

2015

The Façade of Change: Tracing the Post-War Evolution in Japanese Criminal Procedure

Ramsey Fisher

Follow this and additional works at: <http://scholarcommons.scu.edu/historical-perspectives>



Part of the [History Commons](#)

Recommended Citation

Fisher, Ramsey (2015) "The Façade of Change: Tracing the Post-War Evolution in Japanese Criminal Procedure," *Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II*: Vol. 20 , Article 12.

Available at: <http://scholarcommons.scu.edu/historical-perspectives/vol20/iss1/12>

This Article is brought to you for free and open access by the Journals at Scholar Commons. It has been accepted for inclusion in Historical Perspectives: Santa Clara University Undergraduate Journal of History, Series II by an authorized editor of Scholar Commons. For more information, please contact rscroggin@scu.edu.

The Façade of Change: Tracing the Post-War Evolution in Japanese Criminal Procedure

Ramsey Fisher

Introduction

Criminal procedure in Japan lives a multifaceted existence. Enacted as part of the American Occupation in Japan on July 10, 1948, the current Code of Criminal Procedure, on one hand, goes to great lengths to implement an adversarial process of justice that secures the rights of defendants. The code, for example, devotes twelve articles to defining the right to counsel for defendants;¹ grants defendants the right to refuse questioning so long as they are not under arrest;² stipulates rules of evidence that require a standard of “beyond any reasonable doubt” for conviction;³ requires an indictment process before trial;⁴ mandates a trial led by a single judge;⁵ offers defendants protection against self-incrimination;⁶ and the right to cross-examination;⁷ and perhaps most importantly of all, places the burden of proof on the prosecu-

¹ Code of Criminal Procedure (1948), Articles 30-42.

² Code of Criminal Procedure (1948), Articles 197-198.

³ Code of Criminal Procedure (1948), Article 227.

⁴ Code of Criminal Procedure (1948), Article 256.

⁵ Code of Criminal Procedure (1948), Articles 89-90.

⁶ Code of Criminal Procedure (1948), Article 319.

⁷ Code of Criminal Procedure (1948), Article 308.

tion.⁸

There is a wide gap, however, between theory and practice when it comes to Japanese criminal procedure. Japan's system has been described as "predominantly inquisitorial,"⁹ and most scholars and legal practitioners argue that the balance of power tilts in favor of the prosecution to an extent that actually strips defendants of many of the rights they receive in America.¹⁰ Some scholars have even suggested that the central goals of the two systems are radically different in that Japan seeks "not to assure that the rights of the criminally accused are protected but rather to assure 'substantive justice' in the sense that all those who have committed crimes are found guilty."¹¹

There thus appears to be a clear disconnect between the system's intended operation as designed in 1948 and its modern function. The story of how this

⁸ Code of Criminal Procedure (1948), Article 299.

⁹ John Haley, "Japan," in *The Handbook of Comparative Criminal Law* (Stanford, CA: Stanford University Press, 2011), 397.

¹⁰ For example, see: A. Didrick Castberg, "Prosecutorial Independence in Japan," *Pacific Basin Law Journal* 16, no. 1 (January 1, 1997), <http://escholarship.org/uc/item/63r6g7zh>; Daniel H. Foote, "The Benevolent Paternalism of Japanese Criminal Justice," *California Law Review* 80, no. 2 (March 1, 1992): 317–90, doi:10.2307/3480769; David Johnson, "Criminal Justice in Japan," in *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2008); David T. Johnson, *The Japanese Way of Justice: Prosecuting Crime in Japan, Studies on Law and Social Control* (Oxford and New York: Oxford University Press, 2002).

¹¹ See Carl F. Goodman, *The Rule of Law in Japan: A Comparative Analysis*, Third revised edition, (Norwell, MA: Kluwer Law International, 2012), 454.

disconnect appeared, however, is one that has not been explored by scholars of Japanese criminal procedure. The objective of this study is to piece that story together.

This paper is split into three sections. First, we survey the literature on Japanese criminal procedure. Although scholars have yet to directly confront this disconnect directly, we are able to infer that one probable explanation as to why practice may differ from theory with respect to Japanese criminal procedure is that the 1948 code fundamentally clashed with deeply seated cultural beliefs regarding the law and justice.

The next two sections attempt to test this hypothesis. First, we examine the concrete changes of the new code, with special attention on the Anglo-American traditions embedded within the reforms. Next, we evaluate the Japanese response. Though no population-wide surveys were issued at the time, and English primary source data regarding the code is scarce, some of the most impactful Japanese legal scholars of the time drafted pieces in English concerning the new code in the 1963 volume of *Law in Japan: A New Order in a Changing Society*. Using the arguments of Takeyoshi Kawashima, Judge Kohji Tanabe, and Atsushi Nagashima—three scholars who had a significant voice in shaping the modern Japanese criminal justice landscape—we gain evidence supporting the hypothesis that the reforms of the 1948 code were fundamentally in opposition with Japanese legal culture.

Historiography

The literature regarding Japanese criminal proce-

ture is divided into two camps: one that focuses almost exclusively on the concrete changes brought forth by the 1948 code, and a second that focuses on the cultural forces driving the current practice in criminal practice.

Camp One: Concrete Changes of 1948

The first camp focuses almost exclusively on the concrete changes brought forth by the 1948 code. Championed by scholars like Richard Appleton and Hiroshi Oda, the thesis propagated by this school is quite uniform: the 1948 code brought with it distinctly American legal principles not before implemented in Japan.¹² As noted above, such reforms included provisions establishing the rights to counsel and cross-examination, the threshold of beyond a reasonable doubt, and even layperson jury trials in some areas of Japan.¹³ We will examine the changes imposed

¹² See Richard B. Appleton, "Reforms in Japanese Criminal Procedure under Allied Occupation," *Washington Law Review and State Bar Journal* 24 (1949): 401; Kōya Matsuo, "The Development of Criminal Law in Japan since 1961," in *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2008); Hiroshi Oda, *Japanese Law*, Third edition, 2011, 436-442; Shigemitsu Dandō, *Japanese Criminal Procedure*, Publications of the Comparative Criminal Law Project ; v. 4 (Berkeley, CA: The University of California Press, 1965), 12-22.

¹³ Jury trials were conducted on Okinawa during the American Occupation. See: Anna Dobrovolskaia, "An All-Laymen Jury System Instead of the Lay Assessor System for Japan? Anglo-American-Style Jury Trials in Okinawa under the US Occupation," *Vanderbilt Journal of Transnational Law*, 2004, 57-80; Hiroshi Fukurai, "The Rebirth of Japan's Petit Quasi-Jury and Grand Jury Systems: A Cross-National Analysis of Legal Consciousness and Lay Participation in Japan and the U.S.,"

by the 1948 code in greater detail in the next section.

Camp Two: Culturist Perspective on Current Japanese Criminal Procedure

The second camp evaluates the various aspects of Japanese criminal procedure from a culturist perspective. This body of literature is vast, but seems to focus on one major aspect of Japanese criminal procedure: the inquisitorial nature of the system in practice.¹⁴

An adversarial system has two crucial components: 1) a formal separation of the judge and prosecutor, in which “the prosecutor determines the object of proceedings and the judge is a passive and impartial adjudicator,” and 2) a balance of power between the prosecutor and defense attorney when it comes to making their claims.¹⁵ Though the first was firmly established in Japan by the 1948 code, the second has been far from achieved.

David Johnson calls Japan “a paradise for a prose-

Cornell International Law Journal, 2007, 315-359.

¹⁴ Daniel H. Foote, “Reflections on Japan’s Cooperative Adversary Process,” in *The Japanese Adversary System in Context*, 2002. Goodman, *The Rule of Law in Japan*, 454–500; Johnson, “Criminal Justice in Japan”; Setsuo Miyazawa, “Introduction: An Unbalanced Adversary System--Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective,” in *The Japanese Adversary System in Context* (New York, NY: Palgrave Macmillan, 2002), 1–12; Satoru Shinomiya, “Adversarial Procedure without a Jury: Is Japan’s System Adversarial, Inquisitorial, or Something Else?,” in *The Japanese Adversary System in Context* (New York, NY: Palgrave Macmillan, 2002), 114–28.

¹⁵ Miyazawa, “Introduction: An Unbalanced Adversary System--Issues, Policies, and Practices in Japan, in Context and in Comparative Perspective,” 2.

cutor.”¹⁶ In addition to being compensated fairly well and having light caseloads and little crime to prosecute in the first place, prosecutors enjoy an unprecedented amount of procedural power. The principle of “voluntary investigation” allows them to process over four fifths of their cases on an “at-home” basis, away from “judicial scrutiny;” evidence admission rules strongly favor the prosecution over the defense; prosecutors are allowed to order arrests without warrants and hold suspects in detention cells before they have filed charges; and prosecutors are able to question suspects for up to twenty-three days on a single charge, summarizing statements in their own words.¹⁷ In addition, they have the ability to appeal any unfavorable sentence or verdict, including acquittals.¹⁸

Defense attorneys, on the other hand, suffer from a “lack of weapons.”¹⁹ Japanese courts often recognize “broad exceptions to the right to silence” and have relaxed standards to allow prosecutors to restrict meeting capabilities with clients. They also commonly place restrictions on the ability for defense attorneys to compel discovery.²⁰

It is important to note, however, that the role of the defense attorney is starkly different to what one finds in the American system. Defense attorneys have no need for most of the “weapons” utilized by American defense attorneys because they are *expected* to cooper-

¹⁶ See Chapter 1, Johnson, *The Japanese Way of Justice*.

¹⁷ *Ibid.*, 36.

¹⁸ *Loc cit.*

¹⁹ Foote, “Reflections on Japan’s Cooperative Adversary Process,” 32.

²⁰ *Ibid.*, 32–33.

ate with the prosecution from investigation to sentencing. In fact, “prosecutors routinely police defense lawyers to ensure that their behavior does not depart too far from the norms of constructive, cooperative engagement.”²¹ Those who do go out of line are punished and branded as “radical leftists.”²² The entire functionality of the system rests in the hands and trust of the prosecution, and the defense’s role is, in part, to support that system.

Perhaps most interesting, however, is that this aspect of Japan’s criminal process is believed to have cultural roots. Castberg, for instance, argues that the traditional values of respecting and deferring to authority are inherent to the prosecutor’s elevation.²³ When one acknowledges the prestige awarded to prosecutors, it is clearer why they are treated as high authority.

Prosecutors in Japan are some of the most respected individuals in society. Primarily, the process of becoming a prosecutor in Japan is far more selective than that in America. Though there are 74 law schools functioning in Japan today, future prosecutors are generally expected to attend the most elite programs. Those who sit at the top of their class at the best schools are recruited for prestigious internships at the Legal Training and Research Institute, where they work directly under current prosecutors and prepare for the bar exam. A select few of those able to pass the

²¹ Johnson, *The Japanese Way of Justice*, 77.

²² *Loc. cit.*

²³ Castberg, “Prosecutorial Independence in Japan,” 39.

exam²⁴ are then selected for apprenticeships at the Tokyo Public Prosecutors Office in preparation for a career as a prosecutor. Indeed, to become a prosecutor, one has to be among the best legal minds in the nation. As of 2004 the state imposed a quota of prosecutors at 1,508 nationwide.²⁵

It is, therefore, understandable that these individuals occupy a rank in the Japanese social hierarchy. Indeed, as Johnson puts it: “to find a comparable official elite in the United States, one would have to turn to those who staffed the E-Ring of the Pentagon, or the Central Intelligence Agency at the height of the Cold War.”²⁶

This imbalance of power also represents what Goodman calls “a priority on substantive justice.”²⁷ The group orientation of Japanese society implies that “the rights of the few may have to be sacrificed to protect the public welfare” of the whole.²⁸ Thus, the goal of the system is not to protect individual rights—to ensure that each player in the game gets a fair shot—but to get to the truth. Prosecutors take the lead in achieving that objective, and everything else, from the rules of the game to those who play it, is there to facilitate them in doing so.

A number of other scholars agree with Goodman’s

²⁴ It should be noted that this is no easy feat. The bar passage rate in Japan is currently between 2% and 4%.

²⁵ Hisashi Aizawa, “Japanese Legal Education in Transition,” *Wisconsin International Law Journal* 24 (2007): 146–149.

²⁶ Johnson, *The Japanese Way of Justice*, 48.

²⁷ Goodman, *The Rule of Law in Japan*, 447.

²⁸ *Ibid.*, 454.

characterization.²⁹ Some have even gone so far as to say that these cultural forces will prevent any adversarial reform—such as a jury system—from being implemented successfully.³⁰ However, the important note of agreement among all these scholars is that the inquisitorial nature of the system is a reflection of the country's attitudes towards crime and justice.

Thus, it seems that the major lessons we can draw from the literature are: a) that the changes of 1948 were American inspired, b) that the current system is not American, and c) that the current system is, to some degree, linked to culture. What has yet to be determined, however, is just how the disconnect between the terms of the 1948 code and contemporary practice occurred.

It seems, however, that we can piece together a hypothesis. Indeed, given that the cultural factors that drive the current system are issues that have been in place in Japan for centuries,³¹ it seems that one

²⁹ Castberg, "Prosecutorial Independence in Japan"; Johnson, "Criminal Justice in Japan"; Shinomiya, "Adversarial Procedure without a Jury: Is Japan's System Adversarial, Inquisitorial, or Something Else?" Foote, "The Benevolent Paternalism of Japanese Criminal Justice"; Haley, "Japan"; Matsuo, "The Development of Criminal Law in Japan since 1961."

³⁰ Lester W. Kiss, "Reviving the Criminal Jury in Japan," *Law and Contemporary Problems* 62, no. 2 (April 1, 1999): 261–83; Robert M. Bloom, "Jury Trials in Japan," *Loyola of Los Angeles International and Comparative Law Review* 28 (2006): 35. It should be noted that in 2009, Japan implemented the "Saiban-in" jury system, in which lay citizens are chosen at random to act as judges in a case. Though this brought lay people into the judicial process, the system functions in an entirely different fashion from the American system. Individuals that are chosen examine the evidence along with a panel of judges to come to a conclusion; there is no adversarial debate held in front of the lay people, and judges still play a significant role in determining guilt.

³¹ We will examine this briefly in the next section, see: Dan F. Henderson, "Some Aspects of Tokugawa Law," *Washington Law Review and State Bar Journal* 27 (1952): 83; Nobuhiko Kasumi, "Criminal Trials in the Early Meiji Era—with Particular Reference to the Ukagai/Shirei System," in *Law in Japan: A Turning Point*, trans. Daniel Foote (Seattle: University of Washington Press, 2008); Karl Steenstrup,

explanation is that those same forces are what drove Japanese criminal procedure away from the intentions of the 1948 code and that the reforms of the code, from its very conception, clashed so fundamentally with these cultural tendencies that it could never be fully adopted into Japanese society in the way the designers hoped it would be. The next two sections seek to test that hypothesis.

Part I: The Effect of the 1948 Code of Criminal Procedure (CCP)

The history of Japanese criminal procedure, which begins centuries before 1948, must be understood before we can grasp the real impact of the post-war code. Accordingly, this section is split into two parts. The first explores how Japanese criminal procedure functioned prior to 1948, and the second evaluates the changes brought forth by the 1948 code.

Japanese Criminal Procedure: Pre-1948

The first evidence we have of ancient Japanese criminal procedure comes from the eighth century. Writings from the Taiho (701-704) and Yorō (717-724) periods suggest that in these ancient times, Japan was using a criminal code of procedure developed in China during the Sui and Tang dynasties (581-907). In these early codes, judgment had to be based on confession, and any means, including torture, could be used to attain it.³²

Because this code, however, was ultimately some-

"New Knowledge Concerning Japan's Legal System Before 1868, Acquired from Japanese Sources by Western Writers Since 1963," in *Law in Japan: A Turning Point* (Seattle: University of Washington Press, 2007).

³² Shigemitsu Dandō, *Japanese Criminal Procedure*, 8-10.

thing ‘imported’ into Japan, the bulk of the code faded away with time. In fact, by the middle of the Heian period (794-1185) Japan criminal procedure had transformed into an entirely feudal process. Though the emphasis on confession remained, proceedings were no longer controlled by a set of rules. Instead, officialdom dictated proceedings, as feudal lords and officials conducted trials in an entirely inquisitorial fashion.³³

This type of system persisted into the Middle Ages, especially under the Kamakura (1185-1392) and Muromachi (1392-1573) periods. In medieval practice, a single local official called the *shugo* typically rendered judgment. Though this changed slightly in the Tokugawa Period (1615-1867) to allow for a Supreme Council called the *hyōjōsho* to oversee local hearings, the important takeaway is that in both periods, trials were conducted in an incredibly inquisitorial fashion, with local leaders holding wide discretion.³⁴

As was the case with most aspects of Japanese society, the year 1868 brought immense changes to criminal procedure. Between the start of the Meiji Restoration and 1880, several different tentative reforms were put into place.³⁵ The first attempt at a new code came in 1870 with the *Shinritsukōryō*. This code essentially “amounted to a revival of the old

³³ *Ibid.*, 13.

³⁴ Steenstrup, “New Knowledge Concerning Japan’s Legal System Before 1868, Acquired from Japanese Sources by Western Writers Since 1963,” 14.

³⁵ For a detailed evaluation of several of these reforms, see: Kasumi, “Criminal Trials in the Early Meiji Era--with Particular Reference to the Ukagai/Shirei System.”

system based on the ancient Chinese codes.”³⁶ As was the case in the Taiho and Yorō periods, torture was permitted, and all crimes were to “be adjudicated on the basis of confession.”³⁷

Naturally, these new codes faced extensive opposition, especially in regard to their allowance of torture. The result was that the period between 1870 and 1880 saw an influx of what scholars have called “piecemeal reforms.”³⁸ In 1872, for example, members of the press were allowed into courts for the first time, courts were officially separated from the office of the public prosecutor, torture in civil cases was prohibited, and the use of class distinction in trials was formally abolished.³⁹ Furthermore, in 1873, the use of vendettas was banned. In 1875 an appellate procedure was recognized, and in 1876 the age-old requisite of confession for conviction was abolished. Shortly after in 1877, the use of torture in criminal case investigation was formally banned.⁴⁰

While all these reforms were being installed, however, the government was working on a much more comprehensive project: the Code of Criminal Instruction. Formally passed in 1880, the Code had been nearly 10 years in the making. In 1870 the Cabinet established the Bureau for the Investigation of Institutions and charged it with researching French criminal codes in an effort to design a comprehensive Japanese

³⁶ Shigemitsu Dandō, *Japanese Criminal Procedure*, 14.

³⁷ 1873 Code, translated and quoted in: *Ibid.*

³⁸ Meryll Dean, *Japanese Legal System*, 2nd edition (London, UK: Routledge-Cavendish, 2002), 99.

³⁹ *Ibid.*, 100–101.

⁴⁰ *Ibid.*, 102.

code. Accordingly, Professor Gustave Boissonade of the University of Paris was invited to assist, and eventually led the drafting of a new penal and procedure code.

It is, therefore, no surprise that the final Code of Criminal Instruction has undeniably European roots. Primarily, we see that although the code allowed for an appointment of counsel for the accused, the prosecutor was still placed on a higher playing field. As in the French model, the prosecutor was designated to sit next to the judge at trial and play a key role in determining what witnesses would be called, how evidence would be presented, and, ultimately, the verdict of the case.⁴¹

This leads us to the second major example of European influence in the 1880 Code: the inquisitorial nature of the judge. Indeed, the Japanese judge was not to play the role of impartial arbiter, as is the case in a traditional Anglo-American style trial. Instead, he or she was to act more as a “confessor,” conducting and manipulating every aspect of the trial from beginning to end.⁴²

A key part of this was what was termed the “preliminary investigation.” There is no direct parallel to this aspect of old Japanese criminal procedure in the Anglo-American system, yet it was prominent in the French and German systems in the late 19th century.⁴³

⁴¹ *Ibid.*, 103.

⁴² *Ibid.*, 104.

⁴³ Shigemitsu Dandō, *Japanese Criminal Procedure*, 15. An important distinction between this system and the Grand Jury system used in the United States is that the question of indictment fell solely on the judge in the preliminary investigation. There was no jury; the prosecutors were responsible for all investigative work, and the judge, using the evidence and analyses of the prosecutors, made the determination on the case.

Taking place entirely before trial, the preliminary investigation effectively acted as a hearing in which the defense was *not* accorded access to counsel, and a judge made a determination of the case based on evidence presented by the public prosecutor.⁴⁴

Though a trial must take place for formal guilt to be established, one cannot underestimate the weight placed on this preliminary investigation. Because the trial judge relied extensively upon the determination of the preliminary investigation rather than try the case cold, the outcome of the preliminary investigation inevitably biased the outcome of trial. In fact, evidence suggests that many assumed that the outcome of the preliminary investigation was indeed the final outcome of the case and that the trial was more of a procedural loop than a substantive determination of guilt.⁴⁵

This code remained the dominant authority on criminal procedure in Japan until the 1920s, when two new laws came into place. The first was the 1922 Code of Criminal Procedure. Only a slight modification of the Code of Criminal Instruction, this code drew heavily on German influences. Given that the major changes in the 1922 code are the introduction of expanded rights to the accused, some have argued that the code reflected the general progressive trend of the 1920s that favored reform.⁴⁶

Arguably another reflection of this cultural trend was the second new law of the 1920s: the 1923 Jury Law. A milestone for Japanese legal history, this law

⁴⁴ Dean, *Japanese Legal System*, 104–105.

⁴⁵ *Ibid.*, 105.

⁴⁶ Shigemitsu Dandō, *Japanese Criminal Procedure*, 15–20; Dean, *Japanese Legal System*, 108.

was the first in Japanese history to mandate lay participation in all criminal cases. Though the system was similar to the English system in some respects, it maintained several key differences that brought it more closely in line with the German/French model than anything else. For one thing, the “jury had no power to say guilty or not guilty.”⁴⁷ This was still the sole authority of the judge. The jury’s role was instead restricted to making decisions on questions of fact posed by the court. Furthermore, their decisions were non-binding on the court’s ultimate decisions.

Nevertheless, despite the somewhat Anglo-American reforms of the 1920s, one gets the impression that, prior to 1948, Japanese criminal procedure maintained its inquisitorial design, in a hodgepodge of ancient Chinese and modern French and German influences that came together to shape a system defined by three fundamental traits: 1) a dominant and controlling judge; 2) a powerful prosecutor; and 3) an emphasis on finding the truth via controlled investigation rather than through open debate and deliberation. After World War II, the American Occupation forces ordered all of this to change.

Japanese Criminal Procedure: Post-1948

The changes introduced in the 1948 code radically transformed the Japanese criminal procedure into a distinctly Anglo-American construction. Though some of these changes were noted in the introduction to this paper, we can gain a better understanding of the impact of the 1948 Code by examining how it altered three stages of criminal procedure: pre-trial investiga-

⁴⁷ Dean, *Japanese Legal System*, 107.

tion, indictment, and trial.⁴⁸

The primary change in the investigative phase concerned the relationship between public prosecutors and police. Whereas in the older codes prosecutors virtually controlled case investigation, the 1948 CCP gave substantially more discretion to police, providing them the ability to seek warrants from the court, control their own files, and lead crime investigations without the discretion of the prosecutor's office.⁴⁹

Complementing this change was the implementation of a host of safeguards intended to protect the rights of the defendant. The accused gained the right to remain silent when detained, and arrests, searches, and property seizure now required warrants issued by the courts, rather than by the prosecutor's office. In fact, according to the new code, the only circumstances in which a warrant was not required for arrest were: 1) when police had reasonable grounds to suspect that the crime was a felony, and 2) when the criminal was caught in the act.⁵⁰ Furthermore, the code mandated that police officers inform the accused of both the "essential facts of the case" and their right to counsel, upon arrest.⁵¹

We see perhaps even more impactful changes in the indictment phase. Primarily, the new code placed limits on how long a suspect could be detained and gave detainees a right to an explanation of why they

⁴⁸ For a detailed breakdown of the changes brought on by the 1948 Code, see: Appleton, "Reforms in Japanese Criminal Procedure under Allied Occupation."

⁴⁹ Code of Criminal Procedure (1948), Article 191.

⁵⁰ Code of Criminal Procedure (1948), Articles 193,197.

⁵¹ Code of Criminal Procedure (1948), Articles 218–220.

were being detained.⁵² These provisions had the important effect of changing the prosecution's strategy in a case from one focused on gaining a confession to one focused on the entirety of evidence involved in a case.⁵³

Perhaps the largest change introduced by the new code, however, was the elimination of the preliminary investigation process and the installment of a formal indictment hearing supervised by the court.⁵⁴ Under this system, the primary source of evidence for a court was no longer the preliminary investigation, led and controlled by the prosecutor. Instead, the police were to conduct the pre-trial investigation, and evidence would be presented to the judge in open court by *both* the defense and prosecution for preliminary judgment.⁵⁵ The impact of this change cannot be understated. Not only did it begin to—at least theoretically—equate the power of defense and prosecution, but it also effectively changed the role of the judge from that of a “confessor” to more of an unbiased arbiter. The system had indeed taken a great leap in becoming adversarial in procedure.⁵⁶

Leaps were also taken in the trial phase. Once such change was the strong emphasis placed on the accused actually being present during trial. One of the central tools in Japanese criminal procedure prior to

⁵² Code of Criminal Procedure (1948), Articles 60; 82-86.

⁵³ Appleton, “Reforms in Japanese Criminal Procedure under Allied Occupation,” 416.

⁵⁴ Code of Criminal Procedure (1948), Article 256.

⁵⁵ Code of Criminal Procedure (1948), Article 256.

⁵⁶ Appleton, “Reforms in Japanese Criminal Procedure under Allied Occupation,” 414.

1948 was the summary procedure. Under the summary procedure a judge maintained the discretion to convict the accused by order without a hearing or prior proceedings for small, petty offenses.⁵⁷ The new code did not entirely eliminate the summary procedure, but allowed the procedure to be used only if the defendant presented no objection to the order for summary procedure seven days after the prosecutor issued it.⁵⁸

The process by which evidence and witnesses were presented in trial was also changed in the new code. Under the old procedure, the presentation of witnesses and evidence was determined by the prosecutor and judge exclusively. The new code widened the door of discretion for the defense, mandating that the court must listen to the defense's opinions when determining the order and scope of witness examination.⁵⁹ In addition, the defense attorney was granted the right to an opening statement and cross-examination.⁶⁰ Perhaps most importantly, however, the 1948 rendition also made conviction something contingent, not on the judge's suspicion, but rather on evidence that conveyed guilt "beyond a reasonable doubt," with the burden of proof placed firmly on the prosecution.⁶¹

Though some traditions of the past remained in

⁵⁷ *Ibid.*, 420.

⁵⁸ Code of Criminal Procedure (1948), Article 461.

⁵⁹ Code of Criminal Procedure (1948), Article 297.

⁶⁰ See Code of Criminal Procedure (1948), Article 295. It is important to note that the word "cross-examination" is not explicitly used in the code. The terms, however, grant both sides the "full opportunity to examine not only his own witnesses, but those called by his opponent."

⁶¹ Code of Criminal Procedure (1948), Article 227; 298.

place after 1948,⁶² it seems fair to say that the landscape of Japanese criminal procedure had been fundamentally redesigned as a result of the new code. The power and discretion of the prosecutor was tampered slightly. No longer was a trial allowed to begin with the court already having a partial opinion on a case, nor was it the goal of investigation to obtain a confession. And defense counsel—once restricted to doing no more than make a passionate closing statement—was accorded a host of new opportunities to “speak up and influence the court during public trial.”⁶³ Moreover, the accused was given greater rights, especially the right to silence and an attorney, the protection against evidence or confessions made under compulsion, and guarantees against prolonged detention.

All of this had the effect of placing Japan on a road to adopting a Western, Americanized system of justice. The seeds were indeed planted. Yet as we know, they did not grow as expected. As noted above, modern Japanese procedural justice can be summarized as “predominantly inquisitorial,”⁶⁴ with prosecutors controlling pre-trial investigation, indictment, and much of the trial itself. Indeed, in many ways, Japanese criminal procedure functions more like it was designed *before* 1948 rather than after. To test the hypothesis that this digression was due to deeply

⁶² The judge was still the most dominant figure in the system. He maintained discretion in determining the procedures of indictment and trial, the final authority in choosing the order of witness examination, and generally was the first to interview key witnesses [Code of Criminal Procedure (1948), Article 304].

⁶³ Appleton, “Reforms in Japanese Criminal Procedure under Allied Occupation,” 422.

⁶⁴ Haley, “Japan,” 197.

seated cultural differences in jurisprudence that made an American system impossible to fully adopt in Japan, we turn to the works of those writing about Japanese law in this period of transition.

Part II: The Literati's Reaction

In this section we turn to evaluate three important analyses written by scholars reacting to the post-war changes: 1) Kawashima Takeyoshi's "Dispute Resolution in Contemporary Japan,"⁶⁵ 2) Kohji Tanabe's "The Process of Litigation: An Experiment with the Adversary System,"⁶⁶ and 3) Atsushi Nagashima's "The Accused and Society: The Administration of Criminal Justice in Japan."⁶⁷

It should be noted that only Nagashima's article is specifically focused on the changes to the Code of Criminal Procedure. The other two articles are geared at evaluating changes to the Civil Code. While the exactitudes of Takeyoshi and Tanabe's may therefore seem inapplicable to our analysis, it is important to recognize the context in which we use their analyses.

We are not using the pieces of these three scholars for the purposes of evaluating the changes brought by the 1948 code. That was the purpose of Part I of this paper. Instead, here we aim to get a glimpse of how

⁶⁵ Takeyoshi Kawashima, "Dispute Resolution in Contemporary Japan," in *Law in Japan: The Legal Order in a Changing Society* (Harvard University Press, 1963).

⁶⁶ Kohji Tanabe, "The Process of Litigation: An Experiment with the Adversary System" (Cambridge, Mass.: Harvard University Press, 1963).

⁶⁷ Atsushi Nagashima, "The Accused and Society: The Administration of Criminal Justice in Japan," in *Law in Japan: The Legal Order in a Changing Society* (Cambridge, Mass.: Harvard University Press, 1963).

legal scholars reacted to the changes on principle. Did they see the changes as incompatible with Japanese legal culture? Did they believe them to be examples of cultural imperialism, or steps in the right direction? The focus in this section is, therefore, more centered on issues of Japanese culture and society than on the specific features of the changed law.

Furthermore, the changes to the Civil Code were not so different from the changes to the Criminal Code that we should expect these scholars' reactions to be strikingly different in the case of the Criminal Code. Indeed, the basic changes were the same; that is, the post-war codes attempted to transform what was once an inquisitorial system of justice into an adversarial one. Thus, even though this sample of scholars is limited, it paints a clear picture of where the scholarly community stood in the post-war world.

Dispute Resolution in Contemporary Japan, Takeyoshi Kawashima

Kawashima Takeyoshi was a Professor of Law at Tokyo University and a visiting professor at Stanford University from 1958 to 1959. Authoring some of the most fundamental law textbooks on ownership and other areas of civil law in the 1950s and 1960s, he undeniably secured his position as one of the intellectual frontrunners in Japanese legal society.

Kawashima's landmark piece attempted to explain why only a small percentage of civil dispute cases were brought to court in Japan. He presented several different hypotheses, but the most "decisive factor" was what he termed the "social cultural background of

the problem.”⁶⁸ In Kawashima’s point of view, one of the defining attributes of Japanese culture was a reluctance to take disputes to trial. As he stated in his opening thesis:

Rarely will both parties press their claims so far as to require resort to a court; instead, one of the disputants will probably offer a satisfactory settlement or propose the use of some extrajudicial, informal procedure.”⁶⁹

Kawashima explained that this trend had roots in the dynamics of “traditional social groups” in Japan.⁷⁰ Indeed, Kawashima argued that a constant of Japanese culture throughout history has been a strong sense of hierarchy within communities. Within society, “each man’s role is contingent on that of the other,” and circumstance dictates who has the upper social hand.⁷¹

The net effect of these cultural attributes was that, in Japan, judicial decisions were not naturally based on universalistic standards. A system premised on social equality could not feasibly function in a society built on a principle of social inequality. Instead, as Kawashima explains, the “strong expectation” in Japanese society was that disputes were to be solved through cooperation and “mutual understanding,”

⁶⁸ Kawashima, “Dispute Resolution in Contemporary Japan,” 43.

⁶⁹ *Ibid.*, 41.

⁷⁰ *Ibid.*, 43.

⁷¹ *Ibid.*, 44.

with an implicit deference to figures of authority.⁷² There was no rationale for majority rule; in fact, if anything, attempts to “regulate conduct by universalistic standards” only “threaten[ed] social harmony.”⁷³

As noted above, even though Kawashima’s focus is on civil disputes, his basic insights have implications in our analysis. If Japanese culture is based on principles of “mutual understanding,” one can see how an inquisitorial system provides a neater fit for addressing alleged crime. Authority is centralized in the hands of the judge and public prosecutor, two figures sitting atop the social hierarchy, and trial is conducted more like a cooperative search for truth than a process premised on notions of equality and universality.

In this way, it seems that we can infer that Kawashima would argue that the longstanding Japanese tradition was incompatible with an adversarial system such as that created by the 1948 code. Even so, what is interesting is that Kawashima seemed to argue in favor of a more Anglo-American system. Indeed, in discussing the post-war changes, Kawashima stated:

Traditional forms of dispute resolution were appropriate to the old society...but all modern societies, including Japanese society, are characterized by citizens with equal status, and, consequently, by a kind of check and balance of individual power...the need for decisions in accordance with universalistic standards has

⁷² *Loc. cit.*

⁷³ *Loc cit.*

arisen.⁷⁴

Thus, even though Kawashima seems to have been of the opinion that the Japanese legal culture fundamentally clashed with the precepts of an adversarial system of justice, it seems he also believed it was time for that culture to change, and perhaps that the post-war legal reforms were appropriate means for doing so. His peers appeared to be of the same opinion.

The Process of Litigation: An Experiment with the Adversary System, Kohji Tanabe

Kohji Tanabe was a Judge in the Mito District, a visiting scholar at Stanford University, and a participant in the Japanese American Program for Cooperation in Legal Studies at Harvard Law School when he wrote this piece in 1963. The majority of the article is positive in nature, examining the key differences in the Civil Code before and after 1948. However, embedded within this analysis—and especially in his conclusion—Tanabe makes a strong argument in favor of reforms that underlie both the civil and criminal systems.

There were two essential pieces of his argument. Primarily, he made it clear that he was in favor of Japan's system moving forward to become more adversarial. Indeed, when describing how the role of the individual became "more connected to the state," Tanabe argued that the "Anglo-American adversary system is understandable...(and) attractive."⁷⁵ This

⁷⁴ *Ibid.*, 57.

⁷⁵ Tanabe, "The Process of Litigation: An Experiment with the Adversary System," 80.

sort of tone persisted when he described the reforms in broad terms, arguing that the introduction of cross-examination, greater power for defense attorneys, and heightened emphasis on trial procedure reforms have placed Japan “on the road to success” and have created “socially desirable dividends.”⁷⁶

The second part of his argument is that the post-war reforms were effective in moving Japan forward. In many ways, this is the most notable aspect of Tanabe’s piece. Though he clearly acknowledged the cultural tendencies identified by Kawashima,⁷⁷ he argued that the post-war changes had been “interwoven with the old structure” in such a way that “progress in adjusting and adapting...will be steady.”⁷⁸

Terming Japan’s position a “midway approach,” Tanabe noted that the new laws allowed for a sort of productive fusion of old and new, leaving room for judges and prosecutors to collaborate.⁷⁹ The true novelty of his argument, however, is that he believed the new codes would, eventually, change the heart of the nation sufficiently to lead to more reforms. This perspective was shared by some of Tanabe’s peers who focused specifically on criminal law, most notably Atsushi Nagashima.

“The Accused and Society: The Administration of Criminal Justice in Japan,” Atsushi Nagashima

⁷⁶ *Ibid.*, 109.

⁷⁷ At one point, Tanabe directly acknowledges the arguments made by Kawashima, see page 85.

⁷⁸ Tanabe, “The Process of Litigation: An Experiment with the Adversary System,” 85, 110.

⁷⁹ *Ibid.*, 104–107.

In 1963 Nagashima was one of, if not the dominant mind in Japanese criminal law in the post-war era. Serving as Counselor in the Criminal Affairs Bureau, Nagashima was a participant in the Japanese American Program for Cooperation in Legal Studies at Stanford University from 1956 to 1958, and represented Japan in two United Nations seminars on crime and the treatment of criminals in 1960 and 1961. In some ways, this piece is the most valuable opinion we have on the subject because it directly confronted the changes in the Criminal Code. That being said, it seems that Nagashima agreed with Tanabe on multiple fronts.

Like Tanabe, Nagashima argued strongly in favor of more progressive reforms. For example, in recommending the course Japanese criminal procedure should take going forward, Nagashima argued that continuing down the path laid by the 1948 code “should go far toward the creation and preservation of a fair, scientifically sound system of criminal procedure in Japan.”⁸⁰

Also like Tanabe, Nagashima seemed to acknowledge that the code left some room for old traditions to continue. Specifically, he argued that the new code failed to go far enough to change, first, the discretionary power of the prosecutor, and, second, the inferior role of the defense attorney. Though the 1948 code limited the prosecutor in important ways, Nagashima noted that it granted the prosecutor “wide discretionary power in selecting sanctions” and did nothing to alter the fact that, socially, the prosecutor “still occu-

⁸⁰ Nagashima, “The Accused and Society: The Administration of Criminal Justice in Japan,” 321.

pied a status equivalent to that of judges, in which their independence and impartiality have been protected by law.”⁸¹ Similarly, although Nagashima acknowledged that the new code expanded the rights of defendants substantially, he noted several shortcomings. For one thing, defense attorneys had no real legal means of limiting interrogation times of prosecutors, if the prosecutors retained a court order for interrogation.⁸² In addition, the regulations on evidence disclosure “do not reach to the name and residence of witnesses or to documentary or real evidence,” leaving the defense in the dark regarding some of the most important pieces of investigation in a case.⁸³ Lastly, though the defendant gained the right to remain silent in all parts of investigation and trial, they were still not able to be a formal witness in his or her case.⁸⁴

Nevertheless, Nagashima did seem to be of the opinion that the code placed Japan on the right path. Indeed, in conclusion, he argued in favor of reforms that placed a stronger emphasis on the use of evidence rather than confessions, forced judges to take steps in becoming more like “impartial umpires of the trial rather than inquisitorial exposers of the truth,” and accorded defendants greater rights.⁸⁵ In this way, we see that like Tanabe, Nagashima suggests that the

⁸¹ *Ibid.*, 300–301.

⁸² *Ibid.*, 305–306.

⁸³ *Ibid.*, 307.

⁸⁴ *Ibid.*, 312.

⁸⁵ *Ibid.*, 321. Nagashima even expresses an opinion that, eventually, the reforms would open the doors to the introduction of a full jury trial.

heart of the nation *would* change, that the very culture of Japanese jurisprudence could be transformed. One of the most interesting conclusions we can draw from analyzing all three perspectives is that all of the scholars seemed to be of the opinion that change *should* happen; that is, the reforms of 1948 were steps in the right direction.

This raises an important question: If the legal scholars agreed that Japan should move forward in adopting a more Anglo-American system of criminal justice, why hasn't Japan done so? It seems like there are two tentative answers.

The first is that our sample of scholars is particularly skewed. Though all three scholars were widely respected in Japan, it is important to recognize their connection to Anglo-American life. All three worked at American universities during their careers; all three spoke English to some degree; and, perhaps most notably, all three pieces were published in a volume produced in cooperation with American authors. It does not seem that far-fetched, therefore, to imagine that these scholars may have been particularly sympathetic to the American cause and not necessarily representative of the actual Japanese sentiment of the time.

This leads us to the second possible explanation: that the will of the *people* was not actually changed. The 1948 code was comprehensive—by far the most comprehensive and cohesive code of criminal procedure in known Japanese legal history. But cultural traditions and ideologies forged through centuries are not easily overridden. The 1948 code may have changed some of the procedural guarantees of the system and may have even changed the mindset of a

segment of the literati. However, when it came to changing the fundamental way the Japanese system of criminal justice operated, it seems that the code failed. For success on this front requires a true change of heart, a real change in the way the Japanese people think about criminal justice.

If the majority of Japanese citizens shared the opinions of the three scholars evaluated above, it would be hard to imagine the system not becoming more adversarial. Enough time has passed that such a fundamental cultural change would have surely emanated in practice. That it has not suggests that no such change took place, that the 1948 code changed the letter of the law, but not the fundamental underpinnings of Japanese life and culture.

Conclusion

The analysis above produces several conclusions. Primarily, it seems abundantly clear that the 1948 Code of Criminal Procedure brought with it the most sweeping set of changes Japan's criminal justice system had ever seen. Through its attempts to level the balance of power between the prosecution and defense and to scale back the discretion and responsibilities of the judge, the code seemed to have given Japan a head start in developing a truly adversarial system of justice.

More revealing, however, is what we learn from the analysis of the writings of the three scholars writing in English. All three seemed to be of the opinion that the reforms set Japan "on the right track," that, eventually, Japan *would* adopt a more Anglo-American styled system of justice, and that progress was beneficial. Both explanations attempting to reconcile this finding

with the truth that Japanese criminal procedure today is far from the adversarial process these scholars imagined in the 1900s point to the conclusion that the true will and ideology of the Japanese people was not changed with the 1948 code.

There is much room for future research to expand upon this conclusion. Primarily, analyses examining a wider range scholarly legal opinions, especially those written in Japanese that may have escaped American eyes in the wake of the war, may provide more nuanced representations of the legal scholars' reaction to the new code. Also valuable would be research that is able to tap into the reaction of common Japanese people by surveying newspaper articles, and other outlets of public opinion in the years following the code's introduction.

Ramsey Fisher graduated in 2015 with a major in History. He was initiated into Phi Alpha Theta in 2013.