

Volume 1, Number 2
Published June 18, 2021

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

The Significance of This Essay Collection

By Setsuo Miyazawa

Carlos Ghosn, then chairman of Nissan Motors, was met by prosecutors of the Special Investigation Division of the Tokyo District Public Prosecutors Office upon his arrival in Japan by business jet at Haneda International Airport. They demanded that Ghosn accompany them. His arrest – for alleged violations of the Financial Instruments and Exchange Act in connection with false entries concerning executive compensation in annual securities reports from 2010-2014 – occurred over two years ago on November 19, 2018.

As background for this essay collection, I set forth the chronology following his arrest based on newspaper articles and other sources.^[1] The reasons for arrest are abbreviated as #1 - #4, corresponding to the four charges ultimately brought against him: #1 false reporting of compensation—FY 2010-2014; #2 false reporting of compensation—FY 2015-FY 2017; #3 misappropriation of company funds—transfer of loss/Saudi Arabia route; #4 misappropriation of company funds—Oman route.

2018

November 19: Arrest on count #1 for false entries from 2010-2014. Representative director Greg Kelly is also arrested for

allegedly conspiring with Ghosn to make false entries.

November 21: Detention approved.

November 30: Extension of detention approved.

December 10: Indictment on count #1. Arrest on count #2 for false entries from 2015-2017.

December 11: Detention approved.

December 20: Extension of detention denied.

December 21: Arrest on count #3 for aggravated breach of trust for damage to Nissan due to Ghosn's transfer of loss from his personal investment to the company.

December 25: Kelly is released on bail. A bond payment of 70 million yen (\$700,000).

2019

January 11: Indictment on counts #2 and #3.

February 13: Resignation of first defense attorney. Hiroshi Kawatsu, Junichiro Hironaka, Takashi Takano, etc. are appointed defense attorneys.

March 6: Release on bail (108 days of detention). Bond payment of 10 billion yen (\$10 million) and conditions including installation of a surveillance camera at residence, prohibition on overseas travel.

April 4: Arrest on count #4 for aggravated breach of trust for damage to Nissan due to Ghosn's arranging for Nissan funds sent to its distributor in Oman to be transferred back to himself.

April 5: Detention approved.

April 12: Extension of detention for eight days from April 15.

April 22: Indictment on count #4.

April 25: Release on bail (22 days of detention). Bond payment of 5 billion yen (\$5 million USD) and conditions including entrusting his passport to his lawyer, prohibition in principle from interacting with his wife.

May 23: Court's pretrial conference procedure begins.

December 31: Announcement of statement of Ghosn's flight to Lebanon.

2020

January 29: Prosecutors conduct a search and seizure at Hironaka's law office.

September 15: First public court appearance of Kelly at Tokyo District Court.

The arrests of Ghosn and Kelly were due to the cooperation of other Nissan employees in a plea bargain concluded in June 2018. It was only the second time that Japanese prosecutors used the new plea bargain system and the first time it was used in an investigation of a company head. The period of detention was extended by taking what was thought to be a single course of action and

dividing it into multiple arrests (counts #1 and #2). When the extension of detention was denied, there was immediate arrest on a separate charge (count #3) and even after release on bail, there was an arrest for a new charge (count #4). This investigation process, which resulted in interrogation being conducted without the presence of a defense attorney for an average of seven hours each day and on many days for 10 to 11 hours,^[2] drew international criticism as "hostage justice," particularly from the media in France, where Ghosn held citizenship.

International Comparisons in Japanese Media

Triggered by international criticism, Japanese media also made international comparisons of criminal procedures. From this perspective, Japan is conspicuous for the absence of a defense attorney at interrogations. In addition, the length of the detention period in cases where arrests are made successively on multiple charges, as in the Ghosn case, is a problem. However, there is also a view that Japan's detention period is not long in comparison to France, where pretrial detention can extend to a maximum of four years and eight months.^[3] In Germany as well, the principle is that police bring suspects to court within 48 hours, but there is a view that the court may detain the suspect until the trial ends for a maximum of six months.^[4] If so, it is necessary to compare actual practices between Japan and those countries in terms of the frequency, conditions, and length of detention.

Articles by Japanese Legal Scholars or Legal Professionals and the Significance of this Essay Collection

Of course, such empirical, comparative sociology of law is the work of researchers. However, not

only is that kind of analysis not found, there are very few articles about the Ghosn case in Japanese by legal scholars and legal professionals.^[5] The ones that I found include substantive legal analysis by Tomomi Kawasaki^[6] and procedural legal analysis by Yuji Shiratori,^[7] Ayano Kanazuka,^[8] and Tomoyuki Mizuno.^[9] Professor Shiratori is a legal scholar of criminal procedure who studied abroad in France, and Ms. Kanazuka is a lawyer with an attorney's license from France.

Professor Shiratori's 2019 article explains that in France, under an October 14, 2010 decision of the European Court of Human Rights, a defense lawyer must be present at pretrial interrogation by an examining magistrate, that in principle there is no detention until a decision to indict is made, if necessary there is a judicial restraining disposition that substitutes for detention by imposing a flexible duty for the suspect to appear, if that is insufficient there is an order to remain at home while wearing a GPS tracking device, and if that is also insufficient then, for the first time, there is an order for detention. Ms. Kanazuka's article, after providing an explanation of the detention system as in Professor Shiratori's article, goes on to explain that, unlike Japan, in France the maximum period of detention is established by law, that in the case of a pretrial hearing all investigation materials must be disclosed to the defense attorney, and that also in the case of police detention in principle there can be no interrogation until after the arrival of the defense attorney. On the other hand, this article points out that confinement in excess of capacity at detention centers and the harshness of conditions are big problems.

In contrast, I found no article in the Japanese media that makes a comparison with the United States. It is necessary to have broader comparisons with the various countries of

Europe, taking into consideration that not only is the inquisitorial procedure of continental Europe the point of departure for Japan's modern criminal justice system, but also that there are strong commonalities between the victim participation system introduced in Japan in 2008 and the lay judge system introduced in Japan in 2009 and their counterparts in the continental systems.^[10]

The Main Points of This Essay Collection

Finally, I introduce the main points of the essays in this collection.

Bruce Aronson organized this special essay collection. His essay points out the problems in the calculation of conviction rates. If the calculation is made on the basis of all indicted cases, the conviction rate in the US is about the same as in Japan; even if the calculation is based only on contested cases, the difference between Japan and the US is not extremely large.

Frank Upham's essay criticizes the tendency in American comparative legal research to look only at the negative aspects of Japanese criminal justice based on an idealized image that ignores the troubling realities of criminal justice in America.

Daniel Foote's essay looks at changes in Japan following his famous 1992 article in which he argued that in Japan, under the control of prosecutors, criminals receive lenient treatment with the goal being their rehabilitation. He points out that not only has lenient treatment been maintained, but that the function of checking investigative institutions has been strengthened. On the other hand, a danger has also arisen that the ideal of rehabilitation may weaken due to the introduction of plea bargaining and the crime of conspiracy. His conclusion is that America,

where the severity of punishment has gone too far, has more to learn from Japan than the other way around.

David Johnson's essay points out that criminal procedure in Japan and the US relies heavily on confessions—in Japan through strong pressure to confess brought during interrogation while in detention, and in the US through pressure to plead guilty as part of a plea bargain in order to avoid severe punishment at trial.

Dimitri Vanoverbeke's essay points out that while a 2009 decision of the European Court of Human Rights requires European Union countries to permit the attendance of defense counsel at interrogations from the police stage, in reality, implementation is insufficient due to factors such as limiting attorneys to passive attendance, excluding voluntary interrogations, and failure to secure a budget to hire and train sufficient personnel. He states that researchers must grasp the complicated reality of legal reform.

Please enjoy reading the individual essays.

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Postscript: A Personal Reflection on Japanese Criminal Justice and the Ghosn Case

In my view, in Japan lenient disposition is provided at every stage of the process by police, prosecutors, and courts due to the background of favorable crime conditions, such as low crime rates compared to other advanced countries. However, I do not think that such leniency lessens the need to protect the human rights of suspects and defendants, and we cannot permit our human rights protections to be inferior to those of other countries. I also do not think that the existence of problems in other

countries means one cannot demand reform of the system in one's own country. Furthermore, I cannot readily believe the generally cited justification for interrogation without the presence of a defense attorney—that it is necessary for rehabilitation of the criminal—in light of examples such as Atsuko Kimura being held in detention for 164 days until trial under a false charge (the postal system fraud case) and Shinichi Nakayama being held in detention for 395 days until trial also under a false charge (the Shibushi vote-buying case). In addition, I think that the system of intermittent hearings in which the trial itself is prolonged and can be prolonged further by a prosecutors' appeal to an appellate court if the defendant is acquitted in the first instance should be reconsidered in light of international comparisons. The Ghosn case is nothing other than an example of the problem of the detention procedure itself becoming a punishment.^[11]

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This essay is a substantially revised English version of Setsuo Miyazawa, "Karurosu Gōn Jiken ga Teiki shita Kentō Kadai to Hontokushū no Igi" [Issues for Consideration Raised by the Carlos Ghosn Case and the Significance of this Essay Collection], 2473 *Hanrei Jiho* 109 (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/>

Suggested Citation:

Setsuo Miyazawa, “The Significance of This Essay Collection,” in Symposium on Making Sense of the Carlos Ghosn Case: Comparative Views of Japanese Criminal Justice, USALI East-West Studies 1, No. 2, June 16, 2021, <https://usali.org/comparative-views-of-japanese-criminal-justice/the-significance-of-this-essay-collection>.

Notes

[1] Takano, Takashi and Ode Yoshitomo (dialogue). “ゴーンさんの保釈はどのように獲得したのか” [In what way was Mr. Ghosn’s Release on Bail Obtained?] 100 KIKAN KEIJI BENGU 144 (2019); Goto, Akira et al. (panel discussion, part 2), “ゴーン事件弁護士事務所の捜索差押えと押収拒絶” [Search and Seizure and Refusal of Confiscation at Law Office in the Ghosn Case] 102 KIKAN KEIJI BENGU 83 (2020), available at <https://www.keiben-oasis.com/7589#:~:text=2020%E5%B9%B4%E5%BC%91%E6%9C%8829,%E5%95%8F%E9%A1%8C%E3%82%92%E5%90%AB%E3%82%93%E3%81%A7%E3%81%84%E3%82%8B%E3%80%82>.

[2] Takashi Takano, blog (2006-present), available at <http://blog.livedoor.jp/plltakano/archives/65953931.html>.

[3] “日産：ゴーン容疑者逮捕 勾留、論争” [Nissan: Arrest of Suspect Ghosn, Detention, Controversy], MAINICHI SHINBUN (eve. ed.), Nov. 28, 2018 [other sources omitted].

[4] “ゴーン前会長の拘束長期化” [Prolonged Detention of Former Chairman Ghosn] ASAHI SHINBUN, Dec. 30, 2018.

[5] I obtained the cooperation of Hiroto Hata, lecturer at Hiroshima University, for this article search.

[6] Tomomi Kawasaki, “不思議の国のカルロス・ゴーン？” [Carlos Ghosn in Wonderland?], 91 HORITSU JIHO (No.3) 1 (2019).

[7] Yuji Shiratori, “ゴーン事件と日本の刑事司法” [The Ghosn Case and Japanese Criminal Justice], 93 KANAGAWA DAIGAKU HYORON 167 (2019); Yuji Shiratori, “ゴーン氏出国と”人質司法”の行方” [Mr. Ghosn’s Departure and the Whereabouts of ‘Hostage Justice’], 92 HORITSU JIHO (No. 4) 1 (2020).

[8] Ayano Kanazuka, “ゴーン事件と「人質司法」” [The Ghosn Case and ‘Hostage Justice’], 89 NICHIFUTSU BUNKA 85 (2020).

[9] Tomoyuki Mizuno, “「カルロス・ゴーン事件」を考える” [Considering the ‘Carlos Ghosn Case’], 475 HOGAKU KYOSHITSU 42 (2020)

[10] Setsuo Miyazawa, *Citizen Participation in Criminal Trials in Japan: The Saiban-in System and Victim Participation in Japan in International Perspectives*, 42 INT’L. J. OF LAW, CRIME AND JUSTICE 71 (2014).

[11] See MALCOLM M. FEELEY, *THE PROCESS IS THE PUNISHMENT* (1979).

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