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Comparative Views of Japanese Criminal
Justice

What's Wrong with America's Approach to Foreign Legal Systems?

By [Frank K. Upham](#)

Too often American legal interaction with other legal systems is one-sided, pre-occupied with finding the flaws in the other legal system and dedicated to helping our foreign counterparts understand the virtues of the American experience and implementing reforms in their home jurisdiction. There is of course nothing wrong with learning from others; indeed that is a core purpose of comparative law. All too often, however, American observers of foreign legal systems ignore what works and concentrate on what the observer believes falls short. Perhaps the worst aspect of this side of American comparative law is Americans' tendency not to compare a foreign jurisdiction's reality with our reality, but to contrast foreign reality with our ideals or national mythology.

The reaction of the United States media and intellectual classes to the Ghosn case is an archetypical example of this pattern. Virtually every newspaper, broadcaster, and internet site hysterically described the "99% conviction rate" in Japan, implied that Ghosn could not get a fair trial, and thus that his criminal behavior in jumping bail was justified. Many of these accounts began with the hackneyed recitation of the deep roots that Western law has in principles

of individual liberty, the panoply of protections for criminal defendants, and the role that American lawyers play in preserving citizens from police and prosecutorial abuse. In contrast, Japan was described as a land where the police were not accountable, prosecutors' discretion was unconstrained, and defense attorneys powerless. Defendants spent weeks in detention with minimal access to their lawyers, everyone confessed, bureaucratic judges rubber-stamped the prosecution's allegations, and virtually all trials ended in conviction. Lurking behind all these stereotypes was a baseline image of the US as the "land of liberty" and Japan as a land of conformity and deference to authority.

My point is not that any of these observations are wrong. One does not have to believe that [Masayuki Suo's film *I Just Didn't Do It!*](#) is a perfectly accurate portrayal of Japanese criminal justice to acknowledge that the Japanese state has a lot, perhaps too much, unfettered power or to believe that Japan has room for improvement in its criminal justice system. Indeed, I might offer another criticism of Japan's system: that the emphasis on conviction rates in promoting prosecutors means that too few complex corruption and political crimes are ever tried for fear that an acquittal will hinder the prosecutors' careers. My argument is not about Japan at all. It is about the American legal system and Americans' understanding of it.

Given the awful state of the American criminal justice system, there is a deep irony in American criticism of Japanese criminal justice. There are many aspects of American society that Japan could learn from, but criminal justice seems a bizarrely inappropriate one. When I was once asked what Japan could learn from the US in criminal justice, my response was: "Why would a nation with one of the best criminal justice systems in the world want to copy a nation with

one of the worst?” To simplify a complicated situation, one need only ask a few comparative questions: What is the incarceration rate? How many persons do the police kill? What percent of defendants get a trial before an actual judge? What is the level of violent crime or the overall crime rate? What is the level of honesty, professionalism, and competence of trial judges? In all of these aspects, the American system is grossly inferior to the Japanese, even when one remembers the diversity within our federal system. The list of questions could go on, but it is difficult to imagine a question about criminal justice where the American system would be clearly superior. If you asked an American critic of Japan’s “99% conviction rate” about these aspects of the American system, I suspect virtually all would acknowledge the bad state of our own system. It is not, in other words, a matter of knowledge *per se*. But when Americans turn to foreign countries, we tend to forget that reality and compare the foreign system with American mythology: the land of individual liberty, of inspiring defense lawyers freeing the innocent, of juries defining justice. Once that is their vision, the other legal system always falls short. And we are persuasive in our proselytizing: Japanese and Chinese legal reformers often are as besotted with American mythology as we are.

Again, I need to emphasize, especially to the many Japanese citizens and legal professionals working hard to improve the many injustices that do exist in Japan, that my point is not that the Japanese system is wonderful. My point is about how Americans view other legal systems and particularly Asian ones. Our tendency to compare others’ reality with our ideals has consequences. One consequence is the inappropriate and self-righteous criticism of foreign jurisdictions, but a worse problem is that it prevents Americans from learning how to improve our own system. It produces blindness to the possibility of learning

from comparative law. When one realizes that the US has the highest rate of incarceration in the world, a rate that is 16 times higher than Japan’s, six times higher than South Korea’s, five times higher than China’s, and 2.5 times higher than Taiwan’s according to the *World Prison Brief*, one would think that American legal institutions would be sending comparative law scholars to Asian jurisdictions, especially to Japan, to learn how to reduce the incarceration rate. To my knowledge, there is no systematic attempt to do so.

On the contrary, in its programs directed toward promoting democracy and the rule of law in the People’s Republic of China, the US government prohibits participants from using grant money to study the Chinese system. There may not be that much about Chinese law that would be useful to the US, but to think that there would be *nothing* of value is a monumental failure of imagination. When we turn to attitudes toward Japan, the failure to investigate and learn is truly astonishing, even with the huge differences between the two societies. With all its flaws, the Japanese system of criminal justice – with its leniency toward suspects, attempts at restorative justice, non-violent police, and professional judges – would seem to be worthy of emulation by an American system that denies more than 97% of defendants a trial before a judge, whereas many people (three) are killed by police every day as are killed by Japanese police in a year, and where most judges and prosecutors are elected in partisan contests without any requirement of professional competence whatsoever. But if you were to ask a well-educated American to describe the Japanese criminal justice system, the response is liable to be “99% conviction rate”!

Why Americans are not interested in learning from others is too complicated to attempt to explain fully here. One reason is likely “American

exceptionalism,” the belief that the US is unique in unique ways. Japanese are also dedicated to the idea that their country is simply too different from everywhere else to try to explain to foreigners, and yet the Japanese borrow legal institutions. Perhaps another reason is history and specifically the history of American legal missionaries. Although the isolation of the Tokugawa period spared Japan some of this narrative, American missionaries have a centuries-old tradition not only of converting foreigners to Christianity but also of converting their legal systems to ones resembling an imagined American legal system. One prime subject of such legal missionary work was and is China, but the rest of the world was not neglected. Nor have these efforts abated. Through agencies such as the US Agency for International Development and the State Department, international agencies dominated by the US such as the International Monetary Fund and World Bank, and private foundations and universities, the US continues to pursue legal reform on a global basis – a version of legal reform that strongly resembles the ideal, not the reality, of American law. In this context, it is important to remember that when one is a missionary, even a secular legal missionary unconcerned with actual religion, it is not likely that one will decide to adopt the foreigners’ practices or institutions. After all, the point is to help others to become like you, even if the “you” is an imagined one. The loss to the missionary, however, is the opportunity to learn.

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wa Nani ga Mondai na no ka?” [What’s Wrong with Comparative Law in America?], 2473 *Hanrei Jiho* 118 (Yuki Hatsutani trans., 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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