

Wrongful Convictions and the Culture of Denial in Japanese Criminal Justice 冤罪 日本の刑事司法を支配する否認の文化

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The release of Hakamada Iwao from death row in March 2014 after 48 years of incarceration provides an opportunity to reflect on wrongful convictions in Japanese criminal justice. My approach is comparative because this problem cannot be understood without asking how Japan compares with other countries: to know only one country is to know no country well. Comparison with the United States is especially instructive because there have been many studies of wrongful conviction there and because the U.S. and Japan are the only two developed democracies that retain capital punishment and continue to carry out executions on a regular basis. On the surface, the United States seems to have a more serious problem with wrongful convictions than Japan, but this gap is more apparent than real. To reduce the problem of wrongful convictions in Japanese criminal justice, reformers must confront a culture of denial that makes it difficult for police, prosecutors, and judges to acknowledge their own mistakes.

Wrongful Convictions in America and Europe

The United States has been the subject of more wrongful conviction research than any country in the world. In the quarter century since 1989, more than 1400 persons were wrongfully convicted and subsequently released from prison because of evidence of their innocence (National Registry of Exonerations, 2014). This is about 4.5 exonerations per month, or one per week every week for the past 25 years. More than 90 percent of these exonerates were men and 46 percent were African-American (African-Americans make up 13 percent of the

U.S. population and 40 percent of America's prison population). They spent an average of 10 years in prison before being released, and many spent two or three times that long. About three-quarters were wrongfully convicted of homicide or sexual assault-crimes which tend to leave physical evidence behind and which attract more media attention than other offenses do. Less than one quarter of these 1400 persons were exonerated based on DNA evidence, for biological evidence (saliva, semen, blood, and the like) is available in only 10 to 15 percent of all serious felony cases (Innocence Project, 2014)

All wrongful convictions are tragic, but the most worrisome are those that result in a mistaken sentence of death. Since 1973, 146 persons in 26 American states have been released from death row because of evidence of their innocence (Death Penalty Information Center, 2014). More than half of these exonerations occurred in five states: Florida (24), Illinois (20), Texas (12), Oklahoma (10), and Louisiana (10). Many analysts believe that some wrongly condemned persons have been executed. For example, Carlos DeLuna, a poor Hispanic man with childlike intelligence, was executed in Texas in 1989 based on one, nighttime, cross-ethnic eyewitness identification with no corroborating forensic evidence (Liebman, 2014). There is a growing list of executed persons whose guilt has been called into serious doubt following post-execution investigations. One cannot be sure, but America's wrongful executions may also include Ruben Cantu (executed in Texas in 1993), Larry Griffin (Missouri, 1995), David Spence (Texas, 1997), Claude Jones (Texas,

2000), and Cameron Todd Willingham (Texas, 2004).

While the foregoing figures are large and troubling, the true scale of America's wrongful conviction problem cannot be known because some wrongly convicted persons are never discovered. But educated estimates of the percentage of criminal cases resulting in wrongful conviction have been made, and they range from 3 to 5 percent in capital homicide cases and 8 percent or more in cases of sexual assault (Simon, 2012, p.4). These estimates are much larger than experts supposed before the "discovery of innocence" in the 1990s raised awareness of the problem of wrongful conviction in American criminal justice. The steep decline of capital punishment in the United States since 2000—death sentences have dropped 75 percent and executions are down 60 percent—has several causes, including a sharp decrease in homicide and the spread of Life Without Parole sentences, but the most important cause appears to be public concern about miscarriages of justice, which has made prosecutors, judges, juries, and governors more cautious about capital punishment.

The problem of "actual innocence" is far from the only problem afflicting America's death penalty system, for death sentences are also imposed on many defendants who are guilty but who do not deserve to be executed. A study of 4578 death sentences imposed between 1973 and 1995 found that 68 percent were overturned on appeal because of "serious reversible error" in the original trial. When these cases were retried, 82 percent resulted in a sentence less than death and 7 percent ended in acquittal. Findings such as these suggest that the actual practice of American capital punishment has all the consistency of a lottery. Errors in finding facts and assessing culpability are so widespread that American capital punishment can be called "a broken system" (Liebman, Fagan, and West, 2000).

The problem of wrongful convictions is serious in European countries too. In the former West Germany, for example, Dr. Karl Peters identified 1415 wrongful conviction cases between 1951 and 1964—an average of 101 wrongful convictions per year in a country that had 40 percent fewer people than Japan (Nose et al, 1981). The causes of these wrongful convictions (false confessions, mistaken eyewitness testimony, self-serving statements by snitches, and the like) were much the same as those that have been identified by wrongful conviction researchers in the United States. The wheels of all criminal justice systems are turned by the same imperfect operations of human beings: memory, recognition, inference, social influence, self-interest, and so on. Criminal verdicts in Germany, the United States, Japan, and other countries can be no better than the combined result of these flawed human activities (Simon, 2012).

But of course, the risk of convicting innocent people is not equal across nations. There is variation from country to country within the European Union (Huff and Killias, 2008), and the risk of wrongful conviction in the United States is probably greater than in most countries of Western Europe because American systems of "adversarial" criminal justice strike a different balance between the need to obtain convictions and the need to find the truth than do "inquisitorial" criminal justice systems on the European continent. American criminal justice also relies on plea bargaining to dispose of more than 90 percent of criminal cases, and errors in fact-finding may be more frequent in cases handled this way than in those that go to trial. For these reasons, wrongful convictions appear to be more frequent in the United States than in countries such as Germany, France, and Holland, even when taking into account differences in population and in the number of criminal cases (Huff and Killias, 2013).

Wrongful Convictions in Japan

It is impossible to know how many persons have been wrongfully convicted in Japan, and even educated estimates are rare because few decent studies have been conducted. One recent effort to count identified 162 cases of confirmed or strongly suspected wrongful conviction between 1910 and 2010, all of which were discovered in the post-war period, and more than half of which involved homicide (Nishijima, 2012). In this century-long survey, the average number of wrongful convictions per decade is 16, with a high of 37 in the 1950s and lows of 2 or fewer in the 1910s, the 1920s, and the 1930s. But 162 must be a major undercount. Indeed, this study probably represents the "tip of an iceberg" of wrongful convictions, for at least three reasons: because old cases are difficult to document (the prewar totals are implausibly low); because less serious crimes such as drug offenses and sexual molestation fell outside the scope of this study; and because, most fundamentally, many cases of wrongful conviction are never discovered. We thus may ask: how big is the rest of Japan's iceberg?

Since 1945, only eight persons have been sentenced to death or life imprisonment in Japan and subsequently acquitted at retrial (Hakamada Iwao will likely become number nine if he does not die before his retrial is completed). This is an average of about one exoneration every eight years—a small fraction of the frequency in the United States or Germany. This tiny number allows two contrasting interpretations.

On the one hand, Japanese prosecutors tend to be cautious about charging cases. In fact, a conservative charging policy—to avoid taking defendants to trial who could be acquitted—may be the main reason for Japan's famously high conviction rate. This charging policy is enforced through organizational mechanisms such as a *kessai* system (whereby front-line prosecutors consult with their superiors about the propriety of their charge and sentence

request decisions), and a penchant for punishing prosecutors who charge or try cases that end in acquittal (Johnson, 2002, pp.237-242). On this view, Japan's prosecutors probably send fewer innocent persons to trial than do their counterparts in the United States and other countries with higher acquittal rates.

The second explanation for the low number of wrongful convictions that have been revealed in Japan stresses their discovery, not their production. On this view, Japan has relatively few actors or institutions that focus on finding wrongful convictions—and hence few are found. Japan has relatively few lawyers, and only a handful of them concentrate on criminal defense. The major national newspapers do little investigative reporting (contrast *Yomiuri* and *Asahi* with *The New York Times* or *The Guardian*). Few Japanese scholars seriously study the subject of wrongful conviction. Japan's appellate courts tend to ratify the status quo. Japan has no exoneration registries or Innocence Projects. And Japan has no case review commissions except for the Japan Federation of Bar Association's Committee for the Protection of Human Rights, which has done good work in some cases and has published two fine reports (1998 and 2009), but which is hardly capable of providing assistance to all of the victims of wrongful conviction in the world's tenth most populous nation.

The number of wrongful convictions revealed in any country depends not only on how many have been produced but also on how effectively they are found. Japan's institutional shortcomings suggest that its wrongful conviction problem may well be much larger than it appears. When Kitani Akira was a judge in Urawa in the late 1980s and early 1990s, he helped acquit two or three defendants each year, and none of those acquittals was overturned on appeal (Kitani, 2013). Yet hundreds of other Japanese judges go year after year without issuing a single acquittal – and without wrongfully convicting a single

defendant? Surveys of private attorneys in 1989 and 1999 suggest there is a problem here, for in both years more than 40 percent of respondents said they had handled cases in which they believed a wrongful conviction occurred (Japan Federation of Bar Associations, 1999, p.506). A prominent defense lawyer has also estimated that Japan's true total of wrongful convictions is vastly larger than the tiny total of recognized wrongful convictions suggests. In his view, Japan may produce about 1500 wrongful convictions (*enzai*) each year, almost none of which are officially recognized (Takano, 2007). In the years since he wrote, Japan's acquittal rate has not significantly changed, though prosecutors may have become more cautious about charging cases in the new lay judge system (Takano, 2009).

Structural Reforms

A steady stream of wrongful convictions has been revealed in recent years, including Sugaya Toshikazu, Yanagihara Hiroshi, Govinda Mainali, Sakurai Shoji, and Sugiyama Takao. To some observers, these cases suggest that Japan is where the United States was about twenty years ago—just waking up to the problem of "actual innocence" in its own criminal justice system. But whether Japan experiences its own "innocence revolution" will depend on what legal professionals and law reformers do in the years to come, and in thinking about the future it is important to remember the past. In the 1980s, four men—Menda Sakae, Taniguchi Shigeyoshi, Saito Sachio, and Akabori Masao—were released from death row because of evidence of their innocence. Afterward, many proposals were made for reform of Japan's criminal justice system, but in all fundamental respects the system remained unchanged (Foote, 1992, p.102). A 229-page report by the Supreme Prosecutors Office did not even acknowledge that prosecutors were wrong to prosecute these defendants (Saiko Kensatsucho, 1986). In the aftermath of more recent miscarriages of

justice, Japan's penchant for conservative reform has been on display once again (*Yomiuri Shimbun*, 2014). In 2010, who expected that the revelation of serious prosecutorial misconduct in the case of Muraki Atsuko (who was acquitted) would lead to the *expanded* powers of law enforcers to plea bargain, wiretap, and grant immunity (Kingston, 2011)?

The problem of wrongful convictions in Japan suggests several structural reforms that are as important and familiar as they are difficult to achieve. For starters, Japan needs to develop better institutions for finding wrongful convictions after they occur. In this respect, the country remains well behind the United States and many European countries. The study of wrongful convictions also needs to become more important in Japan's legal academy. For this to happen, funders such as the Japan Society for the Promotion of Science (*Nihon Gakujutsu Shinkokai*) must make this subject a high research priority.

In order to prevent wrongful convictions before they occur, Japan should also implement recognized "best practices" in its criminal justice system, the most important of which is a requirement to electronically record *all* criminal interrogations in their entirety. Japan has made a little progress in this direction—but only a little. In fiscal 2013, Japanese police recorded the entire interrogation process in less than one percent of the 3315 criminal cases that were to be decided at lay judge trials (*Japan Times*, 2014). The Ministry of Justice apparently plans to submit a bill to the Diet that will make it obligatory for police and prosecutors to electronically record the entire interrogation process in all criminal cases subject to lay judge trial. While this would be a welcome step forward, it does not go far enough, for 98 percent of criminal cases are decided by professional judges, not by lay judge panels.

When a wrongful conviction occurs in Japan, a

false confession is usually the primary proximate cause. One study released in 2005 found that "a confession was part of the evidence marshaled against defendants in 84 percent (42 out of 50) of the confirmed *enzai* cases between 1945 and 1991 in which a conviction was later overturned" (Davis, 2014, p.76). This percentage is substantially higher than the United States, where false confessions were a "contributing factor" in 13 percent of the 1465 exonerations [documented by the National Registry of Exonerations between January 1989 and October 2014](#). In Japan, the problem of false confessions has remained unchanged for decades (see Johnson, 1972, pp.149-196), but its significance has never been recognized in law. There is no good reason not to record all criminal interrogations. The "sweet-talking for the government" that Professors Inoue Masahito (Waseda University), Sakamaki Tadashi (Kyoto University), and Shiibashi Takayuki (Chuo University) provided in the Special Committee on Criminal Justice for a New Era (*Shinjidai no Keiji Shiho Seido Tokubetsubukai*) resulted in remarkably lax recommendations for reform (Suo, 2014). Japan can do better than this.

To substantially reduce the risk of wrongful conviction, Japan must create more transparency and accountability in its interrogation rooms-the most closed and secretive spaces in Japanese criminal justice. Prosecutors must also become more transparent about the evidence in their possession, and the last half-century of history shows they will not do so voluntarily. Since the "Conspiracy at Matsukawa" case that resulted in the wrongful conviction of 20 men in 1950 and their subsequent acquittal (Johnson, 1972), almost every exoneration in Japan has involved the failure of prosecutors to disclose critical evidence to the defense. In Hakamada's case, this failure endured for decades (Ibusuki, 2014).

Japan's death penalty system also needs

reform. The most fundamental problem in the Japanese jurisprudence of capital punishment is that death is not deemed a "different" (*tokubetsu*) kind of punishment. As a result, few special procedures or protections have been established to reduce the risk of error in life-or-death cases. Prosecutors are not obligated to give the defense advance notice of whether they will seek a sentence of death at trial. There are no separate stages for fact-finding and sentencing at trial, and some defendants who deny the charges against them have been condemned to death in the near absence of information about who they are. Victims and survivors are allowed to make demands for punishment before the facts have been found, thereby raising the risk that fact-finding will be contaminated by emotional appeals for vengeance. The *Nagayama* death sentencing standards-a simple list of nine "factors"-are hopelessly vague. There is no automatic appellate review for persons who have been sentenced to death, so that over the past decade about one-third of all persons executed in Japan never had their case reviewed by the Supreme Court. Prosecutors are permitted to appeal non-death sentence outcomes, and appellate courts often give them what they want - as happened when a juvenile offender was condemned to death in the well-known *Hikari* case (Masuda, 2009). Most remarkably, a death sentence can be imposed by a 5 to 4 vote provided that at least one vote in this "mixed majority" comes from a professional judge (Johnson, 2013). Given all of these problems, is it surprising that the death sentencing rate in murder trials where prosecutors seek a sentence of death has risen from 56 percent in the trial system that relied solely on professional judges to 70 percent or so in lay judge trials?

Japanese legal professionals-prosecutors, judges, and defense lawyers-frequently emphasize the need to be "cautious" (*shincho*) about capital punishment. This word is ubiquitous in Japan's death penalty discourse,

and it appears to be the main claim in the press conferences where the Minister of Justice fields questions after a hanging has occurred. But the stress on "caution" in capital punishment is mostly empty rhetoric. If Ministers and prosecutors were serious about what they say, they would push for special procedures and protections which reflect the fact that death is indeed a different kind of punishment.

Japan's Culture of Denial

The structural reforms described above are essential, but without a change in Japan's culture of criminal justice they are likely to have limited impact. Reforming institutions is the main means of change in the modern approach to developing democracy, but the idea that structural reform alters actual practice is more hope than fact (Flyvbjerg, 1998). Research on "making democracy work" warns that the "designers of new institutions are often writing on water" (Putnam, 1993, p.17). Culture and history strongly condition the effectiveness of new rules and institutions, and long established practices frequently limit the possibilities for achieving meaningful reform. Since culture counts, addressing the problem of wrongful convictions in Japan must attend to this area as well. The most important imperative concerns cultural assumptions that are relevant in many areas of Japanese society, from aviation and medicine to nuclear energy and criminal justice. Three principles are primary.

First, in order to reduce error one must assume it is inevitable (Schulz, 2010). When I started studying criminal justice in Japan in the early 1990s, prosecutors told me that the miscarriages of justice that happened in the first decade or so after the Pacific War "could not occur anymore" (*arienai*) because they were caused by an immature system of criminal justice that had been radically reformed during the Occupation and that was still working out its problems in the early postwar period.

Subsequent events reveal this claim to be false. Japan continues to have problems with wrongful conviction, and the most serious problem involves a culture of denial that makes it difficult for police, prosecutors, and judges to acknowledge their own mistakes and for the media and other external agents of accountability to conduct rigorous investigations (Ezoe, 2010). This culture of denial shields criminal justice officials from pain, humiliation, and change-and it is therefore easy to understand why they cling to it. Letting the culture of denial go and embracing the lessons that error can teach will require honor and courage from police, prosecutors, lawyers, and judges. More importantly, it will require pressure from Japanese politics and society.

Second, in fields like medicine and aviation, successful strategies for error prevention rely on principles of openness and transparency to identify and learn from mistakes (National Institute of Justice, 2014). But Japan's system of criminal justice is so hostile to outside scrutiny that it remains impossible to see or say with precision what many of its problems are. Most interrogations are not electronically recorded. Prosecutors possess wide discretion to withhold evidence from the defense, and they are not reluctant to hide evidence when it serves their own interests. Lay judges are not permitted to discuss case details or deliberations even after their service has ended. And Japan's system for administering executions is surrounded by secrecy that is taken to extremes not seen in other developed democracies. The insularity of Japanese criminal justice reflects the mistaken assumption that criminal proceedings are the special province of legal professionals. Whether Japan experiences its own "innocence revolution" will depend partly on how much more transparent its criminal justice system becomes.

The third important principle of error

prevention is reliance on data so that criminal justice can be administered based on facts rather than on opinions, assumptions, and the prerogatives of power (Schulz, 2010). Empirical criminology is not well developed in Japan, and little is known about how Japanese criminal justice is patterned. One key cause of this deficiency is the resistance of Japanese criminal justice officials to being studied in a serious way. Some fine Japanese scholars have experienced this resistance firsthand, and so have I, several times. To take one example, I went to Tokyo a few years ago to do research about policing in Kabukicho. I was relying on the word of an executive in the National Police Agency, who had promised that I would be given meaningful access to study police activity in Japan's largest red light district. Despite my best efforts, that access never materialized. When I was permitted to do any "research" at all, it consisted of standing outside a police box (*koban*) in a safe suburban setting many miles removed from the action I was interested in. All the while, I was watched by handlers sent from the Tokyo Metropolitan Police Department, who seemed every bit as bored with their assignment as I was with my own meager access to their world.

Police are the most understudied actors in Japanese criminal justice. This is both ironic and unfortunate, for police are also the most important actors in Japan's criminal process, not least because they gather the evidence which informs decision making by other criminal justice officials and which is used to "make crime" (Miyazawa, 1992). But hardly anyone studies the Japanese police in a serious way, and in this respect Japan remains a strange land with respect to police research. Without decent data, reporters and citizens will continue to be manipulated by the public relations efforts of Japan's most powerful government agency.

Conclusion

Wrongful convictions will continue to occur as long as there are criminal convictions, but they can be curtailed. In the United States, police and prosecutors now initiate or cooperate in more than half of all exonerations, and more than a dozen large prosecutors' offices across the country have created "conviction integrity units" to review wrongful conviction claims. As of June 2014, these units had agreed to review some 5000 cases, and the number is growing rapidly (Peltz, 2014). This more open orientation to mistakes is a marked break from the culture of denial that long characterized prosecution in America, and it also helps explain why there have been so many more exonerations in the United States than in Japan. Of course, America still has a long way to go to adequately address its problem with wrongful convictions, but the increased willingness to acknowledge error and learn from mistakes must be reckoned a welcome development.

In contrast, exonerations in Japan are almost always achieved despite strong resistance from police and prosecutors, and Japanese judges are often slow to acknowledge error as well (while Hakamada was incarcerated, more than a dozen judges rejected his appeals). It is often said that "to err is human," but once a mistake has been made, humans have a choice between "covering up" and "fessing up." As of this writing, Japanese prosecutors are still appealing the decision to grant Hakamada a retrial, and police are on their side. Their stance has two main causes: a desire to save face, and a tendency toward tunnel vision which leads them to dismiss evidence that is inconsistent with their preferred outcome ("guilty!") as irrelevant, incredible, or unreliable. If you recognize that errors are inevitable, you will not be surprised when they occur and you will have plans in place to correct them. Conversely, if you refuse to admit to yourself or the world that mistakes do occur, then every wrongful conviction becomes stark and embarrassing evidence of how wrong you

are (Tavris and Aronson, 2007, p.156).

Japan's culture of denial is toxic to justice, and so is the certainty of criminal justice officials about the propriety of their own conduct. Doubt is a skill they still need to learn, and error is a reality they must learn to acknowledge. But they will not learn these lessons on their own. How long will Japanese society tolerate the status quo? And when will Japanese law and society take serious interest in the iceberg?

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