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Symposium on Making Sense of the Carlos Ghosn Case:
Comparative Views of Japanese Criminal Justice

A Decade of Reform in Europe and Japan

By Dimitri Vanoverbeke

Introduction

Since Carlos Ghosn's dramatic escape from Japan at the end of last year, media inside and outside Japan have been rife with criticism of Japan's criminal legal system. The "unfair" lack of attorney representation during Ghosn's interrogation as a suspect and "inhumane" pretrial detention ("hostage justice") has been the focus of criticism in, for example, France, Belgium, and the Netherlands. Japan is quite familiar with the foreign critique that criminal trials based on early interrogation will not yield a fair criminal trial. It actually has been a long-existing critique that was also the base for Ryūichi Hirano's famous assessment in 1985 that the Japanese criminal justice system was diseased.[1] Hirano's and many other's claims, combined with a public outcry against miscarriages of justice in the 1980s and a changed socio-political context in the 1990s, resulted in important reforms in Japan's judicial policy. Many of these reforms were aimed at making the criminal procedure in Japan more fair (*kōsei*).

A lot has changed since the start of the 21st century in criminal justice in Japan. One of the most important of these reforms – the lay judge system – implemented in 2009 has had repercussions on reforms at the stage of interrogations, as more interrogations are being recorded (*torishirabe no kashika*) and the suspects have now the right to consult with an attorney before indictment (*higisha kokusen bengo seido*). Much has changed but suspects still enjoy far fewer rights that in an adversarial legal system.[2]

This essay argues that the issues related to the rights of suspects with which Europe has been grappling are not that different from those in Japan. The impact of the reforms that have been implemented in Europe, moreover, also has been limited by a variety of social, legal, and historical forces.

Law reforms in Europe

Miscarriages of justice happened in Europe in the 1980s and 1990s and resulted in pressure by citizens and experts alike to reform the judicial system to ensure a fair trial. In various European countries this resulted at the beginning of the 21st century in important law reforms (Vanoverbeke 2004). But the turning point in protecting suspect rights during police interrogations – expressions such as "bombshell" and even "revolution" are used – was the so-called Salduz judgment by the European Court of Human Rights in 2008. The police interrogation stage of criminal procedure is extremely important, as most of the convictions in criminal cases are based on statements made by the suspects in the first hours of interrogation. Reflecting this importance, the Salduz judgment on November 27, 2008 stated that pursuant to Article 6 § 1 of the European Convention on Human Rights, the right to a fair trial "requires that, as a rule, access to a lawyer should be provided as from the first interrogation of a suspect by the police. … Even where compelling reasons may exceptionally justify denial of access

to a lawyer, such restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6.” One of the judges at the European Court of Human Rights asserted that the Salduz judgment led to a revolution for fair-trial rights and also that only in highly exceptional cases could the access to an attorney be limited.[3] The European Union (EU) confirmed the Salduz judgment in a directive (2013/48/EU) stipulating that member states had to bring into force the laws, regulations, and administrative provisions necessary to comply with this directive by November 27, 2016. The member states had to change their domestic laws and practices to comply with this important ruling, but they did so in very diverse and often reluctant ways consistent with their mainly inquisitorial doctrinal tradition, which had been central to the way that the suspect in interrogations was approached.

Reform in practice: the limits of change in Belgium, France and the Netherlands

In general terms, in the inquisitorial tradition that goes a long way back, a suspect in interrogation and investigation is a source for the officer who is trying to discover “the truth.” It is understood that the officer will also consider the interests of the suspect.[4] In this public interest-centered approach, the police are reluctant to include the attorney in the interrogation as they see attorneys as working only in the interests of the accused, i.e., against the interests of the investigation.[5] This approach is certainly different from the adversarial tradition and can also shed light on the reluctance of Japanese officers to allow the attorney’s presence in interrogations.

In many European countries, interrogating officers still talk suspects into refraining from demanding the presence of an attorney at the early stage of interrogations.

Departing from past practice after the Salduz judgment posed challenges for Belgium, France, and the Netherlands, among other countries in Europe. Some adjustments were made to laws and practices, but basically attorneys were still kept at bay from suspects at the early stages of interrogations, or if they could be present, it was only in a passive way. Here are some examples. In the words of a Belgian suspect who challenged this passivity in the Belgian Supreme Court (*Cour de Cassation*) in 2012, the attending attorneys were as useless as a “vase of flowers” (a case that was decided by the court on January 24, 2012). In France the enhanced rights of the attorneys during interrogation were not applied to suspects in *audition libre*, i.e. those submitting to voluntary interrogations, resulting in a post-Salduz surge in the number of interrogations on a voluntary base.[6] In many European countries, interrogating officers still talk suspects into refraining from demanding the presence of an attorney at the early stage of interrogations by “telling them that it would delay their release; or that they did not need a lawyer if they had nothing to hide; or by failing to inform them that legal advice was free at the point of delivery.”[7]

In the Netherlands, since March 2017 attorneys can be present during police interrogations[8] but their ability to participate actively remains limited. Adverse results of the reforms can also be noted, such as an increase in the maximum duration of police custody from six to nine hours. In Belgium, the Law Related to the Rights of People Being Interrogated entered into force on November 27, 2016. According to this law, the attorney can play a more proactive role such as requesting some investigative measures, asking to explain questions posed during the interrogation, and making remarks concerning

the investigation and the interrogation. But the attorney is not allowed to disturb the interrogation or to reply on behalf of the client. The attorney who was sitting behind the client can now sit next to him and talk with him during the interrogation. However, the officer in charge of the interrogation is still able to define what is meant by disturbing the interrogation.

The effects of law reforms are also limited by a lack of funding to hire more personnel or organize adequate training. The workload of attorneys is increasing so much that it is reported they often provide insufficient, poor-quality advice. Not only is it important to provide a legal framework for the reforms, it is also necessary that political support continues providing the necessary means to make the reforms long-lasting, effective, and understood by all stakeholders (especially attorneys, police officers, and prosecutors). Only by doing this will professional attitudes and professional culture gradually change so as to make the law reforms take root.

Change is hard: Complexity, context, and the long durée in Japan and Europe

Fair interrogations were a major weakness in the criminal procedure prior to the Salduz judgment in Europe. They still are mostly left unattended in Japan and are an important weakness in criminal justice. However, in Europe as well as in Japan there are important signs that reforms do gradually lead to more procedural guarantees of a fair trial. Yet there are important setbacks and concerns in both regions as to how real and lasting the positive effects of the reforms are, and how some of the intentions of the reform architects are reversed or undermined. It is not easy to change deeply rooted practices in criminal procedure. Reforms have to be sustained and fine-tuned constantly. The way that the reforms are implemented in practice is very complex, as the case of the Salduz judgment demonstrated.

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Oftentimes law reforms need a lot of time before they can be implemented effectively in law or in practice. Time is crucial because citizens' attention to a certain problem can dissipate, closing the window of opportunity for change before reforms have turned into lasting practices. Time is also crucial because a shift in the political context and mood in society can make it much more difficult to develop the necessary measures and free up the funds needed to put the reforms into practice on the field. Case law can also change to set back the reforms, as can be seen in the November 2018 decision by the European Court of Human Rights in *Beuze v Belgium.* According to the court, despite the fact that the applicant had no access to an attorney at the investigative stage, there was no violation of Article 6 because of an "overall fairness of the proceedings."[9]

Comments on the legal system and practices in Japan – especially in the Ghosn case – lack a dynamic understanding of the reforms. What is the *historical path* of the law and related practices and what is the *broader socio-political context* over a longer durée? Observers of the Carlos Ghosn case in media are not necessarily wrong. They reflect a social mood at a certain time. It is the role of scholars and others to look beyond the static observations and the simple hurray for one's own legal system, in order to foster a proper understanding of the complex story of law reforms in context.

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A list of the authors and titles of the original essays in Japanese is available on the website of Hanrei Jiho: http://hanreijiho.co.jp/wordpress/book/%E5%88%A4%E4%BE%8B%E6%99%82%E5%A0%B1-no-2473%E3%80%94%E8%A9%95%E8%AB%96-no-746%E3%80%95/

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Notes

[1] Hirano R. "Gendai Keijisoshō no shindan" (Eng.: Diagnosis of the current code of criminal procedure), in: Hiraba Yasuharu, et. al. (eds.) *Collected Essays at the Occasion of the Celebration of Dr. Dandō Shigemitsu's 70th birthday*, vol. 4 (1985), pp. 407-423. Translated as: Hirano, R. "Diagnosis of the current code of criminal procedure." *Law in Japan* 22 (1989): 129.

[2] See: Johnson, David T., and Dimitri Vanoverbeke, "The Limits of Change in Japanese Criminal Justice." *Zeitschrift für Japanisches Recht* 25, no. 49 (2020): 109-165 and Johnson, David T., and Dimitri Vanoverbeke. "The Limits of Lay Participation Reform in Japanese Criminal Justice." *Hastings Journal of Crime and Punishment* 1, no. 3 (2020): 4.

[3] Celiksoy, E. "Overruling 'the Salduz Doctrine' in Beuze v Belgium: The ECtHR's further retreat from the Salduz principles on the right to access to lawyer." *New Journal of European Criminal Law*, no. 10, 4, (2019): 342-362.

[4] Brants, C. "The reluctant Dutch response to Salduz." *Edinburgh Law Review*, 15 (2011): 299.

[5] Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account*, (Oxford University Press, 2020), 233.

[6] Cape, E. and Hodgson, J. "The Right of Access to a Lawyer at Police Stations: Making the European Union Directive Work in Practice." *New Journal of European Criminal Law*, vol. 5 (2014): 450-479.

[7] Jacqueline S. Hodgson, *The Metamorphosis of Criminal Justice: A Comparative Account*, (Oxford University Press, 2020), 207.

[8] Mols, V. 2017. "Bringing directives on procedural rights of the EU to police stations: Practical training for criminal defence lawyers." *New Journal of European Criminal Law*, no. 8, 3, (2017): 300-308.

[9] Celiksoy, E. "Overruling 'The Salduz Doctrine' in Beuze v Belgium: The ECtHR's further retreat

from the Salduz principles on the right to access to lawyer." *New Journal of European Criminal Law*, no. 10, 4, (2019): 342-362; at 343.

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