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"Benevolent Paternalism" Revisited

By Daniel H. Foote

Nearly thirty years ago, in an article entitled "The Benevolent Paternalism of Japanese Criminal Justice" (Benevolent Paternalism),[1] I sought to set out a model for the Japanese criminal justice system, the "benevolent paternalism" model. As the label reflects, I viewed the Japanese criminal justice system as consisting of two sides, a "paternalistic" side and a "benevolent" side. This essay begins with a short summary of the model; it then turns to an examination of major developments in the intervening three decades and considers whether the model remains relevant today.

Overview of the Benevolent Paternalism Model

Paternalism

The genesis for the Benevolent Paternalism article lay in extensive research I had undertaken on four highly-publicized cases, the so-called "death penalty miscarriage of justice cases." In those cases, individuals who had been convicted of murder and sentenced to death were acquitted in retrials obtained after each had spent decades on death row.[2] The cases brought into sharp relief various concerns relating to the Japanese criminal justice system. The issues included severe questioning lasting for many hours over many days with no defense counsel present, use of so-called "voluntary accompaniment" and arrests on other crimes to avoid warrant requirements or extend the time available for questioning even beyond the 23-day period that normally follows an arrest, doubts regarding the voluntariness and reliability of confessions, concerns regarding the handling and storage of evidence, and failure to disclose exculpatory evidence. In Benevolent Paternalism and other works,[3] I raised these issues and also noted that bail is seldom granted to defendants as long as they deny the charges and refuse to confess. The term "hostage justice" evidently was not coined until after I had published Benevolent Paternalism. If I had heard that term, I almost certainly would have included it, for I feel it captures one aspect of the Japanese system very well.

While introducing these and other strict and rather intrusive aspects of the Japanese criminal justice system, I elected to use the term "paternalism" for this side of my model. The reason I chose that expression is that, at every stage of the process, the criminal justice authorities, especially the prosecutors, possessed great authority and were accorded broad discretion. By using the term paternalism, I sought to highlight the dominant role played by the prosecutors. Within the Japanese prosecutorial system, internal checks are important, with higher-ranking officials reviewing decisions on whether to indict, whether to grant suspended prosecution, sentence requests, and other major matters relating to the prosecution. Yet at the time I wrote Benevolent Paternalism the scope of tools available for the defense was highly circumscribed, with tight restrictions on meetings with defense counsel by suspects, highly limited disclosure of evidence to the defense, and many other limits. Scrutiny by the

judiciary also was limited,[4] resulting in a system often characterized as "prosecutor justice."

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Benevolence

My research thus began with an examination of issues and problems with the Japanese criminal justice system reflected in the miscarriage of justice cases. Yet in the course of my research, I became aware of another side of the system – a much brighter side, a praiseworthy side, from which I felt the United States had much to learn. That is the side I sought to capture with the "benevolence" label: a commitment to rehabilitation and reintegration of offenders into society.

When one focuses only on the investigative stage of the Japanese criminal process, one finds a thorough, intensive investigation, resting heavily on long and stringent interrogation of the suspect. Yet when one expands the focus to the disposition stage, one finds a very different picture. With the exception of certain crimes, such as those that are regarded as especially brutal and subject to widespread societal condemnation, at the disposition stage the primary consideration of police and prosecutors is rehabilitation of the offender. The standard approach is to impose the lowest level of punishment needed to ensure rehabilitation and to facilitate the offender's reintegration into society. As of the time of my initial research, in the late 1980s and early 1990s, the great majority of cases (admittedly mainly relatively minor crimes) were resolved at the police level with an apology letter and pledge to avoid such conduct in the future, often accompanied by an apology and restitution to the victim. For those who were arrested and referred to the prosecutors, offenders in nearly forty percent of all Penal Code offenses were granted suspended prosecution, pursuant to Article 248 of the Code of Criminal Procedure (CCP), which permits the prosecutors to refrain from prosecuting a case where they conclude that prosecution would not be in the interests of justice, despite solid evidence of guilt.[5] As has been widely reported in accounts of the Japanese criminal justice system in the United States and elsewhere, for those who are indicted and go to trial, well over 99% are convicted. Yet, as of the time of my initial research, nearly sixty percent of all those convicted for Penal Code offenses were given suspended sentences. Based on the view that spending time in prison is likely to harden criminal tendencies, sentencing to imprisonment was regarded as the last resort. Even for those sentenced to actual imprisonment without suspension, sentences in Japan were quite lenient. Of more than 17,000 people sentenced to penal servitude for Penal Code crimes in 1988, the great majority were sentenced to terms of under two years; in all of Japan only eighty-four persons were sentenced to terms of more than fifteen years. In my research, I found it especially striking that, when prosecutors decided to suspend prosecution or request a suspended sentence or relatively light sentence, and when judges imposed a sentence that was lighter than that requested by the prosecution, they typically told the suspect or defendant they had done so in the desire to encourage rehabilitation, and in faith the suspect/defendant would meet that expectation.

This is the side of the Japanese system that I labeled as "benevolent." I hardly felt that police and prosecutors were following such practices and policies out of true feelings of benevolence to offenders. Rather, those policies were based on the fundamental goal of maintaining safety and order. Their view was that avoiding

recidivism was vitally important to achieve that objective, and that the best means for avoiding recidivism was to focus on rehabilitation and reintegration into society for offenders. The end result was what I labeled "benevolence."

In deciding whether to grant suspended prosecution or request a light sentence, prosecutors considered a wide range of factors. In addition to the type and gravity of the crime, the motive, and the presence or absence of a prior criminal record, those factors included whether the offender was truly remorseful; the existence of a sincere apology; restitution to the victim; and the offender's character, family circumstances, and work or other societal environments, among other matters. In this connection, the role of interrogation went beyond simply obtaining a confession and establishing evidence of the crime. Questioning also played an important role in determining the character and societal circumstances of the offender and in promoting true remorse. From this perspective, I came to appreciate the view that a certain degree of intensive questioning may be essential for achieving an understanding of the offender's nature and encouraging genuine remorse as a key step in the rehabilitation process.

That said, quite apart from the intrusion on personal autonomy of suspects entailed by the rather severe interrogation process, it carries the risk of mistaken prosecutions and indictments, and, in turn, false confessions, resulting from inherent biases or hunches of the investigators. In cases where the police and prosecutors are convinced of a suspect's guilt, they are inclined to think that the suspect's repeated denials are lies and further evidence of the total lack of remorse. Similarly, when foreigners, those who have been raised abroad, or others assert the right to silence or demand that defense counsel be allowed to attend the interrogation sessions, police and prosecutors tend to think the suspects have something they are trying to hide. In each of these types of cases, the tendency of police and prosecutors is to feel they must redouble their efforts to obtain confessions, thereby often resulting in even more extended and intensive questioning.[6]

> *[I]n the event an innocent person is indicted or a wrongful conviction is obtained, the criminal justice authorities are highly reluctant to admit mistakes and often seem to close ranks in a desperate effort to avoid public disclosure.*

Additionally, there appears to be a strong tendency on the part of the police and prosecutors to feel that if mistakes are made and those mistakes become public, it will undermine public trust in the administration of justice. Based partly on this concern, prosecutors are very careful about issuing indictments, so as to avoid the specter of acquittal at trial as much as possible. On the other hand, in the event an innocent person is indicted or a wrongful conviction is obtained, the criminal justice authorities are highly reluctant to admit mistakes and often seem to close ranks in a desperate effort to avoid public disclosure.

To protect against mistakes and correct them if they occur, my view is that while internal checks within the police and prosecutors' offices are important, they alone are not enough; external checks also are essential. While noting that public trust in the prosecutors is high in Japan, I took the position that no matter how high the level of trust, the absence of external checks was a serious concern. In Benevolent Paternalism and companion articles, I offered my view that without endangering the core values of the Japanese system in encouraging remorse and achieving rehabilitation, external checks could

be achieved by measures such as expanding the prosecution's disclosure of evidence to the defense and taping interrogations.

Reaction to Benevolent Paternalism

Following the publication of the Benevolent Paternalism article, I received criticism from both sides. The most frequently voiced criticism was that I had been overly generous to the police and prosecutors (with some critics going so far as to assert I had been taken in by the rhetoric of the criminal justice authorities). From the other side, a senior prosecutor wrote to say my recommendation for taping interrogation sessions was misguided. Doing so, he contended, would destroy the atmosphere of the questioning and thereby make it difficult if not impossible to achieve true remorse. This, he said, in turn, would undermine the sense of mission that motivates prosecutors and take away the very appeal of the job. Time and space do not permit me to respond to those criticisms here. For those who read Japanese, I offered a response to some of the criticisms in a 1999 article, cited in the endnote.[7]

Revisiting Benevolent Paternalism: What has changed?

Nearly thirty years have passed since the publication of Benevolent Paternalism in 1992. What has changed? Below, I offer brief thoughts on three themes.

Punitiveness

In the 1990s, the mass media in Japan contained frequent, often overwrought reports on rising crime rates and the increasing heinousness of crimes. Even though the reports were frequently sensationalized and evidently were quite different from reality,[8] the perception that Japanese society had become far more dangerous took hold among the general public. During much the same period, a crime victim movement emerged and steadily gained strength. Under influences such as these, a trend toward greater punitiveness developed, with some new categories of crimes, increases in the statutory sentencing ranges for various crimes and establishment of systems for victim impact statements and victim participation in trials.[9] In connection with the debate over the introduction of the lay judge (*saiban'in*) system in Japan, one reason offered by some supporters was the view that the sentences issued by professional judges were too lenient. Including lay judges in the sentencing phase as well as the guilt determination phase, it was thought, would ensure that "the common sense of society" was reflected in sentencing, with the further presumption that this would lead to harsher sentences. Frankly, as I watched the apparent rise in punitiveness, I worried that the "benevolence" of Japanese criminal justice was in danger of crumbling and that the commitment to rehabilitation was under threat.

At least for the time being, subsequent developments have laid my fears to rest. After reaching a peak in 2002, the crime rate in Japan has declined every year since. In 2018, the rate was less than 30% of the 2002 level; it is now at the lowest level of the entire postwar era. Whatever the public perception may have been, even as of 2002 Japan was a very safe society, and it has been getting steadily safer ever since. Not surprisingly, the clamor over punitiveness has largely subsided. Given the lower crime rates, the numbers of arrests naturally have declined. For those who are arrested, the stance toward prosecution remains very similar to what I found thirty years ago. According to statistics for 2018, nearly 43% of offenders in Penal Code offenses were granted suspended prosecution – even

higher than the rate in 1988. As was the case thirty years ago, well over 99% of those indicted were convicted. For those who were convicted, more than 60% were given suspended sentences. Here again, the rate is somewhat higher than in 1988. And, as was the case thirty years ago, for the great majority of the remainder whose sentences were not suspended, the sentences are quite lenient. Of the nearly 18,000 people sentenced to penal servitude for Penal Code crimes in first instance trials at the district court level in 2018, 49.3% were sentenced to terms of less than two years; only eighty in total were sentenced to terms more than fifteen years (including fifteen who were sentenced to life imprisonment and four who were given the death penalty). As to the impact of the 2009 introduction of the lay judge system for serious crimes (with mixed panels of three professional judges and six lay judges), there has been a modest but statistically significant increase in sentences for sex-related crimes, but no statistically significant change in sentences for other crimes. Lay judges have the opportunity to offer comments to defendants at the conclusion of the trial. Contrary to the view that lay judges were likely to be harsh on defendants, it has been reported that lay judges often offer encouragement and express their expectation and belief that defendants can turn their lives around and reform themselves. In sum, I feel reassured that the relative leniency and commitment to rehabilitation remain intact as central characteristics of the Japanese criminal justice system.

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External Checks

Over the past three decades a number of noteworthy developments have occurred with respect to external checks on police and prosecutors.

The first set of major developments relates to access to defense counsel. In the typical case in Japan, the standards provide the police and prosecutors with a total of up to twenty-three days between the time of arrest and the decision whether or not to file an indictment. Under both the Constitution and the CCP, the suspect has the right to refuse to answer questions. Yet the Supreme Court has held unanimously that, pursuant to a somewhat convoluted provision in the CCP, suspects who are under arrest or in pre-indictment detention must submit to questioning during that period.[10] Given this "duty to submit to questioning," the police and prosecutors routinely utilize the period between arrest and indictment for interrogation. Prosecutors typically use that time to firm up their case by obtaining detailed confessions from the suspect and procuring other physical evidence based upon the suspect's statements.

Thus, the period between arrest and indictment constitutes a vital stage in the investigative process. For that reason, the opportunity to consult with defense counsel during that period is very important for suspects. Article 34 of the Japanese Constitution seems to guarantee such an opportunity; it provides: "No person shall be arrested or detained … without the immediate privilege of counsel." Under Article 37 of the Constitution, however, the right to publicly appointed counsel for those who are unable to secure counsel by themselves applies to "the accused" – in other words, those who have been indicted. It does not extend to suspects at the pre-indictment stage. In the past, indigents were

not entitled to publicly appointed counsel until prosecution was instituted, after the key stages in the investigation had concluded. Even suspects who were able to retain their own attorneys, moreover, faced barriers to their opportunity to confer with defense counsel. Article 39 of the CCP provides that prosecutors and police may designate the date, place, and duration of meetings with counsel during the pre-indictment period "when necessary for the investigation," and investigators were not shy about using this designation authority to delay the first meeting with counsel and sharply limit both the number and duration of other meetings.

As mentioned above, the past three decades have seen important developments with regard to meetings with counsel. In 1990, the bar association in Oita Prefecture established a so-called duty solicitor system, through which attorneys provided one free consultation to suspects who had been arrested, regardless of their ability to pay. Two years later, in 1992 (the year the Benevolent Paternalism article appeared), the Japanese bar extended this duty solicitor system throughout all of Japan. In its final report, issued in 2001, the Justice System Reform Council[11] called for a wide range of reforms to the criminal justice system, including several reforms designed to strengthen the role of defense counsel and the adversary system. Among those recommendations was a call to extend the system for publicly provided counsel for indigents to suspects at the pre-indictment stage. In 2004, the CCP was amended to include that right.[12]

What of the limits on meetings with counsel? While CCP Article 39 remains unchanged, in a series of rulings the courts have pushed to restrict use of the designation authority and emphasize the final section of that article, a proviso stipulating that "such designation must not unduly restrict the rights of the suspect to prepare for defense." In one such ruling, finding illegality in a case in which police denied requests by both the suspect and attorney for a short meeting soon after arrest and refused to allow a meeting until the following day, the Supreme Court observed that the opportunity to meet with counsel "promptly after arrest is especially important for preparation of the suspect's defense."[13] These decisions, coupled with a campaign for more active challenges by defense lawyers, have led to a relaxation in the use of the designation authority.[14]

The recommendations of the Justice System Reform Council led to many other reforms to the criminal justice system, as well. Undoubtedly the most visible and highly publicized reform was the introduction of the lay judge system, which commenced in 2009 after five years of preparation. Although lay judge trials are limited to certain specified categories of serious crimes and account for fewer than 2% of all criminal trials, their impact has gone far beyond what the number suggests. They have generated much greater public knowledge of the criminal justice system. Their introduction, either directly or indirectly, has influenced many aspects of the system, including the attitudes of judges, attorneys, and prosecutors.[15]

Other reforms that grew out of Reform Council recommendations include an expansion in disclosure of evidence, the introduction of pretrial preparation procedures aimed at adjusting the positions of the parties and helping to streamline the trial, and, while largely limited to lay judge trials, efforts aimed at realizing the principles of "orality" and "directness" – in other words, trials centered on in-court oral testimony. (The standard practice in most criminal trials in Japan has been to rely on the submission of non-verbatim written statements of the defendant

and witnesses, prepared by prosecutors or their assistants.) One goal of these and related reforms was to strengthen the adversary system and encourage more attorneys to specialize in criminal defense. To some extent that has succeeded. While the defense bar in Japan (as with the bar as a whole) remains far smaller than that in the United States, the past two decades have seen a rise in the number of attorneys with a specialization in criminal defense and the establishment of a few firms that specialize in criminal matters. Their activities, in turn, have played an important role in achieving expanded access to meetings with counsel, as mentioned earlier, and a gradual rise in court rejections of prosecutor requests to detain suspects (from 1.1% of such requests being rejected in 2010 to 4.9% in 2018). An additional noteworthy reform that arose from a Reform Council recommendation is the introduction of a system under which Prosecution Review Commissions (bodies composed of members of the public) may institute mandatory prosecution in cases in which the prosecutors have declined to proceed.

> *[O]ver the past three decades there has been a considerable rise in the potential for external checks on the police and prosecutors.*

With regard to external checks on the police and prosecutors, what may well be the single most significant reform is a matter the Reform Council touched on but deemed “too difficult to decide with certainty” and left as “an issue to be considered in the future.” That is audio or visual recording of the interrogation itself.[16] After decades of struggle by the defense bar and other proponents, against stiff resistance by the police and prosecutors, in 2016 the Diet amended the CCP to require the audio or videotaping of the interrogation process, effective from June 2019.

In sum, over the past three decades there has been a considerable rise in the potential for external checks on the police and prosecutors.

New “Weapons” and the Continued Dominant Position of Prosecutors

Do the expanded tools for the defense and strengthening of the defense bar mean the prosecution and defense now stand on an equal footing in Japan’s adversary system? I hardly think so. Prosecutors remain in a far stronger position. Moreover, since 2016 they have gained two potentially strong additional tools.

The reform that mandates taping of interrogation sessions provides a potentially valuable tool for defense counsel, and it also provides the courts with an important means for assessing the voluntariness and reliability of confessions. Based on the rationale that suspects would be reluctant to talk in front of cameras and it would become far more difficult to elicit confessions, however, as in effect a bargaining chip for agreeing to taping of interrogation sessions the Ministry of Justice insisted on being granted authority for plea bargaining (albeit Japanese-style plea bargaining, subject to various conditions). Furthermore, pursuant to the so-called Conspiracy Act (more formally, the Revised Organized Crime Punishment Act) of 2017, the prosecution obtained another potentially strong weapon in the form of a great expansion in the scope of the crime of conspiracy, which previously had been limited to a highly circumscribed set of specified circumstances.

For both plea bargaining and conspiracy, the US approach was invoked in the debates. In presenting the case for the importance of both these tools, the Japanese criminal justice authorities pointed to the United States, noting that both tools are important in investigation and

prosecution of organized crime. Yet in the United States, both are also used routinely in ordinary criminal cases. A common pattern is to seek to identify a weak link, threaten a conspiracy prosecution, and then through plea bargaining offer either non-prosecution or lenient treatment in return for testimony implicating one or more accomplices. In line with this pattern, in the United States it is often thought that lenience (or, in my phraseology, "benevolence") is afforded not out of the view that the offender is truly remorseful, as an important part of the rehabilitation process, but rather as a mere quid pro quo for cooperation, as part of a bargain.

In Japan, at present use of plea bargaining is subject to various conditions. Apart from the highly publicized case of Carlos Ghosn, to date plea bargaining reportedly has been used in only one or two other cases. Various conditions also attach to use of the conspiracy charge, and to date the Conspiracy Act also reportedly has hardly ever been used. In other nations that have introduced plea bargaining, supposedly on a highly circumscribed basis, however, one often finds that use steadily increases. If the same pattern should occur in Japan, and plea bargaining comes to be used together with conspiracy, I fear that the commitment to rehabilitation that underpins the benevolent paternalism model may be lost, replaced with a "let's make a deal" mindset. I very much hope – and trust – that will not be the case. I trace the commitment to rehabilitation as a core value of the Japanese criminal justice system back to 1914, over a century ago. Given Japan's success in maintaining low crime rates throughout most of that time, I tend to believe that the rehabilitative ethos is deeply ingrained and will not be lost anytime soon. Given the dominant role prosecutors continue to play in Japan, the future direction rests in their hands.

In Closing: Reflections on the United States

Apart from the criticisms of Benevolent Paternalism mentioned earlier, an additional criticism was that it focused almost entirely on comparisons with the United States and did not provide sufficient consideration of other nations. To that criticism I must plead guilty. In composing that article, a major motivation was my desire to appeal to readers in the United States. Even then, nearly thirty years ago, the United States was in a headlong dash toward ever-greater punitiveness, with rehabilitation often treated as at best a pipe dream. In a widely cited essay published in 1985, a leading Japanese criminal procedure scholar, Hirano Ryūichi, characterized the Japanese system as "diseased" and "almost hopeless."[17] For a very different constellation of reasons, as I watched the United States rush ever further down the road to punitiveness, I came to feel those adjectives applied even more aptly to the US. Very recently, at least some in the United States seem to have begun a serious effort to reexamine the many decades of increasing punitiveness and the sad consequences that have resulted. But I have yet to see much basis for hope of a major turnaround. Even now, nearly thirty years after Benevolent Paternalism appeared, I still feel the United States has much to learn from Japan.

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Daniel H. Foote is professor emeritus and project professor at The University of Tokyo Faculty of Law.

This essay is a substantially revised English version of Daniel H. Foote, "'Kandai na Patānarizumu' Saikō" [Reconsideration of "Benevolent Paternalism"], 2473 *Hanrei Jiho* 111 (2021).

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] 80 *Calif. L. Rev.* 317 (1992).

[2] For an examination of the facts of those cases, with reflections on their significance for Japan's criminal justice system, see Daniel H. Foote, "From Japan's Death Row to Freedom," 1 *U. Wash. Pac. Rim L. & Pol'y J.* 11 (1993). For a very long examination of the death penalty in Japan and the relaxation of the standards that opened the door to the retrials, with comparisons to the death penalty and habeas corpus in the United States, see Daniel H. Foote, "'The Door that Never Opens'?: Capital Punishment and Post-Conviction Review of Death Sentences in the United States and Japan," 19 *Brooklyn J. Int'l L.* 367 (1993).

[3] With respect to the "intrusive" side of the Japanese system, see especially Daniel H. Foote, "Confessions and the Right to Silence in Japan," 21 *Ga. J. Int'l & Comp. L.* 415 (1991).

[4] For some reflections on the role of the Japanese judiciary in the criminal justice field, see Daniel H. Foote, "Policymaking by the Japanese Judiciary in the Criminal Justice Field," 72 *Hōshakaigaku* [the Journal of the Japanese Association for Sociology of Law] 6 (2010) (in English).

[5] The formal standard for suspended prosecution, as set forth in Article 248, reads as follows: "Where prosecution is deemed unnecessary owing to the character, age, and environment of the offender, the gravity of the offense, and the circumstances or situation after the offense, prosecution need not be instituted."

[6] Similar attitudes underpin features of the system reflected in the phrase "hostage justice." Under CCP Article 89, the key reason for denying bail after indictment is "probable cause to suspect the defendant may conceal or destroy evidence." From the prosecutors' point of view, a basic premise is that if the defendant has not confessed, it must mean he/she has something to hide, and if released from detention, defendants who have not confessed will try to conceal evidence, or at least get their stories straight with potential witnesses. The same basic mindset underlies the widespread refusal to permit those being detained prior to trial to receive visits from or have other contacts with anyone other than counsel, a prohibition used for over 37% of pre-trial detainees in 2017. (The relevant article, CCP Article 81, provides that a court may prohibit contact and/or written communications between a detained defendant and anyone *other than their counsel* if there is probable cause to suspect the defendant may flee or conceal or destroy evidence.) Here again, the underlying presumption appears to be that if a defendant is contesting the charges or refuses to confess, the defendant might use visits by family members, friends, or others to gain their

aid in concealing evidence or getting stories straight. The upshot is a practice that keeps many non-confessing defendants in detention prior to trial, essentially incommunicado except for visits by defense counsel – in short, "hostage justice."

[7] Daniel H. Foote, "Nichibei hikaku keiji shihō no kōgi wo furikaette" [Perspectives from Teaching Comparative US-Japan Criminal Justice], 1148 *Jurisuto* 165 (1999).

[8] For a fine study in Japanese, see Kawai Mikio, *Anzen shinwa hōkai no paradokkusu* [The Paradox of the Collapse of the Safety Myth] (Iwanami Shoten, 2004).

[9] *See, e.g.*, Setsuo Miyazawa, "The politics of increasing punitiveness and the rising populism in Japanese criminal justice policy," 10 *Punishment & Society* 47 (2008).

[10] The provision in question, Article 198(1), reads as follows: "A public prosecutor, public prosecutor's assistant officer or judicial police official may ask any suspect to appear in their offices and interrogate said person when it is necessary for the investigation of a crime; provided however, that the suspect may, *except in cases where said person is under arrest or under detention*, refuse to appear or, after said person has appeared, may withdraw at any time" (emphasis added).

[11] For an overview of the Justice System Reform Council and the extensive set of reforms it set in motion, see Daniel H. Foote, "Introduction and Overview: Japanese Law at a Turning Point," in *Law in Japan: A Turning Point* xix (Daniel H. Foote ed.) (Seattle and London: University of Washington Press, 2007).

[12] The right took effect from 2006. Initially it was limited to suspects in crimes subject to sentences of over three years, but as of 2018 was extended to all crimes. It should be noted, however, that the right to appointed counsel attaches not immediately upon arrest, but upon issuance of a request for detention, which must occur within 72 hours after arrest.

[13] Sup. Ct., 3rd P.B., Judgment of June 13, 2000, 54 *Minshū* 1635.

[14] *See* Makoto Ibusuki & Lawrence Repeta, "The Reality of the 'Right to Counsel' in Japan and the Lawyers' Campaign to Change It," *The Asia-Pacific Journal*, Vol. 18 Issue 13 No. 4 (June 25, 2020).

[15] For an essay setting out some of my views on the impact of the lay judge system, written a few years after it went into effect, see Daniel H. Foote, "Citizen Participation: Appraising the Saiban'in System," 22 *Mich. State Int'l L. Rev.* 756 (2014).

[16] Notably, in the same sentence in its report, along with audio and visual recording, the Reform Council referred to demands for "attendance of defense counsel at the interrogation" as another matter to be left for future consideration. The defense bar continues to push for attendance by counsel at interrogation sessions, but as of now prospects seem dim for achieving that objective anytime soon.

[17] Hirano Ryūichi, "Genkō keijisoshō no shindan" [Diagnosis of current criminal procedure], in *Dandō Shigemitsu hakase koki shukuga ronshū dai-yon kan* [Collection of works to commemorate the seventieth birthday of Dr. Shigemitsu Dando, Vol. 4] 407 (1985); translation available at 22 *Law in Japan: An Annual* 129 (1989).

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