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Carlos Ghosn Case:  
Comparative Views of Japanese Criminal  
Justice

## **Carlos Ghosn and Japan’s “99% Conviction Rate”: Examining Japan’s Criminal Justice System from a Comparative Perspective**

By Bruce Aronson

The arrest and criminal prosecution of Carlos Ghosn, together with his dramatic flight from Japan, have focused unprecedented international attention on Japan’s criminal justice system. Much of the resulting commentary has highlighted a single statistic: Japan’s purported conviction rate of 99%. The reality is more complicated. In both the US and Japan the overwhelming majority of criminal cases are cleared without trial, and conviction rates in the remaining contested cases are strikingly high. However, the methods of clearing cases and calculating conviction rates differ. Why has there been so little discussion of comparable issues in different systems?

There have been two fundamental problems. First is the basic principle of comparative law that I learned in law school that one should always try to avoid the trap of comparing “my theory with your practice.” Abstract theory always looks better than the troubling realities of practice. The value of comparative law lies in utilizing the study of another country’s system to shed new light,

including a better understanding of your own system.

Second is the unfortunate tendency to quickly resort to broad cultural generalizations and stereotypes whenever there is a discussion of Japan. This is true of both critics and defenders of Japan’s criminal justice system. The press in Japan has often been critical of Ghosn while the Western media has generally been more receptive to his criticisms of the Japanese system. Cultural images are quickly deployed in “support” of such views. A view of culture as the determining factor in explaining differences in legal systems makes comparisons both difficult and largely meaningless.

Problems in finding comparable data make the analysis of conviction rates a complicated task. Data in the US, which has a complex federal structure, are only fragmentary concerning the bulk of the cases which occur at the state level. Data in Japan, a unitary system, are far more systematic. The two systems also include different categories of cases in “conviction rates,” making an apples-to-apples comparison quite a challenge.

Any comparison is further complicated by our image of dramatic courtroom battles in criminal cases, which is largely a made-for-TV myth. As noted above, in both the US and Japan the vast majority of criminal cases are disposed of at an early stage. However, the procedures for clearing cases are quite different.

In the US it is plea bargains. Most cases referred to prosecutors result in indictments (83.6% in federal cases). The vast majority of prosecuted cases are decided by guilty pleas achieved through plea bargains (over 97% at the federal level; see US FY 2016 data [here](#)), and fewer than 3% of cases go to trial.

In Japan the majority of cases are cleared by prosecutors through the exercise of broad discretion to refrain from bringing any indictment. Unlike plea bargains in the US, the suspect receives no punishment and has no criminal record. Prosecutors decide to indict in fewer than one-third of the referred cases (see [here](#) and [here](#) for Japanese FY2017 data in English). Some 90% of the cases indicted in district courts result in confessions and guilty pleas, although in Japan these cases still go to trial. The remaining 10% of the indicted cases are contested at trial.

So how do conviction rates in the US and Japan compare for similarly contested trials? In the US the conviction rate for contested trials is about 83%. In Japan, the conviction rate for contested cases is over 96%. This difference of roughly 13% is significant for defendants, but hardly the yawning chasm one would imagine from reading recent commentary on the Ghosn case. The fact remains that conviction rates in both countries are strikingly high.

Japan's often-cited conviction rate of more than 99% is a percentage of all prosecuted cases, not just contested cases. It is eye-catching, but misleading, since it counts as convictions those cases in which defendants pleaded guilty. If the US conviction rate were calculated in a similar manner it would also exceed 99% since so few cases are contested at trial (in FY 2018 only 320 of the total number of 79,704 federal defendants were acquitted at trial).

The US and Japanese systems also have common fundamental problems, in particular the potential for coercion in clearing the bulk of criminal cases. In Japan this occurs in the context of forced confessions during detention of suspects whose lawyers are not present during interrogation. In the US a similar danger is

present in plea bargaining. There is a well-known "trial penalty"—a defendant who spurns the prosecutor's offer of a plea bargain will generally receive a significantly higher sentence if found guilty at trial. Both systems struggle to provide oversight of confessions and plea bargains, respectively, by means of judicial hearings.

Ghosn's case was atypical of white-collar criminal cases in Japan, as it included a lengthy pre-trial detention, his complete failure to cooperate (such as by providing a statement setting forth his version of events) and the presence of a flight risk. And although in Japan white collar criminals rarely go to jail, the enormous amount of alleged undisclosed compensation (\$80 million) and retirement benefits (\$60 million), together with the inclusion of more serious allegations of misuse of corporate funds, created uncertainty as to the possibility of jail time if convicted.

The Japanese criminal justice system struggled to deal with the Ghosn case. Anyone who posed a significant flight risk would be a good candidate for detention until trial, in the US as well as Japan. In this case the judges did not grant the full periods of detention sought by prosecutors, and Ghosn's lawyers ultimately succeeded in getting him released on bail under strict conditions. Ghosn then famously fled Japan. There is no evidence Ghosn was treated any differently due to being a foreigner. However, a rich and powerful person might be particularly offended by the detention conditions for noncooperating suspects.

The workings of criminal justice systems are, by their nature, controversial in advanced democratic countries, as they attempt to achieve a balance between public safety and individual rights. There are always significant gaps between the high ideals that underpin criminal justice systems and the messy reality of criminal

procedure in practice. Systems in the US and Japan have different strengths and weaknesses. It is hard to call Japan's system a "failure" when it has among the lowest rates of crime, incarceration and gun ownership in the world (in contrast to the US).

I am privileged to know a number of dedicated legal professionals in Japan and the US who do their utmost, at modest salaries, to achieve justice for criminal defendants. We should not hesitate to point out weaknesses in all criminal justice systems and advocate for reform. However, we should also be conscious of making fair comparisons to maintain the level of discourse above cultural generalizations and one-sided attacks that are taken out of context. Thoughtful comparisons are more persuasive and useful for reform efforts. The Ghosn case presents a splendid opportunity to further our own understanding of both a foreign and our own criminal justice system.

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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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