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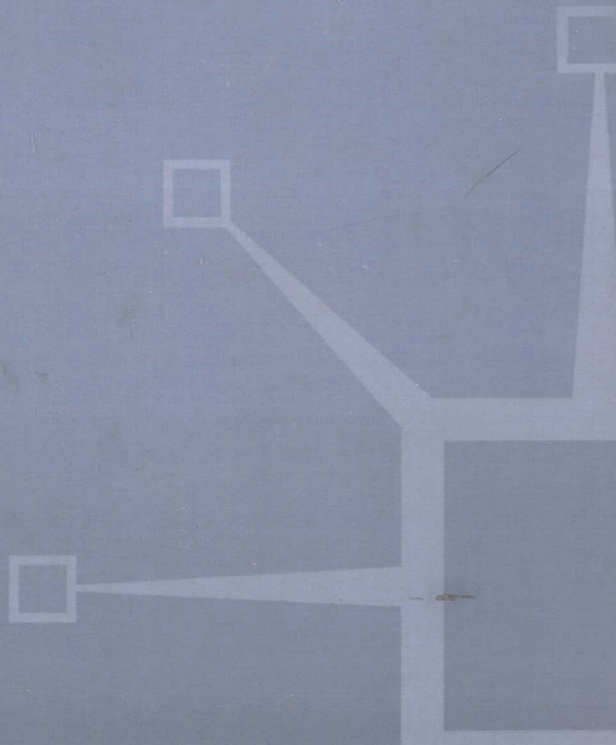
Malcolm M. Feeley and
Setsuo Miyazawa

THE JAPANESE ADVERSARY SYSTEM IN CONTEXT

Controversies and Comparisons



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To the memory of
our friend and colleague,
Sho Sato

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Notes on the Contributors

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Preface

Like religious institutions, legal systems are usually repositories of tradition. At least in long-established nation-states, today's legal systems are likely to look a lot like those of the last century or the century before; they remain firmly anchored in tradition. If an English or American or German lawyer from the nineteenth century suddenly reappeared in a twenty-first-century courtroom in his own country, he would certainly find much that was bewildering. But after a period of acclimation, the continuities would become apparent. Many features of the process would be familiar.

However, if a Japanese lawyer were to reappear, what he would find would be much less familiar. Since the mid-nineteenth century, the Japanese legal system has undergone two transformations. The Meiji Restoration of 1868 set in motion a period of radical transformation as the newly established government embarked on a crash course to modernize and westernize Japan. All facets of Japanese society were subject to rethinking and change. With regard to law, the new Japanese government turned primarily to Europe (and not to the common-law countries) for inspiration. It embraced Continental jurisprudence, and in so doing brushed aside the Tokugawa legal system. Throughout Japan, for instance, Victorian-era red brick courthouses were built in the early twentieth century that appeared to have been transplanted from England. In addition, the prewar period of military domination of the government imposed its own distinctive concerns on many of these institutions and harnessed them to its own purposes, but ultimately it did not effect a deep transformation of the nature and structure of the Japanese legal system. Postwar American occupation, however, did effect significant changes. What has come to be known as MacArthur's Constitution set about to transform yet again the Japanese legal system. American Occupation forces dismantled emergency provisions adopted by the prewar and wartime military regime. They insisted upon an American-style constitution, complete with an expansive Bill of Rights, and superimposed on this system an Anglo-American style of adversarial structure. While the substantive criminal law remained virtually unchanged, right to counsel, the right against self-incrimination, and the aggressiveness obligatory in the adversarial system all cut against the grain of values implicit in the prewar Japanese legal system.

This series of changes presents enormous challenges for criminal justice scholars. Even attempts to describe practices in Japan are complicated, since a cross-cultural description must not only address the observed reality but also make explicit underlying societal ideals not necessarily shared or understood by potential consumers of the study. And making comparative analyses of Japan with other systems is even more daunting. Should Japanese practice be understood against a background of traditional Japanese culture (whatever this may be)? How should we account for the influences of the original transplanted Continental code? What have been the effects of the more recent embrace of American-style adversarial and constitutional ideals? Or are current practices a consequence of the long-dominant single-party system that unwittingly permits strong bureaucracies to impose their visions of social control upon the population? There is a case to be made for each, and indeed there is an impressive tradition of scholarship on the Japanese legal system that supports each of these perspectives. The dean of sociology of law in contemporary Japan was the late Takeyoshi Kawashima (1963, 1974). In his writings about Japanese civil law, he argued that where Japanese practices differed greatly from those in the West, one could identify the effects of the traditional Japanese culture, which discourages application of universalistic norms of clearly defined rights and duties. This theme has been echoed in the work of criminologist John Braithwaite (1989), who has suggested that Japan's low crime rate, heavy reliance on confessions, and apparent success at rehabilitation are a consequence of its homogeneous population, its "shame culture," and its long-standing practice of extracting expressions of remorse from wrongdoers. David H. Bayley (1976, 1991) and Daniel H. Foote (1992) have presented similar arguments.

Others, including the eminent comparativist David Nelken, have suggested that many of what appear to be distinct features of traditional Japanese culture may in fact reflect features of the inquisitorial system transplanted from Germany to Japan in the late nineteenth century. Still others seek to account for practices (or avoidance of practices) in terms of the failure of Japanese authority to embrace constitutional rights and adversarial norms formally ensconced in the Constitution – that is, in terms of a residual resistance even at the highest levels to internalizing true respect for the rule of law (Upham, 1987).

Some scholars of Japan offer decidedly less culture-specific explanations. Employing rational choice models which assume a sort of universal *homo economus,* Mark Ramseyer (1994; Ramseyer and Rasmusen, 1997)

argues that participants in the Japanese legal process are motivated by the same objectives as are citizens in other countries – the desire to minimize costs and maximize benefits – and that their behavior can be accounted for accordingly. For example, in addressing the question of extremely low acquittal rates in criminal cases, Ramseyer and his colleague (Ramseyer and Rasmusen, 2001) present statistical evidence of relationships between judicial decisions and promotions and relocations of judges. Similarly, in a recent book exploring public interest litigation in Japan, Eric Feldman (2000) argues that the pursuit of rights through litigation in Japan and the expectations of the litigants are remarkably similar to what one might find in allegedly hyperlitigious America, despite important structural differences between the two cultures.

What becomes clear is that there is an array of coherent and persuasive perspectives ready to play counterpoint to any given context in which the Japanese legal process might be placed. If one embraces a culture-centric perspective, a critic may claim, "No, the key to the problem is the influence of the inquisitorial transplant." If one adopts this perspective, another critical voice may retort, "Perhaps so, but in fact practices are anchored in traditional norms that preceded this transplantation by centuries." And so forth. Ultimately we might conclude that there is validity to be found in each of these approaches – that each one contributes a true puzzle-piece to a complex whole.

Thus when we suggest, as we have done in the title of the volume, that we are presenting studies that explore *contexts, controversies and comparisons*, we do not mean that we have found a single most powerful perspective. Rather, the essays herein examine facets of the Japanese criminal justice system from multiple perspectives and contexts. If anything, our contributors reveal methodological challenges rather than suggest solutions. This volume offers a wide range of insightful observations and assessments by a stellar grouping of scholars and legal practitioners.

Nine of the 14 essays are written by leading Japanese criminal justice scholars, prominent Japanese criminal defense lawyers, or internationally recognized American experts on the Japanese criminal process. Indeed, the contributors constitute a veritable who's who of experts in the field. Setsuo Miyazawa, formerly a member of the Law Faculty of Kobe University and now at Waseda University in Tokyo, has conducted empirical research on the behavior of Japanese police detectives; he has published widely in Japan, the United States and Europe on police and criminal justice in Japan. Daniel Foote is the preeminent American scholar on Japanese criminal law and is the author of several

major studies of the Japanese criminal process. During the period this book was in production, he moved from his longtime home in the School of Law at the University of Washington to Tokyo, where he assumed the chair in the sociology of law at the University of Tokyo Faculty of Law. Masayuki Murayama of Chiba University has conducted empirical research on Japanese patrol officers, and has written widely on the American, English, German, and Japanese criminal justice systems. One of his central interests is the availability of defense counsel to poor people accused of criminal offenses. Satoru Shinomiya practices law in Chiba. He has been a leading proponent of the idea to reintroduce jury trials in Japan, and recently became the head of the Unit of Research on Judicial Reform of the Japan Federation of Bar Associations. Takashi Takano, who received an LLM from Southern Methodist University in Texas and practices in Saitama, is a prominent criminal defense lawyer in Japan. He has been leading the Miranda Society, a group of lawyers advocating for extension of the right to counsel and the right against self-incrimination. David T. Johnson, an assistant professor at the University of Hawaii, has studied in Japan, and received his PhD in the Jurisprudence and Social Policy Program at Berkeley in 1996. He has produced a groundbreaking observational study of Japanese prosecutors, and is the author of an award-winning article on prosecutorial decision-making in Japan. His book on Japanese prosecutors will appear in 2002. Masahito Inouye is professor of criminal procedure at the University of Tokyo. He is the author of numerous books and articles on Japanese law, including a book comparing the criminal process in Japan and the United States. He has also served on numerous government blue-ribbon committees, most recently for two years on the Judicial Reform Council, which presented final proposals to the Prime Minister on June 12 of this year. On the Council, he was particularly involved in the reform of professional legal education and lay participation in criminal trials. Toshikuni Murai, formerly of Hitotsubashi University in Tokyo and now at Ryukoku University in Kyoto, has written extensively on constitutional criminal procedure and juvenile justice in Japan. He is a former dean of Hitotsubashi University Law Faculty and the current President of the Japanese Association of Criminal Law. Nobuyoshi Araki teaches criminal procedure and criminal justice policies at Rikkyo University in Tokyo. He has studied in both the United States and Japan, and has written widely on both the Japanese and American criminal justice and juvenile justice systems. He is the current President of the Japanese Association of Sociological Criminology. Although most of these

authors have published other pieces on the Japanese criminal process in English, and most are very well-known to Western scholars of Japanese law, no other single volume in English contains such wealth of analysis of the Japanese criminal justice system.

The remaining contributors to this volume are also well-known scholars of comparative law and politics or specialists on specific issues of the American criminal justice system. Malcolm Feeley, Professor of Law at Berkeley, has published several books on the American criminal process and has lectured extensively in various countries, including Japan. Robert Kagan is Professor of Political Science and Law at Berkeley, and is also the Director of that university's Center for the Study of Law and Society. He is the author of several books on the American legal system, including the recently published volume, *Adversarial Legalism* (2001). Roger Hanson has been Senior Research Associate at the National Center for State Courts, where he and his two colleagues, Brian J. Ostrom and Ann M. Jones, have conducted a series of studies of the quality of counsel offered by various types of public defense systems (in contrast to private counsel) in the United States. Richard Leo received his JD and PhD from Berkeley in the mid-1990s, and is currently Associate Professor in the Crime, Law and Society Program at the University of California at Irvine. He has received several national awards for his research on the consequences of police interrogation. Gordon Van Kessel served for many years as a prosecutor in San Francisco before changing careers to teach criminal law and procedure at the University of California's Hastings School of Law in San Francisco. He has written extensively on criminal law and procedure and comparative law. Much of his work traces changes that he believes will lead to a convergence of the inquisitorial and adversarial systems.

These American scholars offer insights from an Anglo-American perspective; in so doing they offer a valuable perspective from which to view some Japanese practices. Interestingly, the Japanese contributors seem to be explicating, although from different perspectives, various Japanese issues for an English-speaking audience. In contrast, the Anglo-American contributors seem to be writing for their Japanese colleagues, offering various ways to understand similarities and differences between these two systems, and at times cautioning against making unwarranted assumptions about Anglo-American practices. Taken together, these contributions offer a host of perspectives and identify a number of contexts in which to describe, assess, and compare the Japanese criminal justice system.

Although few of the pieces offer sustained methodological discussions of the theory and method of comparative analysis, they are rich in establishing context and offering substantive detail. In a sense many of the contributions offer information that could be the raw material for comparative sociolegal analysis, material that is deeper and more detailed than most other presentations of the Japanese criminal process available in English. Thus this volume should become an invaluable resource for both the interested student of the Japanese criminal process and the dedicated specialist in comparative criminal law and politics.

This volume is decidedly not a book that presents a single integrated framework for comparative analysis. Nor does it purport to be a comprehensive analysis of all major issues in the Japanese criminal process. But it contains a collection of spirited and insightful essays presented by leading scholars and practitioners in Japan who are active and articulate participants in the ongoing and at times raucous debates about the nature and function of the Japanese criminal justice system, as well as a set of observations about the American system for purposes of comparative analysis, that begin to outline bases for sustained comparative study. Indeed, we believe these essays constitute a unique introductory anthology even for scholars outside the field of Japanese legal studies, since many of them crystallize important, contentious, and ongoing policy debates about the nature and future of the criminal justice system in Japan.

This volume had its origins in a conference sponsored by the Sho Sato Japan Fund of the Boalt Hall School of Law at the University of California at Berkeley in 1998. The Fund was established to honor the memory of the late Sho Sato, Professor of Law at Berkeley and the first Japanese-American to hold a professorship at a major American law school. Periodically the Fund sponsors conferences in Berkeley on issues related to Japanese and American legal issues. The contributions to this volume represent the revised, edited, and at times much-changed, versions of the original papers from the 1998 Sho Sato Conference. One note in this vein. The editors standardized the entire volume by following the Western custom of placing first names first, rather than the Japanese custom of last names first. The editors are indebted to the diligence, good nature, and patience of the conference participants and contributors.

The original conference and this volume could not have been completed without the help of a large group of wonderful colleagues, indeed too many to list here. But among those we feel obliged to single out are: Mas Sato, for her unflagging support for the Fund which was

established to honor the work of her husband, the late Sho Sato; Professor Harry Scheiber, Director of the Sho Sato Fund at Boalt and the then Associate Dean and Chair of the Jurisprudence and Social Policy PhD Program at Boalt; Professor Robert Kagan, Director of the Center for the Study of Law and Society at Berkeley which cosponsored the Conference; and Professor Herma Hill Kay, then Dean of Boalt Hall, which hosted the conference. As always with Center-sponsored activities, Margo Rodriguez and Rod Watanabe did a marvelous job coordinating complicated travel plans, arranging for housing and expense reimbursements for the participants, and taking care of other countless details in setting up the conference itself. The production of the book was possible only because of e-mail. At times the editors and contributors were in different locations spread over several countries on three continents. The lynchpin which held this enterprise together was Kay Levine, Boalt Hall JD 1993, JSP PhD Candidate, and editor extraordinaire. She kept track of questions and queries, maintained up-to-date files, and above all served as an unerring editor to a group which collectively was in dire need of good editing. Whatever success the volume enjoys owes much to her dedicated work, and whatever defects it contains should be attributed to the editors who no doubt failed to heed enough of her good advice. Many thanks also to Kiara Jordan for her good spirit in typing and retyping some of the essays, as well as her keen editorial contributions, and to Takeshi Akiba for important editorial help at the last minute.

References

Bayley, D. (1976 and 1991) *Forces of Order* (Berkeley: University of California Press).

Braithwaite, J. (1989) *Crime, Shame and Reintegration* (Cambridge: Cambridge University Press).

Feldman, E. (2000) *The Ritual of Rights in Japan: Law, Society, and Health Policy* (New York: Cambridge University Press).

Foote, D. (1992) "The Benevolent Paternalism of Japanese Criminal Justice," *California Law Review*, Vol. 80, p. 317.

Kawashima, T. (1963) "Dispute Resolution in Contemporary Japan," in A.T. von Mehren (ed.), *Law in Japan: the Legal Order in a Changing Society* (Cambridge: Harvard University Press).

Kawashima, T. (1974) "The Legal Consciousness of Contract in Japan," *Law in Japan*, Vol. 7, p. 1.

Ramseyer, M. (1994) "The Puzzling (In)Dependence of Courts: a Comparative Approach," *Journal of Legal Studies*, Vol. 23 (June), p. 721.

Ramseyer, M. and E. Rasmusen (1997) "Judicial Independence in a Civil Regime: the Evidence from Japan," *Journal of Law, Economics and Organizations*, Vol. 13, p. 259.