Protecting the Equilibrium of Japan's Criminal Justice: How Carlos Ghosn's Case Failed to Highlight a Fundamental Aspect of the Japanese Pre-trial Detention System

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1. Introduction

The recent arrest and detention of the Nissan Corporation's charismatic foreign executive, Carlos Ghosn, has placed the Japanese criminal justice system under the spotlight. A great many reports have been written on the topic of his detention at Tokyo Detention Center, which has so far lasted over four months. Questions have been asked, such as: Is this lengthy period of deprivation of liberty justified for a man who has not been proven guilty in a court of law? Should the "risk of flight and evidence concealment", which are the reasons cited by the Tokyo District Court to refuse Ghosn bail, render him a prisoner until trial, even if a trial might not happen for some months? What makes it legitimate to prioritize investigation over legal counsel (as happened at the outset of Ghosn's detention) and contact with family? How many hours a day is he being questioned by the prosecution and is he given a break when he falls ill? What are the physical conditions under which he is held, such as the size and temperature of his cell and the food he is given?

As most observers would be aware, Ghosn's treatment so far within the Japanese criminal justice process has provoked many of his supporters abroad, amongst whom diplomats and top-level government representatives, to condemn the Japanese criminal justice system. Japanese officials, on their part, have also not shied away from responding to these condemnations, with the dialogue thus formed starting to resemble the exchanges made at the end of 19th century when the suitability and fitness of the Japanese criminal justice system for trying and penalizing Westerners was debated. The 29th November 2018 press conference in Tokyo given by the second in rank at the Tokyo Public Prosecution's Office, Shin Kukimoto, summarized in relatively subdued terms what had preceded: Kukimoto objected to criticisms of Ghosn's detention by saying that there is nothing problematic about it, since it is based on a court warrant, as required under the current law. He added that even though foreign media condemn the length of the detention, "the [criminal justice] system of each country is reflective of the latter's [unique] history and culture, so just because another country's system is different, it does not mean that an outright criticism of it is justified"[1].

Whilst it seems astonishing that 120 years have not been enough for this dialogue to run its course, what is further pertinent to note is that the recent scrutiny of the Japanese detention system

has failed to engage with its arguably most definitive characteristic. This is the fact that, unlike the high-profile case of Ghosn where, upon arrest by the Special Investigation Department of the Public Prosecutor's Office, he was sent to the Ministry of Justice (MOJ)-run Tokyo Detention Center, the vast majority of suspects, or 98% of them more precisely, are detained for the entire period prior to indictment (sometimes with multiple arrests imposed one after another upon them) in the cells of police stations – the average length of such detention being 26 days.

The reason why such prolonged detention in police facilities could be seen as problematic is because of the conflict of interest inherent in the investigator controlling every aspect of the life of the suspect. Even if the police officer or prosecutor in charge does not mean to intimidate the suspect and coerce them to confessing to something they have not done, in their passion to resolve the case, they are susceptible to unwittingly crossing the line between questioning and abuse. This is particularly true when investigators are given the opportunity to examine the suspect uninterrupted behind closed doors for weeks on end.

The present article aims to bring to light this feature of the Japanese system for suspect detention, which, by virtue of affecting so many, could be said to be one of the defining components of the country's criminal justice as a whole. By highlighting that most pre-indictment detention in Japan happens on the premises of the police stations, the present article seeks to put the discussions about the authority of the investigation in Japan on more concrete and empirical footing than has hitherto been the case. Indeed, whilst the strength of the investigative authority in Japan has been the object of attention by a great number of scholars (most notably, Haley 1991; Foote 1992; Johnson 2001), how that authority is implemented on the ground and what facilitating framework there might exist to allow those state organs to hold the sway that they do has evaded attention.

The article will begin by outlining the content of the relevant legal statutes, introducing a little-known provision that authorizes the substitution of detention centers for police station cells. It is by recourse to this provision that suspects are detained in police premises for the length of time cited above. The article will then describe briefly the history of the provision in question and how the actual practice emerged in the post-Occupation era. Upon this historical overview, and before concluding by making further observations on the ongoing debates triggered by Ghosn's detention, the major stakeholder's attitudes towards this facility-substitution system will be outlined.

2. Explaining the Detention of the Average Suspect in Japan

2. 1. The Legal Statutes

The criminal investigation process starts with the apprehension of the suspect, which unless in case of emergency or when the culprit is caught red-handed, is undertaken on an arrest warrant issued in advance by a judge. Once so confined, the suspect could spend up to 72 hours in police

station cells (*ryūchi shisetsu*) (with the first 48 hours of detention being undertaken under the jurisdiction of the police itself, and the remaining 24 hours under that of the prosecution). If the prosecutor wishes to extend the custody past this initial limit, there is a legal requirement upon them to bring the suspect to a court of law and petition for their continuous detention. The decision as to whether this is necessary and justified is up to a judge, who is under legal obligation to hear the suspect's own defence at this point. Some of the reasons that compel judges to grant the prosecutor a detention warrant include: reasonable grounds for suspecting involvement in the crime; flight-risk (e.g. in cases where a permanent address is not established in Japan or multiple passports are held); and, a possibility for obstructing the investigation of the case, as in tampering with evidence or talking to witnesses and accomplices and persuading them to change their statements.

The legal requirement that upon seizure the investigative authorities bring the suspect promptly to a court, as opposed to continuing to hold him/her without recourse to a neutral organ, is a foreign import in Japan. Such clauses were established for the first time in medieval Europe and their inclusion in the legal books has ever since been regarded as a hallmark of civilization. Known as *habeas corpus*[2] clauses in legal circles, these statutes have helped to safeguard against arbitrary and prolonged imprisonment for centuries. In the United States too, the principle of *habeas corpus* has been enshrined in key legal instruments so as to "ensure that miscarriages of justice … are surfaced and corrected", in the words of the Supreme Court[3]. With regards to Japan, the principle was embedded within the Constitution and the Code of Criminal Procedure (CCP) during the Allied Occupation led by General Douglas McArthur. As far as the Constitution is concerned, its Article 34 states that "[n]o person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel"[4]. As for the CCP (which was revised in 2016 without any substantive changes in respect to the *habeas corpus* principle), Article 205 reads as follows:

> (1) When a public prosecutor has received a suspect referred pursuant to the provision of Article 203, he/she shall give the suspect an opportunity for explanation and shall immediately release the suspect when he/she believes that it is not necessary to detain the suspect, or shall request a judge to detain the suspect within 24 hours of receiving the suspect when he/she believes that it is necessary to detain the suspect.
> (2) The time limitation set forth in the preceding paragraph shall not exceed 72 hours of the suspect being placed under physical restraint.
> …
> (4) When the public prosecutor does not make a request for detention or institute prosecution within the time limitation set forth in paragraphs (1) and (2), he/she shall

immediately release the suspect.[5)]

To shift attention back to the suspect, assuming that the judge has decided to issue a detention warrant, the question arises as to where this should be undertaken. Here, the basic legal provisions dictate, or at least so the majority of Japanese jurists seem to agree, that the place of detention is to be changed to a "penal facility" (*keiji shisetsu*), which fall under the jurisdiction of the MOJ, with the particular sub-type meant being "detention centers" (*kōchisho*). However, because an article authorizing substitution of "penal facilities" for "police station cells" also exists in a separate law, the issue of where to send the suspect becomes less straightforward. Since it is the judge who has discretion as to whether detention is to be granted at all, it is understood that the choice of detention place too falls within their purview and is to be determined, similarly, on a case-by-case basis.

With regard to the CCP, it does not commit suspects against whom a detention warrant has been issued to remand in penal facilities. Indeed, neither the revised 2016 version of the CCP nor the one promulgated during the Occupation period (in 1948), make an explicit link between suspects (*higisha*) and "penal facilities"; such a link is made only for defendants/accused (*hikokunin*), suggesting that the facility-transfer only has to happen when formal charges are pressed by the prosecution and the "suspect" becomes a "defendant". The specific Article from the Code that is referred to here is No.64 and it stipulates that:

> A subpoena or detention warrant shall contain the name and residence of the accused [emphasis added], the crime, a summary of the charged facts, the place where the accused is to be brought or *the penal institution where he/she is to be detained* [emphasis added], the valid period and a statement that after expiry of the valid period the subpoena or detention warrant shall not be executed but shall be returned, the date of issue, and other matters prescribed in the Court Rules; and the presiding judge or the commissioned judge shall affix his/her name and seal to it.[6)]

However, even if the CCP per se is silent as to the place of detention of suspects, in describing the purpose of "penal facilities", the Act on the Penal Detention Facilities and the Treatment of Inmates and Detainees (*Keiji shūyō shisetsu oyobi hi-shūyosha no shōgū ni kan suru hōritsu*, henceforth "The Act on Penal Facilities")[7)] makes it clear that this is where they ought to be detained. Concretely, the Act stipulates, in Article 3, that "[p]enal facilities are establishments for [confining] and the appropriate treatment of [amongst others] persons under detention pursuant to [the issuance of a warrant, as per] the provisions of the CCP"[8)], amongst whom are suspects.

Although the above-mentioned silence of the CCP makes some representatives of the police argue that the law does not specify any place for suspect detention, the dominant interpretation in

Japanese legal circles of the legal framework described so far is that its intention is for suspects to be transferred at this juncture to penal facilities. After all, the majority of Japanese jurists would say, does not the very constitutional and legal requirement of *habeas corpus*, which was discussed earlier (i.e. that anybody who has been arrested should be promptly brought to a court for hearing to determine if their detention is justified), not make it abundantly clear that the spirit of the law is for police detention to be discontinued (*Keiji rippō kenkyū kai* 2005)?

As for why detention centers in particular are the specific sub-type of penal facilities where suspects' detention is thought to be intended, this is because their purpose is to simply temporarily host those within the criminal justice process who are awaiting the completion of pending procedures. The other two categories of detainees held in detention centers are: 1) defendants (who are awaiting their trial); and, death row inmates (who anticipate the Justice Minister's signing of their execution order). This type of penal facility is thus quite different in nature from prisons (*keimusho*), which is where convicts are kept for a proactive kind of treatment – namely, rehabilitation so as to return to society.

Regardless of the conviction of most Japanese jurists that the intent of the legal framework is for suspects to be transferred on day three of detention to detention centers, the existence of a different provision in the Act on Penal Facilities cited earlier has had the effect of changing what happens actually in practice, as will be discussed in the sub-section below. The provision in question is Article 15 of the said act, and it stipulates that "[t]hose set forth in the items of Article 3 [No.3 of which is 'persons remanded on detention warrant', which includes suspects], may be detained in police station cells as an alternative to penal facilities…"[9]. What this stipulation means in plain language is that substituting penal facilities for police ones is permissible, with the implication of this being that if this article is invoked, suspects who have undergone police detention for three days could legitimately be returned back to police stations for further detention until the expiry of their detention warrant.

2.2. The Actual Practice

As mentioned earlier, the discretion to decide where a suspect is to be detained in each individual case rests with the judge. So how often does it happen in practice that Article 15 of the Act on Penal Facilities is invoked and a suspect is sent, instead of to a detention center, back to a police station cell?

To take the discussion a step back, when applying for detention warrants, prosecutors in Japan tend to request that the detention is continued in police station cells, as opposed to detention centers. In the majority of cases their request is granted. This prosecutorial tendency is often discussed in Japanese language articles on this topic, but a particularly convincing verification that it really exists occurred during the negotiations between the MOJ, the National Police Agency (NPA) and the Japan

Federation of Bar Associations (JFBA) that preceded the 2006 revision of the Prison Law, where the issue of facility substitution became arguably the hottest point of contention (*Miketsu kōkinsha no shogū ni kan suru yūshikisha kaigi* 2006)[10].

The reason typically given by prosecutors for this preference of facilities is that detention there is necessary for ensuring the smooth and efficient progression of the investigation, which would not be the outcome if the alternative arrangement is followed. To corroborate their claim, prosecutors further cite several other aspects of the two types of facilities: firstly, they argue that police station premises are better equipped for questioning (in terms of having sufficient number of rooms with, for example, special windows through which the suspect cannot see but their actions can be observed by investigators or witnesses standing on the other side); secondly, they highlight that police stations are more centrally- and conveniently-located compared to the often remote detention centers, and because prosecutors are operating under time-constraints, the investigation of the case would be best served if they spend the shortest possible time to reach the suspect.

It should be noted that the period of police detention which would result from the judge granting the prosecutors their preference is 23 days, with the amount of days being authorized at the point of suspect's court presentation being 10, and a possibility existing for a further 10-day extension. However, this is only for one suspicion. In practice, multiple suspicions can be raised, with the suspect being re-arrested prior to the end of the 23-day period, so that the same process starts all over again. Furthermore, because there is no legal limit as to the total number of charges that could be invoked in concession, it is theoretically plausible that the suspect is detained in police cells indefinitely.

That Japanese judges rarely see the return of suspects to police cells as problematic is attested by the statistic of near-100% continuous detention there. Relying on MOJ data submitted to the Diet, Croydon explains that:

> On any given day in 2004, for example, as many as 98 per cent of the approximately 5,500-strong population of suspects were being detained in police cells (this rate has grown steadily over the past thirty years from approximately 3,000 …). Moreover, whilst arrestees are held in police cells as a matter of course, on a suspect's presentation to a judge, the investigative authorities request in 93 per cent of cases that the suspect be returned to police detention facilities afterwards. This request is almost always granted so that suspects are detained beyond the initial three-day period into the first period of extension, and in 54 per cent of cases there is a further extension into the second. (Croydon 2016: 150-153).

Furthermore, from her findings it is also clear that multiple suspicion charges are indeed often applied, making the average detention of suspects in police cells in practice greater than 23 days.

Specifically, she reports from the NPA data that "in 2010 the average period of detention for each arrestee in police cells was as great as 26.3 days (and has been even higher over the previous decade)." "In particular", she continues, "over the years 2006–9, the average number of days was 28.0, 27.4, 27.3, and 26.9, respectively" (*Ibid*.: 3).

With Article 15 of the Act on Penal Facilities was relied on extensively in the post-Occupation era (for reasons that will be outlined below), the facility-substitution became an established practice and it has since become known as "substitute prison" (*daiyō kangoku*). When the Prison Law was revised in the mid-2000s, the word "prison" (*kangoku*), whose equivalent in English could be said to be "gaol", was abolished in favor of the modern word "penal facilities" (*keiji shisetsu* or sometimes *keiji shūyō shisetsu*). However, since substantively the Act on Penal Facilities kept the status quo, experts critical of the practice and familiar with its roots continue to refer to it pejoratively as "substitute prison" (e.g. for a most recent example see: Takeuchi & Kitoh 2018).

3. A Brief History of the Facility-substitution Article

Whilst it is clear from the introduction of the legal framework above that the police facilities would be used only as a replacement of detention centers in exceptional circumstances, it remains unclear how and why this policy of substitution was incorporated as well as what factors account for its persistence to this date. This section provides a concise account in this regard. It cites evidence that demonstrates the facility-substitution practice was meant to neither expand to the extent that it has, nor to last for more than a few years.

At the point when the article permitting the use of police cells instead of detention centers entered the law (that is, the Prison Law) in 1908[11], its aim was merely to serve as a stop-gap measure that would alleviate a shortage of infrastructure. This was a period characterized by rapid, heavy borrowing from abroad and major structural reorganization for Japan, with the Meiji oligarchs seeking to replace a feudalistic system of criminal justice, amongst other frameworks of governance, with a codified one modelled on those of leading Western nations. As a new French-based Code of Criminal Instruction (*Chizai Hō*) was adopted in 1880, fresh demands were imposed on the detention system, with, concretely, a preliminary investigation stage requiring that defendants are held in close proximity to the courts, so as to facilitate the pre-trial investigation of the preliminary judge (Ishii 1958). However, it was deemed impossible to accommodate this requirement using the existing detention centers (known as *kōchikan* at the time), since there were not enough of them, with the focus hitherto having been on developing a network of large central prisons. To fill this gap, and also for the planned transfer to take place of jurisdiction of prisons and detention centers from the Home Ministry (which had become overburdened) to the MOJ, it was decided to permit on a temporary basis the use of police station facilities (*ryūchijo*) as a replacement of detention centers

(*Daikasumi kai* 1971; Niwayama & Igarashi 1981; Röhl 2005). The former type of facilities, i.e. police station ones, had become ubiquitous due to Home Minister Aritomo Yamagata's authoritarian orientation.

The separation between policing and prison administration through transferring of the jurisdiction of prisons and detention centers from the Home Ministry, wherein the police force was managed, to the MOJ could be understood as part of Japan's attempts to Europeanize its criminal justice system. Having convinced a number of Western powers that its legal system was "sufficiently modern and civilized", achieving, for example, in 1894, a coveted abolition of the extraterritoriality treaty with Britain (Cassel 2012), the Japanese oligarchs were determined to maintain their "modern nation" status and were even playing their own civilization politics vis-à-vis several of their neighbours (Botsman 2007). In the midst of this, the debate occurred in parliament and legal circles as to whether the policy of using police cells for the detention of pre-trial detainees is appropriate. In particular, a MOJ official, Shigeo Wakayama, as well as several lawyers raised the concern that this practice would permit the abuse of the police known from the past to continue (Croydon 2016: 44-46).

Over the ensuing years it was incumbent upon the MOJ to expand the network of detention centers that it was bequeathed from the Home Ministry after the jurisdictional transfer. Although the MOJ duly attempted to do so, due to budgetary constraints the expansion of physical infrastructure that it could achieve was very limited (Igarashi 1989; 1991). Furthermore, as the modernization of the criminal process continued, with an ever increasing number of localities using preliminary procedure, the dependence on police cells for the detention of pre-trial detainees failed to be resolved and, one could argue, became even worse.

These developments notwithstanding, by the time of the enactment of the Prison Law the replacement of detention center cells for police cells in pre-trial detention cases was hardly the most pressing issue in terms of human rights within the Japanese criminal justice system. As suggested already, the police was gaining increasingly power and a number of legal tools were promulgated that would enable it to not only summarily detain individuals for extended periods of time but to also sentence and imprison them in police cells without any recourse to the basic criminal procedure. The reduction in value for the Home Ministry of prisons/detention centers as tools for maintaining social control relative to the powers that those new tools afforded it was arguably why it decided to relinquish the jurisdiction of these facilities to the MOJ. Even though with labour and socialist movements on the social scene there was a danger of chaos, the Home Ministry no longer needed control of detention facilities to retain order. To begin with, 1886 saw the enhancement of the political wing of the police's powers, with the establishment of a Higher Police (*Kōtō Keisatsu*) section (Tipton 1990; 1997). The following year, the Peace Preservation Ordinance (*Hōan Jōrei*), which included provisions to prevent uprisings and social order disturbance and which were

implemented with vigor (Smethurst 1974; Jansen and Hall 1989), was put into force. Two further laws were passed in 1900 – the Administrative Enabling Law (*Gyōsei Shikko Hō*) and the Public Order and Police Law (*Chian Keisatsu Hō*), which both gave the police legal grounds for arresting individuals without recourse to the CCP (Aldous 1997). Moreover, on the same day when the Prison Law was passed, the Police Crimes Punishment Ordinance (*Keisatsu-han Shobatsu Rei*) was enforced by the Home Ministry. Together with the Summary Trial Regulations for Police Offences (*Ikeizai Sokketsu Rei*), the latter statute enabled police chiefs to impose an immediate imprisonment on an individual, for up to 30 days, with the implementation of this penalty taking place in police cells (Ames 1981).

The law-enforcement officers of Taisho and the war period utilized the facility-substitution option to an extent. However, this was mainly for the detention of prisoners the police had themselves convicted. It was not until after the departure of the Allied Forces that the provision in question came to be relied on more heavily for pre-trial detainees. What is in the background of this change is General McArthur's stripping of the police of their former powers. To elucidate, during the Occupation, the stature of the police was greatly reduced, with the special branches that had played a role in Japan's militarization and suppression of opposition having been abolished. Furthermore, all the legal statutes giving special authority to the police with regards to arrest and trials were also repealed. Relatedly, the CCP was revised to introduce the aforementioned principle of *habeas corpus* precisely with the goal of serving as a safeguard against arbitrary and prolonged police detention – something which, as Sissions discusses, had often produced cases of forcefully extracted false confessions (Sissions 1959).

Upon departure from Japan, the Allied Forces were no doubt confident that all the legal measures were in place to prevent future police malpractice with respect to criminal detainees. However, even though the list of the safeguards they had introduced was extensive, room still remained for abusive police practices to occur. Indeed, the Prison Law's facility-substitution provision, which most likely had simply evaded the attention of McArthur's legal aides (Sato 2005), permitted the investigative authorities to continue to hold suspects beyond the new compulsory day-three presentation to a court of law. By utilizing this provision, suspects could be returned back to police station cells after their meeting with a judge. With this significantly extended period of time under the control of the investigation, suspects remained vulnerable vis-à-vis the police. As far as the latter is concerned, the pre-war practice could continue of investigating the suspect with the goal of producing a guilt-confirming affidavit that would serve in court (*kyōjutsu chōsho*).

As a result of the said Prison Law article remaining untouched in the midst of many legal changes that restricted the police's authority with respect to the criminal investigation process, the scene was set for the substitute prison reliance to grow. The police, indeed, did not shy away from availing itself of this article. It gradually began utilizing it to an extent that made continuous

detention of suspects in police station cells the norm.

4. Stakeholders' Attitudes toward Facility-substitution

The eagerness of the investigative authorities to take advantage of the facility-substitution provision as an investigative tool was indeed what drove the expansion of this practice. However, the latter would not have happened had the major stakeholders been in opposition. This section is devoted to describing the enabling environment in which the substitute prison entrenchment occurred.

To start with the MOJ, and the Correction Bureau (CB) in particular (wherein the proper jurisdiction precisely lies over the detention of suspects), it appears to be helpful and convenient for it that the NPA is keen to take on some of the responsibility of suspect detention. This is because the CB could thus focus more of its resources on managing the convicted prisoners' population, for which facilities are insufficient. As Igarashi has found, with prisons being chronically overcrowded and operating over capacity, it has been useful for the CB to convert some of the detention centers into premises for convicted prisoners (Igarashi 1989, 1991). With the NPA volunteering to share the duty of suspect detention, not only can the CB feel less pressure to supply the quantity of detention cells adequate for the demand that the criminal justice process produces, but it can also transform detention centers into prisons. Since this has become an identifiable tendency, as Igarashi describes, the number of detention centers has decreased considerably. Indeed, detention centers are becoming a rarity, especially in more central urban locations.

With regards to politicians, there seems to be a low incentive for them to proactively seek to divert sparse resources from the NPA to the MOJ. The lack of motivation for politicians in this direction, and indeed their inaction, could be said to be a function of the images the two agencies hold in the public mind. Whilst the former is generally considered to be the "citizens' guardian", the latter tends to be associated simply with convicted criminals. This mirrors local attitudes towards the facilities of these two agencies – the NPA finds it easy to receive approval to build new premises in residential areas, whereas the MOJ struggles to overcome "not in my backyard" opposition. For the ruling party politicians, then, to initiate a diversion of resources from the NPA to the MOJ would be a publicly unpopular move that could result in loosing votes. This electoral disincentive could explain the hands-off stance of the legislature when it comes to securing MOJ facilities for all suspect detainees.

As for the lawyers, although the JFBA's official position is that facility substitution should be abolished, in private many individual members of the bar seem to take a diverging stance. This lack of unanimity within the lawyers' organization means that their ability to lobby for the elimination of the facility-substitution practice is compromised. More specifically, lawyers are concerned about the

difficulty of paying regular visits to their clients if the latter were to be detained in far-off detention centers, as opposed to the centrally-located police stations (Croydon 2016: 160-5). Indeed, police station cells tend to exist in large numbers across central and residential city areas, in contrast to the very few and remote MOJ facilities (for reasons to do with the aforementioned issue of public popularity of the NPA relative to the MOJ). For purposes of visitations then, and from convenience perspective, the placement of suspects in police station cells is much more attractive as an option for lawyers than remanding them in detention centers. Granted, the danger exists in police cells that the suspect might be subjected to an interrogation marathon that is difficult to withstand, with a false confession that could work against them in court being the result. However, in many lawyers' views, this danger appears to be offset by the more effective counsel they could give to their clients through more regular visitations.

With the major stakeholders being in tacit approval of this pre-indictment detention system, a positive feedback mechanism has been created which makes abolition seem unrealistic. Concretely, the more the system is used, the greater the number becomes of the detention center cells that would be necessary in the future to do without it. Indeed, the transition that might have seemed quite challenging at the turn of the 20th century (i.e. of installing in one fell swoop the amount of detention center cells that would accommodate the new CCP), today seems near impossible. As Croydon states, "[e]ven those wanting to take a hard line in opposition to the system [are now] harbor[ing] an increasing sense that campaigning for its end is swimming against the tide, with many viewing the system as a pragmatic inevitability" (*Ibid*.: 173).

On a final note, the sense of resignation with the status quo has been exacerbated by the fact that prefectural authorities have also provided financial resources to the police for bolstering their detention cell infrastructure. In other words, the gap in facilities of the MOJ and the NPA is growing not only on account of the former converting detention centers into prison premises, but also because the cell network of the latter has been expanded with the help of prefectural funds. One recent example of such a prefectural project is the construction by the Tokyo metropolis of a 300-capacity police detention facility in Harajuku.

5. Concluding Discussion

This article has offered a discussion of Japan's pre-indictment detention focusing on the relevant legal statutes and the actual resultant practices. It has emphasized that the overwhelming mass of suspects in Japan, who do not enjoy the special attention given to the recently befallen Nissan CEO Carlos Ghosn, go through the criminal investigation process, right up until indictment, whilst confined by, and within the control at all times of, the police. The possibility which this raises for the occurrence of miscarriages of justice is a topic that is conspicuously missing from ongoing

discussions about the Japanese criminal justice process.

While in times of quiescence commentators can be excused for not knowing about, or failing to draw attention to, the facility-substitution practice with archaic roots described in this article, one can only wonder why this practice continues to be an esoteric knowledge at a moment when so much discussion is generated about Japan's detention system. For those who wonder why Ghosn was sent for detention to the Tokyo Detention Center and not to a police station, there exist no special legal provision that says suspects arrested by the Special Investigation Department of the Public Prosecutor's Office, as opposed to the police, have to be remanded in the MOJ's detention centers; the same rules that apply for suspects arrested by the police apply also for those arrested by the prosecution. True, as someone on whom preliminary investigation had already been undertaken prior to arrest (due to his reported implication in plea bargaining), Ghosn was to be questioned from the very start by the prosecution only, with the stage of the police doing this during the first 48 hours upon arrest being skipped. For that reason, one could legitimately conclude that there was no particular reason for the judge to send him to a police facility for remand. Still, there is nothing in the law that could have precluded the prosecutor in Ghosn's case to petition for detention in a police station on the same grounds on which this is usually done – i.e. for the purposes of the convenience and smooth implementation of the investigation. After all, with Article 15 of the Act on Penal Facilities in place, substitution of detention centers for police cells is perfectly legal whichever the arresting authority is. And as for convincing reasons to request such substitution, let us not forget that Ayase, where the Tokyo Detention Center, is located is much further away from the Public Prosecutor's Office at Kasumigaseki 1-*chōme* than, say, Harajuku. This is not to mention that access to Ghosn by the prosecutor while he is detained in the Tokyo Detention Center would be constrained to this facility's opening times during the day (for reasons to do with availability of staff). In contrast, a government department such as the police is in operation late in the evenings and even at nighttime, due to the nature of its duties, some of which are to remove from the streets drunkards and individuals behaving in an anti-social way.

So, one is led to consider what was the motivation for Ghosn's current location of detention. How indeed should one interpret the placing by the Tokyo District Court of the high-profile suspect Ghosn within the 2% portion of instances where detention is undertaken as intended by the foreigners who installed Japan's CCP? Is it a coincidence that this particular case fell within that small segment of cases?

Certainly one player that has not acted typically in this case is Tokyo District Court. In December 2018 in particular, this Court took the unusual step of refusing the prosecutor's request for extension of detention on the second arrest of Ghosn. This being the case, one also questions the initial motivation for the Court's decision that Ghosn is placed in Tokyo Detention Center, rather than a police cell. Could one extrapolate that the Court is doing its bit to try to preserve the facility-

substitution system, which some cynical observers see as being in the interest of the courts as well, as the confessions that come through its use make those criminal cases fully resolved in the public eyes? Was the court reacting to a perceived threat that Ghosn's case might destroy the equilibrium of Japan's criminal justice?

If the goal with sending Ghosn to Tokyo Detention Center was to shield the facility-substitution system from exposure, then from the state of the reports in the media so far it could be said that this aim has been fulfilled. With the suspect in this case being remanded in a detention center from the start, the possibility did not exist for the investigation to apply pressure on him to confess by interrogating him continuously at free will. The prosecution then indicted quickly, as arguably maintaining some access to Ghosn and a momentum towards a possible admission of guilt was preferable to dropping the case. As a result of Ghosn's quick change of status from a "suspect" to a "defendant", the public debate soon settled on the issue of his bail and the overall length of his detention since arrest as the main aspect that merits discussion. And so the facility-substitution practice, and the reality of most suspects in Japan, remained an obscured aspect of the country's criminal justice system.

Notes

1) This is the author's translation of Kukimoto's words. For the original, see: "*Gōn zen-kaichō no kōryū 'mondai nai': Chiken kanbu ga hihan ni hanron*" [Former Director Ghosn's Detention Is 'Unproblematic': The District Prosecution Counters Criticism]. *Asahi Shimbun* (digital). 29 November 2018. Retrieved on 26 December 2018 at: https://www.asahi.com/articles/ASLCY6G3XLCYUTIL049.html.
2) The full phrase from Latin is *habeas corpus ad subjiciendum* and it translates as "you shall have the body to be subjected to examination", with "the body" meaning "the suspect".
3) Hensley v. Municipal Court, San Jose Milpitas Judicial District, Santa Clara County, California, 411 U.S. 345, 349-50.
4) This is the official translation published by the Prime Minister and his Cabinet and is available at: https://japan.kantei.go.jp/constitution_and_government_of_japan/constitution_e.html. Retrieved 23 January 2019.
5) This translation is by the Japanese MOJ and can be accessed at: http://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail/323AC0000000131_20170713_429AC0000000072/0?revIndex=4&lawId=323AC0000000131. Retrieved 23 January 2019.
6) This is again the MOJ's translation. Accessed 23 January 2019 at: http://www.japaneselawtranslation.go.jp/law/detail/?id=2056&vm=04&re=02.

7) This is the 2005 reincarnation of the 1908 Prison Law (*Kangoku Hō*).

8) MOJ translation, accessed on 23 January 2019 at: http://www.japaneselawtranslation.go.jp/law/detail/?id=2796&vm=04&re=02.

9) This is the author's translation. The original Japanese text can be found at: http://elaws.e-gov.go.jp/search/elawsSearch/elaws_search/lsg0500/detail?lawId=417AC0000000050. Retrieved on 12 January 2019.

10) For an example of what a detention warrant looks like see: http://www.akagi-law.tokyo/pc/privacy/privacy47.html. In this particular sample warrant, provided by a law firm, the place of detention specified by the Tokyo District Court is also a police facility – the Tokyo Metropolitan Police itself.

11) In the Prison Law the facility-substitution provision was Clause 3 of Article1. The exact text of that law can be found at: http://roppou.aichi-u.ac.jp/joubun/m41-28.htm. Retrieved on 6 February 2019.

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Protecting the Equilibrium of Japan's Criminal Justice System: How Carlos Ghosn's Case Failed to Highlight a Fundamental Aspect of the Japanese Pre-Trial Detention System

Silvia CROYDON

This study was motivated by the recent debates on Japanese criminal justice that were prompted by the arrest and detention of the Nissan Corporation's former executive Carlos Ghosn. Ghosn's detention triggered a diplomatic row that has come to threaten established economic ties. The exchanges that are now taking place between Japanese and Western government representatives regarding Japan's criminal justice system closely resemble those of the era of imposed extraterritoriality on Japan. On the one hand, the former celebrity executive's foreign fans, and other commentators are condemning the Japanese justice system as disrespectful of basic human rights because it has deprived a man, who at this time must still be considered innocent, of liberty for months. On the other hand, the Japanese are defending their justice system by arguing that it has followed a different trajectory than that of its European counterparts, and just because it diverges in certain respects from their system, does not mean it is inferior. What remains out of focus in these discussions, however, is that, unlike in the high-profile case of Ghosn, who was detained to a facility neutral of the investigation process (the Ministry of Justice's Tokyo Detention Center) just as the criminal procedure dictates, average criminal suspects in Japan are often detained in police station cells pre-indictment. This study attempts to shift the focus of the discussion away from the aberrant case of Ghosn and onto the reality of Japan's average criminal suspect.

Key words: Criminal justice, Suspect, Police, Detention, Investigation, Japan