit., p.7.

[45] Ibid. p.6.

[46] ibid., 11.

[47] ibid., 25.

[48] Setsuo Miyazawa, The Politics of Increasing Punitiveness and the Rising Populism in Japanese Criminal Justice Policy", *Punishment and Society*, vol. 10, (1) 2008, 47-77.

[49] ibid., p.20. See pp.18-23 for a lengthy discussion of the various merits of full electronic recording of interrogations and the positive experience of other countries.

[50] Ibid., pp. 67-68.

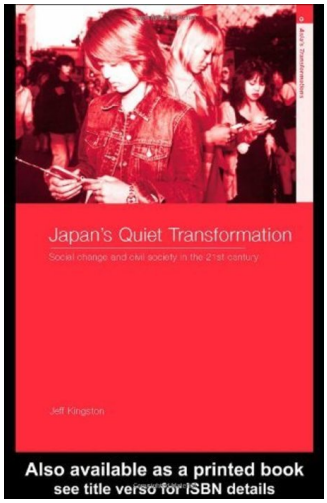
[51] Ibid., p. 70.

[52] ibid., p.70.

[53] David Johnson, Justice System Reform: Where are the Police and Why Does it Matter?, p.4. Visited March 1, 2011.

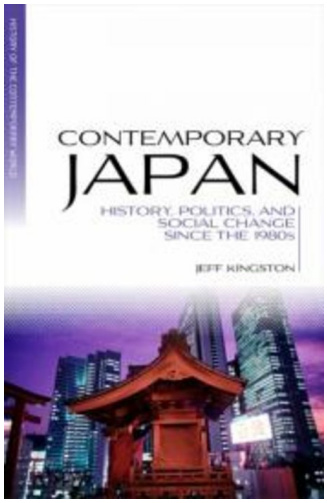
[54] ibid., p.8.

[55] ibid., p.8.



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