

Justice System Reform in Japan: Where are the Police and Why Does It Matter?

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Inspector Gregory of Scotland Yard: You consider this to be important?

Sherlock Holmes: Exceedingly so.

Inspector Gregory: Is there any point to which you would wish to draw my attention?

Sherlock Holmes: To the curious incident of the dog in the night-time.

Inspector Gregory: The dog did nothing in the night-time.

Sherlock Holmes: That was the curious incident.

Arthur Conan Doyle, 'Silver Blaze,' in *THE MEMOIRS OF SHERLOCK HOLMES*

INTRODUCTION

Sherlock Holmes is popular because he solves puzzles that stump everyone else. In particular, Holmes has a gift for elucidating facts that other analysts overlook. In the story of 'Silver Blaze,' for example, the detective solves a mystery when he attends to a piece of evidence that everyone else has ignored: A guard dog that did not bark during the theft of a horse. The dog's silence, Holmes deduces, means the burglar was not a stranger, and this reasoning reduces the number of suspects to one – the real thief. Case closed.

I am no Sherlock Holmes, but in this article I would like to focus on some 'dogs that have not barked' in Japan's justice system reform movement. The 'Recommendations' presented by the Justice System Reform Council in June 2001 conclude with several statements about the ambition of the reform agenda. The recommended reforms are called 'huge' and 'extensive,' and the Council says that they

`relate to the very foundation of *all aspects of the justice system*` (emphasis added).

Not exactly. The justice system reform movement is in some ways ambitious (especially on the civil side), but when it comes to criminal justice reform this movement is `bounded` in the sense that some things that should be targeted for change are not much under discussion.

Ultimately, the main goal of judicial reform is to enhance the rule of law in Japanese society (Suami 2002; Sato 2002; Miyazawa 2001). Since this is a laudable objective, it is unfortunate that large obstacles to that end have not received the attention they deserve (Nonet and Selznick 1978). This paper focuses on one major problem -- the police -- that should have been given primacy of place in the justice system reform movement. I concentrate on criminal justice because it is the area I know best and because it is one of the principal indicators of the character of Japan's democracy. I begin by asking the most important question of all: Why are so few reformers barking about the police?

THE POLICE IN JAPAN: POWER, PERFORMANCE, AND ACCOUNTABILITY

The underlying philosophy of the justice system reform movement is...the expansion of the rule of law in Japanese society.

Sato Iwao (2002:80)

Consider the word `lawless.` The dictionary defines it as `where law does not apply.` I think that the police are Japan's most lawless group.

Ochiai Hiromitsu (1998:128)

The justice system reform movement has omitted and marginalized police issues – and for no good reason. I have mentioned this fact to numerous Japanese judges, prosecutors, and lawyers. Although many agree with my assessment, most seem little troubled by the exclusion. One reply is especially common. `In Japan,` it is said, `the word `judicial` (*shiho*) refers to the three legal professions – judges, prosecutors, and lawyers. Thus, `judicial reform` (*shiho kaikaku*) is not about the police.`

Linguistically, this reply ignores the fact that the police are called *shiho*

keisatsuin in the Code of Criminal Procedure. More fundamentally, the `definitional stop` functions to truncate thought, not to encourage it. In this article I want to move beyond the taken-for-granted realities that are embodied in the reigning definition of `judicial` (*shihō*) in order to raise important issues about the police that otherwise would be ignored. I make four major claims:

- (1) The police in Japan are hugely powerful;
- (2) The police in Japan often misuse their power;
- (3) The police in Japan are neither transparent nor accountable;
- (4) The police in Japan constitute the primary impediment to the `rule of law` that is aspired to in the justice system reform movement.

The conclusion follows from these findings: The police should have been a central focus of justice system reform.

1. Police Power

When I teach courses about Criminal Justice, I usually begin by defining a `criminal justice system` as `a series of inter-linked discretionary decisions.` This approach places discretion at the core of the course, which is just where it belongs. Understanding criminal justice requires analyzing what discretion is, why it is important, why it is dangerous, and how it can be controlled. In postwar America, the story of criminal justice is largely the tale of efforts to `tame` various systems of criminal justice by reducing, checking, and constraining the discretion that is exercised by police, prosecutors, judges, and correctional officials (Walker 1993). It is a story of a few significant successes (including police use of lethal force and high-speed pursuits), some conspicuous failures (such as plea bargaining), and other outcomes that fall between those extremes (sentencing and bail reform).

Discretion consists of the *choices* that legal officials make during the criminal process. Where there is choice there is discretion. In the aggregate, the quality of discretionary decisions determines the content and the quality of the justice that is delivered (Johnson 2002).

Discretion is important because it is both necessary and dangerous. It is

necessary because resources are limited and because case dispositions should be individualized. It is dangerous because the freedom to choose implies the capacity to choose badly. Hence, discretion is like an axe: it can be a useful tool for achieving important ends, but it also can be a weapon that, if misused, causes mischief or mayhem. The challenge for reformers is to eliminate unnecessary discretion and to control, channel, and check what remains.

It is widely believed that in American criminal justice more than half of all discretion is exercised by the police (Davis 1969). Whatever the exact percentage, `who gets what` in American criminal justice is largely determined by the police. In this respect, American criminal justice is `justice without trial,` and practitioners, reformers, and consumers of criminal justice are therefore rightly concerned with what the police do outside the court room (Skolnick 1994).

In Japan, criminal justice is even more a matter of `justice without trial` than it is in the United States. Indeed, the vast majority of trials in Japan are little more than `rituals` for `ratifying` police and prosecutor decisions. The `real substance of criminal procedure` and the `truly distinctive character` of Japan`s criminal process lie in the inquisitorial investigative stages that are dominated by the police (Hirano 1989; Ishimatsu 1989). For this reason, Hirano Ryuichi (1989), a former president of Tokyo University and the dean of criminal justice studies in Japan, believes that Japanese criminal justice is `abnormal,` `diseased,` and `really quite hopeless.`

The police in Japan wield more power than their American counterparts (Miyazawa 1992; Bayley 1991). Indeed, I know of no police force in any other democracy that is as powerful as the Japanese police. Many labels have been used to characterize criminal justice in Japan. `Precise justice` and prosecutor justice` are two of the most familiar, but `police justice` -- the most telling label of all -- is certainly the least appreciated (Nakada 1988; Shimomura 1992:76).

2. Police Performance

For much of the postwar period the police in Japan have been regarded as exemplary administrators of justice. In fact, Professor David H. Bayley once argued that

`if generality of agreement among people in a country is the mark of truth, then Japanese police behavior is astonishingly good. The incidence of misconduct is slight and the faults trivial by American standards. Though a cynical American may always wonder if enough is known about the conduct of individual officers—whether by himself or by insiders—he must begin to consider the possibility that police conduct need not inevitably, recurrently, require substantial improvement` (Bayley 1991:4).

If this position was ever tenable it no longer is today. Since the time Bayley wrote, so many disconcerting truths about the police have been revealed that one can only conclude that their behavior does in fact `require substantial improvement.` Indeed, my own view is that police behavior in Japan was never all that good to begin with, a position that is shared by many other observers (for a partial list, see the citations at the end of this article). In the paragraphs that follow, I present evidence of poor police performance in three important areas: clearance rates, integrity, and interrogations. If space permitted, the record of problematic police behavior could be substantially expanded.

a. **CLEARANCE RATES:** The clearance rate is probably the most important measure of police effectiveness (Skolnick 1994). The most obvious indicator of poor police performance in Japan is this rate, which plummeted from 40% in 1997 to 20% in 2001—a 50% decline (Masui 2002). For serious crimes such as homicide and robbery, the clearance rate declined from 80 percent just five years ago to 48.6 percent today – a 40 percent decline. Although there are multiple causes of these declines, one major force is the fact that the police cannot `cook the clearance rate books` (by lying) like they used to (Nakada et al 2001). The impressive clearance rates of the past were built on a foundation of police prevarication (Yomiuri Shimbun 2002; Akagi 2000; Kuroki 2000).

The low clearance rate reflects and reinforces distrust of the police. Previous scholars have wrongly concluded that Japanese police enjoy wider support from the public they serve than do police in the United States (Ames 1981; Bayley 1991; Parker 2001). In fact, the best available evidence shows that Japanese citizens have significantly lower confidence in police than do Americans (Cao, Stack, & Sun 1998). In one recent poll, for example, 60 percent of Japanese adults said that their trust in

police has declined, and fully 45 percent said they do not trust the police at all. As one elderly Japanese man put it, 'Today the police are a shame and an embarrassment for all of Japan' (Sims 2000). By contrast, in a poll taken at about the same time as the Japanese survey, only 15 percent of American city residents said they were dissatisfied with their local police, and even among black Americans just 24 percent expressed discontent (Associated Press 1999).

b. **CORRUPTION AND MISCONDUCT:** The police in Japan have had a major problem with corruption for at least two decades. In 1984, Matsuhashi Tadamitsu, a former officer in the National Police Agency, published a 400-page mea culpa with a title taken from the 51st Psalm: *My Sin is Ever Before Me (Wagatsumi wa Sude ni Wagamae ni Ari)*. The book meticulously details how police agencies throughout Japan embezzle money from their budgets in order to create slush funds to cover under-the-table payments to senior police officials, to pay for gifts and entertainment for police and their friends and supporters, and to buy silence from people who could cause them trouble. Since the book's publication, Matsuhashi's revelations have been confirmed and elaborated by numerous sources, including other ex-officers (Ouchi 2002; Akagi 2000; Kuroki 2000; Kurusu 2000), journalists (Kobayashi 2000; Ochiai 2000; Otani 2000; Terasawa 1998), and former prosecutors (Sato 1999; Mitsui 2003). On March 26, 2003, almost 20 years after Matsuhashi exposed the problem, the Tokyo High Court finally found that the Metropolitan Police Department created fictitious receipts in the course of manufacturing slush funds.

Police corruption in Japan is pervasive, and the slush fund crimes are only part of the story. In the last five years, numerous cases of bribe-taking have been exposed (Yomiuri Shimbun 2003). In each and every instance, police elites insist that the misconduct is limited to a few bad apples. The evidence belies their claims. Corruption also stems from police control over the enormous pachinko industry and from police regulation of organized crime (Johnson 2003).

The police are to the government as the edge is to a knife. In the end, the problem of police corruption cuts in two ways: It reinforces a culture of secrecy and deceit that is itself the breeding ground for other abuses of authority, and it prevents police from properly enforcing laws against other offenders.

c. **INTERROGATIONS AND CONFESSIONS:** The police in Japan misuse their authority in many other ways as well, through acts of brutality (Mikami and Morishita 1996), perjury (Yamaguchi 1999), and coercion and deception in the interrogation room (Miyazawa 1992) -- just to name three problem areas. What happens in the interrogation room is especially critical because criminal justice in Japan remains deeply reliant on *confessions*. In my view, this is the most important issue of all in Japanese criminal justice.

On the one hand, confessions are the heart of Japan's criminal process – the pump that keeps cases circulating in the system. Confessions are single-mindedly pursued by police and prosecutors, they are practically required by judges in order to convict, and they are deemed by everyone involved to be the `king and queen` of evidence. Confessions are also the precondition for many of the achievements in Japanese criminal justice. Indeed, here is the primary postulate of Japan's criminal process and the premise that animates the entire system: if there is no confession, then there will be no truth, no consistency, no corrections, no convictions, and no justice.

The problem, of course, is that confessions can be difficult to obtain. The biggest problems occur when the case is serious, the level of suspicion is high, and the suspect refuses to confess. In these circumstances, dropping the case is not considered an option, and the system's extreme reliance on confessions leads to extreme efforts to obtain them. As one detective confessed during a murder investigation, `We go after him [the suspect] relentlessly until 11 or 12 at night. We give him as little sleep as possible. We exhaust him physically and mentally. It's rough, but it's the only option remaining to us [because the suspect refuses to confess]` (Mainichi Daily News, February 18, 2001). Another police detective has said that `There aren't any confessions that are really voluntary. They're told that if they don't talk they won't eat, won't smoke, won't meet with their families` (Miyazawa 1992:161). And in a meeting of the Justice System Reform Council, an executive officer from the National Police Agency had this to say about interrogation tactics: `In short, no real statements will be made by the suspect unless he feels compelled to do so. Hence, the aim of interrogation is to bring this about by any means possible.`

As these statements illustrate, the Japanese police are willing to overbear the will of criminal suspects. That attitude is not only widespread, it is inconsistent with

the interrogation ideal of `storytelling without fear.`

Much of the most disturbing police behavior stems from two connected facts: the system's overwhelming dependence on admissions of guilt, and the absence of checks on police power in the interrogation room. In Japan, the conditions of interrogation – the duration and intensity of questioning, the duty to endure questioning even after the right to silence has been invoked, and the unavailability of defense lawyers – mean that an `overborne will` is more than merely an occasional problem (Hamada 1992). Although Japanese courts are peculiarly reluctant to acknowledge this problem, the United Nations is not. It has repeatedly rebuked the Japanese state for violating international protocols about the length, location, and methods of interrogation; for excessive reliance on confessions for evidence; and for inadequate disclosure of evidence to the defense. In the words of one of this country's preeminent legal scholars, Japan `cannot go on forever ignoring the UN's counsel` (Hirano 1999:4).

Some observers believe that the solution to the interrogation problem is to relax the reliance on confessions. Easier said than done. Norms as deeply embedded as this one are difficult to change, and whatever evolution does occur will take time. A related proposal is to institute alternatives (such as plea bargaining) to the standard practice of confession-through-interrogation (Ukawa 1997), but this solution also faces formidable obstacles. In the first place, many Japanese resist the notion that justice can be `bargained` (Sato 1974; Sasaki 2000). Moreover, giving investigators more legal levers would exacerbate the already extreme imbalance of power between the state and the defense in Japan's criminal process. For these reasons (and more), relaxing the system's reliance on confessions will be a long and bumpy process.

At present, the only viable solution to the most serious problem in Japanese criminal justice is to require the recording of all custodial interrogations. Unfortunately, this imperative has received little attention in the judicial reform movement, and the modest pushes for change that have occurred have been defeated by police and prosecutor resistance.

There is no good reason to oppose a taping requirement. First and foremost, since it is a medium for preserving the *truth* of interrogations and confessions, taping helps achieve the cardinal objective of Japanese criminal justice. Taping also serves the

interests of all the parties in the criminal process. It benefits suspects and defense attorneys, of course, by deterring impermissible interrogation techniques and thereby affording protection against false confessions and wrongful convictions. Police also benefit, for taping protects them against false accusations by creating a record that they can use to demonstrate the propriety of their methods. Most importantly, recording helps prosecutors and judges by giving them the information they need to assess the voluntariness and veracity of confessions. Thus, electronically recorded interrogations promote the goals of accuracy in fact-finding, due process, transparency, accountability, and public respect for the justice system. These are compelling objectives, and the American experience with recording interrogations shows that the vast majority of police departments who do so believe that taping has led to improvements in police practice (Johnson 2002:274).

The Japanese expression for `let them talk` (*iwaseru*) is the same as the one for `make them talk.` Inside the interrogation room, however, the difference between these two realities must be maintained. Taping interrogations enables people outside that room to define and enforce this critical distinction. It should not be – it must not be – entrusted to the police. Taping creates an objective, comprehensive, and reviewable record of what transpired during questioning. From that record, all parties – suspects, judges, *saibanin*, police, prosecutors, and the public – can make informed and accurate decisions about the interrogation process and the resulting confessions (Leo 2002:212).

Because of these many benefits, taping has become a mandatory or common practice in England, Italy, France, Australia, Canada, Taiwan, and parts of America. For Japan, it is hard to imagine a more universally beneficial policy reform. In June 2001, the Justice System Reform Council acknowledged that `measures to prevent improper questioning naturally are necessary.` Unfortunately, the only measure that is being seriously considered is one that would require investigators to keep a written record of the dates, durations, and circumstances of interrogation. Although police and prosecutors contend that such written records would constitute an `objective` check on their investigative practices, letting the fox guard the henhouse would do nothing of the kind. If there is no objective record of interrogation, detectives can construct what occurred, as well as how and why it occurred, in a way that most favorably advances their goals of case-building and conviction. In the process, the truth too often gets fabricated, corrupted, and concealed. In this age of inexpensive and reliable technology,

resistance to recording cannot be justified. Taping is the right thing to do. Precisely because Japanese criminal justice depends so heavily on what happens behind closed doors, taping is the reform that would best promote rule of law values.

3. Police Accountability

So far I have showed that the immense power of the police has not produced a praiseworthy record of performance. Police power thus needs to be checked. Unfortunately, in the present system of Japanese criminal justice there are no mechanisms of accountability or transparency that perform the requisite checking function. To make matters worse, few scholars or journalists even attempt to make police performance a public issue. As one of this country's few police analysts has observed, the dogs that should be watching the police seldom make a sound:

'If a prominent sociologist from the West (not someone like David Bayley, who wrote *Forces of Order: Policing Modern Japan*) came here to research the Japanese police, that scholar undoubtedly would conclude that this country is 'a strange land.' First he would run into the police wall of secrecy, and he would be unable to investigate actual police practices and conditions. Next he would be informed that there is no investigative reporting about the police by newspaper or other mainstream journalists, and that there are very few free-lance journalists who follow police issues. Then he would learn that in Japanese colleges and universities there are no courses about the police (as there are in the West) and no scholars who seriously study them. In the end, our friend the sociologist would discover that citizens and taxpayers (who have entrusted their safety to the police) have an extremely weak consciousness to try to check the police. Such a scholar, I think, would be seized by this question: Is Japan really a democratic country?' (Kobayashi 1998:vi)

Kobayashi is correct: The police in Japan are unaccountable to external organs of authority, whether prosecutors, courts, politicians, or private citizens. This is unfortunate because research shows that, with few exceptions, government agents act according to law only when they must (Maravall and Przewworski 2003).

First of all, Japanese prosecutors are notoriously lenient (*amai*) toward police wrongdoers, in large part because they depend on police for the information that they need to charge and try cases. Former Prosecutor General Itoh Shigeki's famous 'parable' about the illegal police wiretapping of the Japan Communist Party makes exactly this point (Itoh 1992:137). In his view, to have pushed the investigation any harder would have provoked police resistance. In the resulting confrontation, 'there seems to be no guarantee that we [prosecutors] will win.'

As for judges, the Japanese police perceive "no significant threat in judicial control" of their behavior (Miyazawa 1992:225). Of course, judges everywhere have limited capacity to control the police because their opportunities to do so occur only indirectly and after the fact. The difference is that judicial decisions that are unfavorable to the police are exceptionally rare in Japan. One result is that judicial scrutiny functions mainly to legitimate police behavior, not to restrain it (Abe 2001).

Similarly, for more than 50 years Japan's Board of Audit has conducted spot inspections of all of the nation's prefectural police headquarters. Despite clear evidence of systemic embezzlement, the Board has exposed no cases of spurious accounting. Where police are involved, 'this watchdog trembles' (Ochiai 2000:55). Politicians dissemble too, often because they fear that if they attempt to disclose police misconduct their own corruption will be exposed. As one source told me in an interview, 'everyone fears the police but the police fear no one.'

As for citizen oversight, the national and prefectural Public Safety Commissions were established after World War II to ensure that police operate independently of political pressure. However, these organizations, composed of citizens appointed by governors and the prime minister, are nothing more than impotent watchdogs. Their members tend to be elderly, conservative men from the community — business owners, doctors, and the like — who have neither police experience nor expertise and who, more importantly, have no staff or office with which to conduct investigations. The safety commissions are, de facto, run and controlled by the police, and their deliberations are, for the most part, "empty rituals" (Kubo 2001:147). In the wake of a wave of scandals that began in 1999, the Police Law was amended, purportedly to enable commissioners to exercise greater supervision over the police, but the changes were cosmetic and have not stimulated significant reform. More ambitious reform was avoided at least partly because conservative politicians such as

Kamei Shizuka, an ex-police officer and a faction leader of the Liberal Democratic Party, said that the police should control themselves since `policing the police would be bizarre` (Iitake 2000). `Policing the police` is anything but bizarre, and there are many examples of successful citizen oversight in other countries (Walker 2000).

Finally, the weak formal controls in Japan are little supplemented by journalistic, scholarly, or other outside scrutiny. If the question is who controls Japanese police, then `the answer is simply that the police are totally autonomous in a formal organizational sense; they control themselves and are ultimately responsible only to the head of the National Police Agency` (Ames 1981: 219).

4. Above the Law

Japan's police establishment is so `keenly suspicious of academic scholars` that it is impossible to see or say what many of the police problems are (Bayley 1991:76). I join other scholars in urging the police to open their agencies to more outside scrutiny (Bayley 1994). If two hallmarks of democratic policing are transparency and accountability, then the near absence of those qualities among Japanese police renders them conspicuously undemocratic (Marx 2001). Moreover, if public discussion and deliberative interactions are the marks of a mature democracy, then the Japanese polity has a long way to go (Sen 2003).

Still, what we do know about the police is more than a little troubling. What we know is this: They are hugely powerful, they are unaccountable., and their performance is problematic in many major respects.

Unfortunately, the justice system reform movement has had little to say about police problems or the circumstances that maintain them. In the absence of pressure from outside, the police themselves remain more interested in buttressing their code of silence and insulating their system from outside scrutiny than in proactively solving the problems described in this article (Kuroki 2000:218). The lengths to which police will go to resist accountability are extraordinary. One especially egregious example is described in *Yomiuri Shimbun Osaka Shakaibu* (1992), an award-winning account of a pregnant woman in Osaka who pressed police to tell her what became of the \$1200 she found and turned in to her local *omawarisan*. The mother eventually discovered that

police had embezzled the money, but only after she was framed for a crime she did not commit.

Under current conditions – complacent outsiders and recalcitrant insiders – justice system reform will not produce a police force that is governed by the rule of law. Although that – the rule of law – is the goal to which the Justice System Reform Council ostensibly aspired, the truth is that all too often the police remain above and outside the law.

CONCLUSION

If reformers want police problems to spread, all they need to do is nothing. That, by and large, is what they have done, and it is worth wondering why.

The justice system reform movement is an effort to improve the quality of Japan's democracy. In modern societies like this one, *rationality* is the major means for making democracy work. It would have been rational to place police at the center of the criminal justice reforms but that, of course, is not at all what occurred. What has happened instead can be summarized in a sentence that is both simple and profound: Rationality depends on context, the context of rationality is *power*, and power often blurs the dividing line between rationality and rationalization (Flyvbjerg 1998).

In Japan's justice system reform movement, police power has blurred the dividing line between what is rational and what can be rationalized. More than anything else it is this – power's triumph over rationality – that explains why the dogs that should be barking about the police are remaining conspicuously silent.

The police appear to be the biggest winner in the justice system reform movement. In particular, they do not want their status (much power and little accountability) to change, and they are getting what they want. At one level this may seem an odd conclusion, for the police have been far less involved in reform deliberations than have lawyers, prosecutors, and judges. More specifically, the police have not participated much in making the decisions that will affect these other legal actors. In this sense, yes, the police have exercised little power.

However, a classic article in political science points out that power has a `second face` which is at least as important as direct participation in deliberative decision-making (Bachrach and Baratz 1962). This second face of power is evident when an actor is able to limit the scope of the political process to public consideration of only those issues that are *innocuous* to the actor. Thus, analyzing the power dynamics in Japan`s reform movement requires examining how the police have exercised influence so as to *limit the scope of decision-making* to issues that they consider `safe.`

The police have succeeded in keeping certain key issues – their power, performance, and unaccountability – outside the realm of public discussion (Ode 2001b). Their success illustrates another general truth, that power has the capacity to define `reality` by producing knowledge that is conducive to the reality it wants and by *suppressing* the knowledge for which it has no use (Flyvbjerg 1998:36). Since at least the time of the Occupation, the Japanese police have been singularly successful at producing rationalizations that serve their interest and suppressing rationality that would challenge their position of primacy in Japanese criminal justice (Aldous 1997).

The best comparative research on justice system reform demonstrates that changes are most successful when they are driven from the bottom-up by actors in civil society, not when they are top-down (Epp 1998). Japan`s *shiho kaikaku* has been, for the most part, directed by state actors, corporations, and other elite interests (Miyazawa 2001). If prior research has anything to say about the prospects for reform, it is that the top-down character of *shiho kaikaku* does not bode well for those who want to see the rule of law better established in Japanese society (Igarashi 2002).

The more things change the more they stay the same. This American aphorism sums up and simplifies the limited scope of the justice system reform movement. It does not take a Sherlock Holmes to recognize that silence about the police speaks volumes about the scope of Japan`s judicial reform and the distribution of power in the Japanese polity. If space permitted, it would be instructive to explore four more areas in which reform dogs should be barking more vigorously: the need to abolish the *daiyo kangoku* system; the need for prosecutors to disclose more evidence (*shoko kaiji*) to the defense; the need to establish forensic laboratories that are independent of the investigating authorities; and the need to expose Japan`s closed system of capital punishment to the sunshine of public scrutiny (Ode 2001a; Morishita 2001).

Finally, it is important to recognize that justice system reform has only just begun. Although the reform of institutions is the main means of change in the modernist approach to developing democracy, the idea that such reform alters actual practice `is a hypothesis, not an axiom` (Flyvbjerg 1998:234). The best research on `making democracy work` warns us that the `designers of new institutions are often writing on water` (Putnam 1993:17). That is, culture and history profoundly condition the effectiveness of new institutions, and pre-modern practices that go back several centuries often limit the possibilities for implementing modern democratic reform. Since culture counts, reformers should attend to this more amorphous area as well.

To choose one especially important example, invigorating Japan`s `20% judiciary` (*niwari-shiho*) will require more than merely adding more lawyers and lay judges to the mix and stirring the ingredients thoroughly (Sato 2002:72). The extraordinary passivity of Japanese judges vis-à-vis other organs of government must also be addressed, and this is fundamentally a cultural challenge. The first step towards that end is to improve the quality of public discussion about the role that judges should play in Japan`s polity. It is therefore unfortunate that many of the deliberative panels in the justice system reform movement have failed to make their discussions as transparent as the Reform Council`s recommendations urged (Nakabo 2002). One can only wonder why.

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