

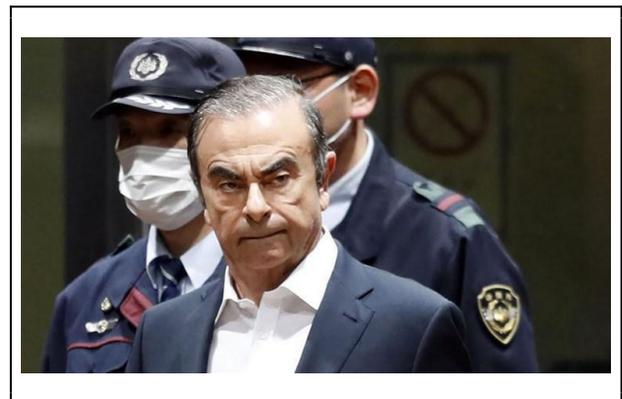
Comparative Reflections on the Carlos Ghosn Case and Japanese Criminal Justice

Bruce E. Aronson, David T. Johnson

Abstract: *The arrest and prosecution of Nissan executive Carlos Ghosn, together with his dramatic flight from Japan, have focused unprecedented attention on Japan’s criminal justice system. This article employs comparison with the United States to examine issues in Japanese criminal justice highlighted by the Ghosn case. The criminal charges and procedures used in Ghosn’s case illustrate several serious weaknesses in Japanese criminal justice—including the problems of prolonged detention and interrogation without a defense attorney that have been characterized as “hostage justice.” But in comparative perspective, the criminal justice systems in Japan and the U. S. have some striking similarities. Most notably, both systems rely on coercive means to obtain admissions of guilt, and both systems have high conviction rates. The American counterpart to Japan’s use of high-pressure tactics to obtain confessions is a system of plea bargaining in which prosecutors use the threat of a large “trial tax” (a longer sentence for defendants who insist upon their right to a trial and are then convicted) to obtain guilty pleas. An apples-to-apples comparison also indicates that Japan’s “99% conviction rate” is not the extreme outlier that it is often said to be. Commentary on Ghosn’s case emphasized the weaknesses in Japanese criminal justice. Those weaknesses are real and important, but by many criteria, such as crime and incarceration rates, Japan outperforms the U.S. As for Ghosn’s case in particular, this article explores four scenarios of what might have happened to him if his case had occurred in the U.S. It is not obvious that*

he would have fared better under American law, nor is it obvious that justice would have been better realized.

Key words: *criminal justice, white-collar crime, Japan, United States, Carlos Ghosn, hostage justice, conviction rates, confessions, plea bargaining*



Carlos Ghosn in Detention in Japan

Introduction

The arrest and criminal prosecution of Nissan executive Carlos Ghosn, together with his dramatic flight from Japan, have focused unprecedented international attention on Japan’s criminal justice system. The period from Ghosn’s arrest in November 2018 until his press conference in Lebanon in January 2020 was filled with a seemingly endless series of controversies. Was Ghosn a greedy autocrat or

the victim of a coup by Nissan? Were Ghosn's arrest and prosecution justified? Were the conditions of his detention acceptable or was he subject to undue pressure to force a confession? More generally, were the tools of Japan's criminal justice system used appropriately against Ghosn, or were they utilized to deprive him of his rights as a criminal defendant? And are defendants' rights adequately protected in Japanese criminal justice, or is the system itself seriously flawed?

The controversy was fanned by Ghosn's tactics in response to his sudden arrest and lengthy pretrial detention and interrogation. Following the failure of Ghosn's first defense team to obtain his release from prolonged detention (for details on Ghosn's detention and other developments of the case, see the timeline in Appendix 1), Ghosn changed lawyers and went on the offensive. He launched a broad public attack, amplified in the international media, on Japan's entire system of criminal justice, calling it "hostage justice" (*hitojichi shiho*). The response of Japan's government often consisted of formalistic citations of provisions in Japan's constitution, rather than descriptions of Japanese criminal justice in practice or acknowledgement of real problems. The government's defense was combined with assertions that each country should be able to choose the system of criminal justice it desires, with little mention of human rights.

The oversimplified arguments on both sides were reflected in much of the prolific commentary on Ghosn's case. The Western media was generally sympathetic to Ghosn's complaints, while the Japanese media mostly condemned him and his actions. The case clearly highlights several difficulties in making comparisons between criminal justice systems. Two of the problems are basic issues that apply to comparisons with Japan generally, while other concerns are specific to the comparison of criminal justice systems.

First is a basic principle of comparative study, that one should not compare "my theory with your practice." Abstract theory always looks better than the troubling realities of practice. In the Ghosn case, there were numerous misleading comparisons that broadly idealized the rights of criminal defendants in the U.S. in ways that would surprise participants in the actual administration of American criminal justice. The value of comparative study lies in utilizing knowledge of another country's system to shed light not only on that country, but also on your own country's system.

Second is the unfortunate tendency in discussions of Japan to resort to broad cultural generalizations and stereotypes. This is true of both critics and defenders (foreign and domestic) of Japanese criminal justice. Critics often imply that the Japanese do not fully understand or appreciate the "Western" rights of defendants due to cultural reasons, while defenders sometimes respond that the Japanese criminal justice system is appropriate because it "fits" with Japanese culture. But an "essentialist" view of culture as the determining factor in explaining legal differences often makes comparison more difficult (Nelken, 2010).

There are also problems specific to comparisons of criminal justice systems. First, criminal justice is largely a domestic field of study. Utilizing the state's sovereign power to deprive individuals of their liberty is a weighty process closely tied to a host of domestic policy considerations. As a result, criminal justice experts seldom make comparisons with other countries' systems, and comparative criminal justice remains a limited field. In addition, white collar crime and corporate crime are neglected in most criminology journals, textbooks, scholarship, and teaching, rendering marginal what may well be the most serious crime problem of our age (Johnson, 2018).

Second, civil and common law systems have

different assumptions and procedures, particularly in criminal cases. The criminal justice system in Japan began as an inquisitorial system imported from Germany, in which defense lawyers played a minor role compared to judges and prosecutors. Postwar reforms from the U.S. resulted in a formal changeover to a more U.S.-style adversarial system, but in many respects the change has been incomplete.

Finally, there is a lack of common assumptions, definitions, and data among countries with respect to criminal justice. Common terms such as “arrest,” “trial,” and “conviction” have different meanings in different countries. As a result, data on matters such as “conviction rates” utilize different methods of calculation and may not be readily comparable without significant qualification. Data availability is also an issue. Japan’s centralized system produces uniform data, while the U.S. has a complex federal structure with only fragmented data for the large majority of cases that occur at the state and local levels. This makes it challenging to carry out apples-to-apples comparisons.

Much of the commentary on the Ghosn case has focused on differences between criminal justice systems in Japan and the U.S. (see, for example, Associated Press, 2018), but it is also necessary to note broad similarities. In both countries the overwhelming majority of criminal cases are cleared without trial, and conviction rates in contested cases are high. The image of dramatic courtroom battles does not represent the reality of how most cases get processed.

Because the Ghosn case raises significant issues for Japan’s criminal justice and corporate governance systems, and for comparisons with Japan more generally, we decided to combine our areas of expertise to take a fresh look at this case from a comparative perspective that has been largely missing to date. The rest of this article

proceeds as follows. Section 2 provides general background on the Ghosn case. Section 3 presents substantive and procedural aspects of the case. Section 4 summarizes Ghosn’s criticisms of Japanese criminal justice, compares the criminal justice systems in Japan and the U.S., focusing on conviction rates and the potential for coercion, and presents several scenarios for how Ghosn might have been treated if his case had occurred in the U.S. Our final section concludes by discussing the significance of the Ghosn case from a comparative perspective.

Contexts of the Ghosn Case

Nissan and Toyota were the only two significant domestic automobile manufacturers in prewar Japan (Morck and Nakamura, 2007). Nissan expanded globally following the Second World War and was the first Japanese car manufacturer to penetrate the profitable U.S. market (beginning in 1958) with a lineup of small, efficient cars and trucks and a famous sports coupe (Nissan Motor Corporation Global Website, 2020).

Nissan fell upon hard times following the bursting of the Japanese bubble economy in the early 1990s. It incurred large losses and accumulated heavy debts. Like many companies in Japan, it was in need of restructuring but appeared reluctant to adopt the necessary, painful measures. This long-deteriorating situation became a question of survival in February 1999 when both major credit rating agencies threatened to downgrade Nissan’s rating from investment grade to “junk” status, and it was unclear whether Nissan could obtain the necessary funds for a restructuring (Milken and Fu, 2005).

Nissan took action the following month. It found a partner in the French automobile company Renault. Renault and Nissan agreed to a global alliance and signed an agreement on

March 27, 1999, under which Renault injected capital and purchased 37 percent (which later became 43 percent) of Nissan stock. Nissan owns 15% of Renault with no voting rights, while Renault's biggest shareholder is the French government.

The person designated to join Nissan as chief operating officer and implement the necessary reforms was Carlos Ghosn (pronounced GOHN). He speaks five languages and is a citizen of France, Brazil, and Lebanon. Ghosn was in charge of Renault's own restructuring in the 1990s following its failed merger with Volvo, and he seemed like a good candidate to reduce Nissan's excess capacity and cut costs, though there was also skepticism as to whether he could succeed with an aggressive turnaround plan that seemed to violate conventional Japanese practices (Milken and Fu, 2005, p. 125).

The turnaround plan was drastic by Japanese standards. Five Nissan plants were shut down. There was a reduction of 21,000 workers, or 14% of the labor force, through a combination of attrition, hiring freezes, and layoffs. The *keiretsu* system (businesses linked together by cross-shareholdings) was essentially ended, with the number of parts suppliers reduced by 50% and with an estimated 20% savings in procurement costs. Debts were also cut in half, and a new performance-related compensation system for executives was introduced (Milken and Fu, 2005, pp. 131-133).

Many analysts agreed that the plan was a great success, as profitability was restored within two years (one year ahead of schedule), in one of the most dramatic turnarounds in the history of corporate Japan. Ghosn received many international and domestic accolades. And he continued to rise in the companies' respective hierarchies, becoming CEO of Nissan in 2001 and CEO of Renault in 2005. He is the only person in modern history to become the head of two major corporations simultaneously. He also

became a famous figure in Japan, with over 50 books written about him and his business exploits (he even became the hero of a manga comic series).

But Ghosn's success at Nissan in the early 2000s was not matched by achievements in the following decade, when Nissan's performance and profitability were inconsistent (Boudette, 2020). His personal reputation took a hit in 2010 due to the high level (at least by Japanese standards) of his executive compensation. A new rule in 2010 required that total individual compensation for company executives must be disclosed if it exceeded 100 million yen (roughly one million US dollars, utilizing an approximate exchange rate of 100 yen per dollar) (Financial Services Agency, 2010). In anticipation of a strong negative reaction to the disclosure of Ghosn's salary, Nissan cut Ghosn's disclosed compensation in half, though he apparently expected to eventually be paid the "remaining" amount after his formal retirement from Nissan. These facts would later lead to the prosecution of Ghosn for the misleading disclosure of his compensation.

Although high by Japanese standards, Ghosn's disclosed compensation was now relatively low compared to the heads of foreign automobile companies. But Nissan continued to worry that Ghosn's compensation was too high, while Ghosn thought it was too low. It was later alleged that Ghosn added to his own benefits through personal use of company funds without following proper procedures, such as internal authorization and disclosure.

During the 2010s, Ghosn's authority at Nissan became more concentrated. He had always retained strong authority over the governance of Nissan, beyond the authority of a CEO at a traditional Japanese company, due to the wishes of Renault (which was the controlling shareholder). This included a delegation of authority from Nissan's board to set executive and director compensation (including his own)

within a total budget (Securities and Exchange Commission, 2019, p. 1). His power was further strengthened by practices at Nissan that had become entrenched over Ghosn's nearly two decades as its head. Day-to-day control at Nissan was delegated to a small group of executives with strong relationships with Ghosn. It seems little open discussion occurred on the board of directors that Ghosn dominated, and beginning in 2009 his aide, Greg Kelly, also exercised extraordinary powers on his behalf (Nissan Motor Co. Ltd, 2020, p. 8).

Two major factors contributing to corporate governance weaknesses at Nissan were the presence of a controlling shareholder, Renault, and the long period - nearly 20 years - of executive control exercised by Ghosn. Neither of these factors is common in Japan or the U.S. (for overviews of corporate governance in Japan, see Aronson, Kozuka and Nottage, 2016; Aronson, 2019).

Renault and Ghosn continued to build up their global automobile alliance with the addition of Mitsubishi Motors in 2016. Nissan became the owner of 34% of the shares of Mitsubishi, and Ghosn became chairman of all three companies (Ma and Horie, 2016). However, business success continued to prove elusive. Profitability was down in the crucial North American market, and it once again seemed that Renault and Nissan were falling behind the international competition, at a time when significant new investments were required to be competitive in emerging markets for electric cars and self-driving automobiles. Ghosn formally resigned as president and CEO of Nissan in April 2017, but retained his title as chairman and apparently continued to function as de facto CEO (Nissan Motor Co. Ltd, 2020, p. 8).

One longstanding proposal favored by Renault to address these challenges was further integration of the alliance companies, which

could have included a complete merger between Renault and Nissan. But this idea was opposed by executives at Nissan (Tanaka, 2018). Like the general public in Japan, they still viewed Nissan as an iconic Japanese car company. They chafed under the alliance's failure to rebalance the share ownership structure between Nissan and Renault despite Nissan producing substantially larger sales and profits than Renault.

In 2018, after Nissan received whistleblower reports alleging Ghosn's misuse of company funds for personal purposes, the company began an internal investigation without notifying Ghosn (Nissan Motor Co. Ltd, 2020). Based on the results of this investigation, and fearing personal and corporate liability, two Nissan employees (Nada Hari and Onuma Toshiaki) went to prosecutors to offer their cooperation in return for immunity from prosecution under Japan's new plea bargaining law, which was passed in 2018 (Jiji, 2019). Ghosn (and his aide Kelly) were then arrested when they arrived in Japan in November of that year to attend a board meeting. By April 2019, Ghosn would be indicted on four counts of financial wrongdoing—two for false information disclosures concerning his compensation, and two for the personal misuse of company funds.

The Ghosn Case in Japan

The first two counts against Ghosn allege violations of securities law, based on false reporting of Ghosn's compensation in annual securities filings. The other two counts are based on aggravated breach of trust under corporate law - a corporate crime that is common in civil law jurisdictions (the most famous criminal case on executive compensation in Germany, relating to Vodafone's hostile acquisition of Mannesmann in 2000, was based on a similar provision of German law; see Gevurtz, 2006, pp. 97-108) and would likely fall under the broad mail and

wire fraud provisions of U.S. federal law (Congressional Research Service, 2019). Japanese prosecutors may have received relatively complete information about Nissan's internal investigation before any charges were filed, but they decided to charge Ghosn one count at a time. This is a common and controversial tactic in Japan, for it enables prosecutors to lengthen the period during which an uncooperative defendant remains in detention and thereby pressure a defendant into confessing. This is the main reason many critics of Japanese criminal justice call it a system of "hostage justice" (within Japan, see the [petition signed by 1010 legal professionals](#); internationally, see the [opinion concerning Carlos Ghosn of the Working Group on Arbitrary Detention](#), UN Human Rights Council).

Substance

Count 1: False Entry in Annual Securities Report, FY 2010-2014

The first two counts filed against the Nissan corporation, Ghosn, and Kelly are based on Japan's securities law. Securities law in Japan was closely modeled after U.S. law during the allied occupation following the Second World War. Article 24 of the Financial Instruments and Exchange Act (Law No. 25 of 1948, as amended, "FIEA") makes it a crime to file an annual securities report that "contains a false statement about a material particular or that omits a statement as to a material particular that is required to be stated." Although inaccurate information disclosure might be considered a "technical" crime not worthy of a criminal arrest, Article 24 provides for significant criminal punishment for violations: up to 10 years in prison, a fine up to 10 million yen, or both.

Confirmation letters concerning the accuracy of annual reports must be signed and sent to the

Tokyo Stock Exchange and Financial Services Agency by the representatives of the company. Ghosn gave final internal approval for these reports (Securities and Exchange Commission, 2019, p. 10) and also signed and attested to the accuracy of the securities filings he is charged with violating.

As noted in the timeline appended to this article, after Ghosn's arrest and detention on November 19, 2018, he was indicted on Count 1 and then rearrested on Count 2 on December 10, 2018.

Count 2: False Entry in Annual Securities Report, FY 2015-2017

Japanese prosecutors charged the same three defendants (Ghosn, Kelly and Nissan) with criminal violation of the same provision of the FIEA for three additional fiscal years. It should be noted that the legal responsibility for filing annual securities reports formally lies with the corporation. Accordingly, the prosecutors' inclusion of two individuals in their indictment is based on these individuals wrongfully withholding information from the corporation so as to make the corporation's annual securities filings false or misleading.

The major legal issue for these two counts is whether or not Nissan had a legal obligation to pay Ghosn the compensation and retirement benefits that he expected to receive following his retirement from Nissan. Ghosn allegedly assigned Kelly the task of finding a way to structure payment to Ghosn of his "postponed" compensation without disclosure. Several schemes were contemplated, including payment through a Dutch subsidiary, but ultimately it was decided that payment would be made through post-retirement "consulting fees" (Securities and Exchange Commission, 2019, pp. 2-3). Prosecutors have emphasized "secret" documents held in Nissan's secretarial office that allegedly prove that future payments to Ghosn were guaranteed (Nikkei, 2018). Ghosn and Kelly have claimed that Ghosn's

“postponed” compensation was not fixed and that post-retirement compensation was discussed only in the context of services that Ghosn might provide to Nissan after his retirement (Saiki and Konishi, 2018).

Count 3: Aggravated Breach of Trust: The Saudi Arabia Route

Counts 3 and 4 both involve aggravated breach of trust under Japan’s Companies Act (Law No. 86 of 2005, as amended). Aggravated breach of trust is generally considered a more serious crime than the two counts of false disclosure cited above. Under article 960 of the Companies Act, a director (or other individual designated under this provision) who commits a breach of trust on behalf of his own interest or that of a third party and damages the company faces the same punishment as for false disclosure (i.e., up to 10 years in prison, a fine up to 10 million yen, or both). The elements of the crime are (1) a violation of official duties, (2) an act done to enrich himself or a third party, and (3) conduct causing financial harm to the company.

In general, the biggest issue in cases of aggravated breach of trust is the requirement of proof of criminal intent beyond a reasonable doubt. As in other countries, if the defendant fails to confess proof of such intent must depend on circumstantial evidence. Such proof of intent in complicated financial cases tends to make challenging cases for prosecutors everywhere.

The “Saudi Arabia route,” which is the factual basis for count 3, is a complicated financial transaction involving Ghosn’s entering into currency swap contracts for investment purposes with Shinsei Bank. When Ghosn incurred paper losses (1.85 billion yen or 18.5 million dollars) following the 2008 financial crisis and Shinsei demanded additional collateral, Ghosn transferred the contract to Nissan. Nissan claims that it suffered a loss, for which Ghosn reimbursed Nissan, but that the

details were never disclosed to Nissan’s board (Nissan Motor Co., Ltd., 2019, p. 9). Ghosn claims that Nissan suffered no real loss.

Ghosn then arranged for a separate credit guarantee of the currency swap (3 billion yen) with his friend in Saudi Arabia, Khaled Juffali, and Nissan returned the contract to Ghosn. It is alleged that Ghosn used Nissan funds (from the CEO reserve fund) to make payments totaling \$14.7 million to Juffali’s company during 2009-2012, thus compensating his friend for helping Ghosn with a personal matter (Kurabe, Yamada and Yuzawa, 2018). Ghosn claims that his initial transfer of the contract to Nissan was properly approved (by the board) and that Nissan suffered no loss. He also claims that the payments to Juffali were for a legitimate purpose and properly approved, with other top executives signing off, as required, for use of the CEO reserve fund (Kyodo, 2019a).

Count 4: Aggravated Breach of Trust: The Oman Route

The factual allegations related to the “Oman Route” are the most damning allegations against Ghosn by Japanese prosecutors, since they clearly involve personal benefits to Ghosn and his family members from Nissan funds. Ghosn is alleged to have again utilized the CEO reserve fund, this time to have Nissan Middle East make \$35 million in payments to Suhail Bahwan Automobiles, a Nissan car dealer in Oman, during 2011-2018 (Kostov and McLain, 2019).

An executive of the car dealership apparently made payments (1.7 billion yen or 17 million dollars) in his personal capacity to an entity effectively controlled by Ghosn, which in turn made payments (560 million yen) to entities controlled by Ghosn’s wife and (partially) by his son. When Renault (with Nissan) eventually launched its own investigation of Ghosn’s activities, it apparently shared information on the Oman route with French prosecutors, who initiated their own criminal investigation in

February 2020, focusing on the Oman route and 11 million euros in questionable expenses (for personal entertainment, gifts and legal fees, donations, use of jets, and housing) found by Renault (Associated Press, 2020; for details of the expense allegations see Nissan Motor Co., Ltd., 2020, pp. 9-10). As of December 2020, the French investigation remains in progress, and Ghosn has announced that French prosecutors will travel to Lebanon to question him in 2021 (Sebag and Patel, 2020).

Although counts 3 and 4 concerning the personal use of corporate funds are more serious than the allegations of misleading disclosures, they are also more difficult for prosecutors to prove. Not only do they involve complex financial transactions; Japanese prosecutors are also not well-equipped to obtain evidence and witness cooperation from sources in the Middle East. However, to the extent that prosecutors had full access to Nissan's (including Ghosn's) emails and other communications, they may well be able to build a persuasive case based on circumstantial evidence of Ghosn's intent.

Other allegations did not result in indictments. Nissan alleged that Kelly underreported his own compensation by a total of 626 million yen (\$6.26 million) from FY2012-2017 and also improperly received 7.17 million yen (\$70,170) through manipulation of share appreciation rights (Nissan Motor Co., Ltd., 2020, p. 11). Following Nissan's initial investigation, it was later revealed that seven directors and officers of Nissan received overcompensation through manipulation of the exercise date of share appreciation rights (including Ghosn's successor as CEO, Saikawa Hiroto), but that this was carried out by Kelly (to benefit Ghosn and Kelly) without their cooperation (Nissan Motor Co., Ltd., 2020, p. 11). Prosecutors decided not to indict Saikawa, Ghosn's handpicked successor who reportedly signed a document that promised to pay Ghosn's "postponed" compensation following

retirement, but then turned against him (Kyodo, 2019b). The decision not to prosecute Saikawa was later affirmed by a Prosecution Review Commission (*kensatsu shinsakai*), an independent committee of 11 citizens which is authorized to review prosecutors' non-charge decisions (Jiji, 2020) – and which has brought charges in other high-profile cases (Johnson, Fukurai, and Hirayama, 2020). Ghosn's defense attorney criticized prosecutors' disparate treatment of Ghosn and Saikawa, calling it "clear discrimination against foreigners" (McLain, 2019). Saikawa resigned following the disclosure of his own overcompensation.

For its part, Nissan was fined 2.4 billion yen (\$24 million) for underreporting compensation by Japan's Financial Services Agency. This was the second largest fine ever imposed by the agency. In February 2020, Nissan filed a civil lawsuit against Ghosn for 10 billion yen (\$100 million) in damages relating to Nissan's fines, Ghosn's use of company funds for personal expenses, and the costs of the company's investigation. In turn, Ghosn filed a civil suit against Nissan and Mitsubishi Motor's Dutch joint venture seeking 15 million euros for wrongful dismissal (Horie, 2020; Nissan Motor Corporation, 2020).

Criminal Procedure

Japan's most significant white collar crime cases involving defendants such as national politicians and corporate executives are usually handled by the Special Investigation Division ("SID") (*tokusobu*) of the Tokyo District Public Prosecutors Office (SID counterparts also exist in Osaka and Nagoya). Many high-profile defendants, who typically face both the aggressive methods of the SID and social pressure to confess and cooperate because of their association with a major corporation or political party, end up confessing, receiving suspended sentences and doing no prison time after conviction (see, for example, the

suspended sentences of three corporate executives who pleaded guilty in the \$1.7 billion Olympus accounting scandal; Woodford, 2012; Tabuchi 2013; Naito, 2019). In contrast, Ghosn's case illustrates what can happen when a defendant with vast resources who is less subject to such social pressures challenges the standard operating procedures of white-collar crime investigations in Japan.

It was not obvious that Ghosn would pose such a challenge when he was arrested and detained on November 19, 2018. He retained as his main defense counsel the ultimate "establishment" defense lawyer, Otsuru Motonari, a former head of the SID in Tokyo. It appears Ghosn initially hoped that by "playing by the rules" of the Japanese system he could make an arrangement that would minimize both his criminal exposure and the duration of his detention, but this approach proved ineffective.

Ghosn's case was not typical in other ways as well, not least because it attracted a great deal of international attention. Prosecutors were surprised by a decision of the Tokyo District Court in December 2018 to refuse a 10-day extension they had sought for Ghosn's detention and interrogation. Although prosecutors' requests for extensions are routinely approved, the court may have been sensitive to the prominence of the case (Konishi, 2019). But instead of agreeing to Ghosn's release, prosecutors filed count 3, which enabled them to keep him in detention. At Ghosn's first court appearance (January 8, 2019, some seven weeks after his initial arrest) he proclaimed his innocence. However, his two subsequent requests for bail were denied.

From Ghosn's perspective, there did not seem to be any prospect of a negotiated settlement or of release from detention, and the judicial process seemed likely to drag on for many months. So Ghosn changed tactics, replacing his lead lawyer with a more aggressive defense counsel, Hironaka Junichiro, famously known

as the "The Razor," and a bail specialist, Takano Takashi, who is widely regarded as one of the best criminal defense lawyers in Japan (Johnson, 2017). The next month, in March 2019, Ghosn's reconstituted defense team succeeded in obtaining his release on bail (for 10 billion yen or about \$10 million), under strict conditions. He had been detained for 108 days. The legally sanctioned period of pre-indictment detention is longer in Japan than in 32 other OECD nations (Croydon, 2016, p.4), and when police and prosecutors make "serial arrests" (*bekken taiho*), as they did with Ghosn, the total length of detention can be very long indeed (Nicholas Johnson, 2019).

In April 2019, the day after Ghosn spoke out and announced he would hold a press conference, he was arrested again (for the fourth time overall, despite having been released on bail). A week after the new detention period started, Ghosn's lawyers released a video in which he alleged a "plot" and "conspiracy" against him. On April 25, following 22 days of detention, the Tokyo District Court released Ghosn on bail of 5 billion yen (\$5 million) under strict conditions and despite the vehement objections of prosecutors who claimed that Ghosn was a major flight risk (he is wealthy and has four passports and many overseas connections). Ghosn's bail conditions included physical surveillance, video surveillance of the entrance to his apartment, restrictions on his use of computers, and other measures. But they did not include an ankle bracelet or other electronic surveillance devices, which are not used in Japan.

The prosecutors' concerns proved prescient. On December 31, Ghosn announced he had fled Japan for Lebanon. In an escape that required months of preparation and considerable outside assistance, Ghosn evaded physical surveillance (on December 29, during the New Year holiday season), took a bullet train from Tokyo to Osaka, and then was smuggled through an

airport in Osaka (packed inside a music equipment case) and onto a private jet. The jet flew to Turkey, where Ghosn changed to another private jet that took him to Lebanon (Campbell et al., 2020).

At a press conference on January 8, 2020, Ghosn denounced his treatment and renewed his attack on Japanese criminal justice. His illegal flight gave pause to some Western media that had previously backed him, but the editorial board of the Wall Street Journal continued its full-throated support, calling his statement “a tour de force of self-exoneration” in a case that “should have been settled in the boardroom” (Wall Street Journal, 2020). The same month, Interpol issued an arrest warrant for Ghosn. As of this writing in December 2020, he remains a fugitive from Japanese criminal justice, and he is also under criminal investigation in France, while those who aided his escape have been arrested in the U.S. and Turkey. As explained below, Ghosn settled with the U.S. Securities and Exchange Commission (“SEC”) by paying a \$1 million fine and agreeing to a 10-year ban on serving as an officer or director of a U.S. reporting company.

In Japan, Ghosn was subject to extensive interrogation while he was in detention for 130 days (see below for more details). Japanese law gives suspects and defendants the right to remain silent, but judicial interpretation of this right also imposes a duty to endure questioning (Foote, 1991) - and without a defense lawyer present (Ibusuki and Repeta, 2020). Hence, Ghosn was required to sit for hours and days on end, while prosecutors asked questions to which he did not respond. And unlike many Japanese defendants who refuse to confess but do engage with prosecutors’ questions (Ezoe, 2010), Ghosn maintained his silence. He did not even provide a statement of his own version of the facts. All of Ghosn’s interrogations were videotaped, and he was permitted to consult with his lawyers on a daily basis (outside the interrogation room). There is no denying that

his interrogations were long, and the conditions of his detention were certainly harsh - a small cell, limits on activities outside the cell, and strictly limited meetings with family. But it appears that the conditions of his confinement were no worse (and no better) than those for other criminal suspects who face serious charges in Japan (Croydon, 2016).

Japan-US Comparisons

Ghosn’s (and his attorneys’) criticism of Japanese criminal justice consisted of four main elements (see also Yamashita, 2020). First was his argument that it is impossible to receive a fair trial in Japan because the system is “rigged” (Abdallah and Kelly, 2019). On this view, Japan’s “99 percent conviction rate” is offered as proof of fundamental unfairness in Japan’s criminal justice system and as a valid reason not to cooperate with the process. Why respect Japanese procedures if it is impossible to receive a fair trial?

Second, Ghosn excoriated Japan’s pretrial detention practices. As noted above, prosecutors (with cooperation from judges) can detain suspects for long periods of time by utilizing the full 23-day period of detention for each count and by staggering arrests and indictments for each count. Even after these detention periods expire, prosecutors regularly persuade courts to deny bail requests, so detentions in contested cases often continue for many months thereafter (for examples, see Naito, 2019). On this view, Japanese criminal justice has long had such low rates of release on bail that it deserves to be called a system of “hostage justice” (Kyodo News, 2019c).

Ghosn’s third criticism was directed at criminal interrogation. As described above, suspects in Japan do not have the right to have an attorney present during interrogation, and though they do have a right to remain silent, they are legally required to attend interrogations and to

endure questioning, which can last many hours each day. On this view, Japanese criminal justice is designed to force confessions, even from suspects who proclaim their innocence, and suspects who do not readily confess will be put under increasingly intense pressure (Dooley, 2019a).

Ghosn's final criticism was political, that the charges against him were the result of a plot by Nissan to prevent a merger with Renault, and that Japan's government supported the conspiracy against him. According to this view, political persecution and prosecution justify Ghosn's escape from Japan (Abdallah and Kelly, 2019).

All of Ghosn's criticisms were reported in the media against a backdrop of implicit comparisons to systems of criminal justice that supposedly safeguard defendants' rights better than is the case in Japan (see, for example, Associated Press, 2018). The favorite point of comparison was the U.S., yet many of those comparisons were based on faulty methods and idealized views of American criminal justice. As the rest of this section argues, more appropriate comparisons reveal that Japanese criminal justice is not the outlier portrayed by its critics (Wall Street Journal, 2020).

High Conviction Rates

The most common criticism of Japan's criminal justice system focuses on its supposed "99 percent conviction rate" (see, for example, Truong, 2018). But definitions and practices differ between Japan and the U.S. Below we use data from Japan and from the U.S. federal system to compare criminal conviction rates in contested cases.

In the U.S., the "conviction rate" usually refers to cases that go to trial where defendants are found guilty. Under American criminal procedure, defendants who plead guilty receive

no trial, which means that all of the cases that go to trial are contested. In the federal system, about 84 percent of criminal cases referred to prosecutors result in indictment (Motivans, 2019, Table 4). The vast majority of these cases are disposed of through plea bargaining - over 97 percent at the federal level (Motivans, 2019, Table 6), and the percentage has been increasing for decades. (In the 50 states the plea-bargaining rate is 94 percent; see Neily, 2019). Conversely, less than 3 percent of federal cases go to trial in the U.S.

In Japan, by contrast, the majority of cases are cleared by prosecutors through the exercise of their discretion to refrain from bringing charges. When cases are dropped or prosecution is "suspended" (*kiso yuyo*), the suspect is neither charged nor punished. Overall, prosecutors in Japan decide to charge in less than one-third of the cases that are referred to them (Supreme Court of Japan, 2019, Graph 3). Moreover, about 90 percent of charged cases involve confessions or admissions of guilt. Although these cases do go to trial, only the remaining 10 percent of charged cases are contested at trial (Supreme Court of Japan, 2019, Table 4). In Japan, the "conviction rate" usually refers to the percentage of *all cases* that have been charged and that result in conviction. We stress: the vast majority of those cases are *uncontested*.

In order to make a meaningful comparison, we need to focus on conviction rates for similarly contested trials. In the U.S. federal system, the conviction rate for contested trials is about 83 percent (it is lower in some state and local jurisdictions) (Motivans, 2016, Table 6). In Japan, the conviction rate for contested cases is about 96 percent - not "more than 99 percent," as is often claimed (Supreme Court of Japan, 2019, Table 4; see also Johnson, 2002, ch.7). In both countries, therefore, the vast majority of defendants who contest the charges against them do get convicted. On the other hand, when we focus on acquittal rates, the U.S.-

Japan difference is striking. In the U.S., the acquittal rate in contested cases is 17 percent, while it is less than 4 percent in Japan. Thus, an acquittal is four times more likely in America than in Japan.

A third perspective provides additional insight. When we employ the conventional Japanese method for calculating conviction rates – as a percentage of all prosecuted cases, not just contested cases – we see great similarity in conviction rates. In fact, this method results in a Japanese conviction rate of 99.8 percent (Supreme Court of Japan, 2019, Table 4) and an American conviction rate of 99.6 percent (Motivans, 2019, Table 4). Putting all prosecuted cases in the denominator produces an extremely high conviction rate in both countries. From this vantage point, a conviction rate of 99 percent may be interesting, troubling, or both, but it is not uniquely Japanese.

Pressure to Admit Guilt

Another striking similarity between Japan and the U.S. concerns the use of pressure to produce admissions of guilt. In both countries, protections for defendants on trial are relatively robust, but in the pretrial process much pressure is brought to bear on suspects to help the state obtain convictions.

In Japan, Ghosn was subject to extremely long interrogations while he was in detention for 130 days. One of his defense lawyers has released [records of the daily duration of Ghosn’s interrogations during 70 of those days](#). The average length of interrogation was 7 hours per day, and on several days Ghosn was interrogated for more than 10 hours. As noted above, Japanese law gives defendants the right to remain silent, but if they invoke it (as Ghosn did), judicial interpretations also impose a duty to endure questioning (Foote, 1991) – and without a defense lawyer present (Ibusuki and

Repeta, 2020). Hence, Ghosn was required to sit for hours on end, day after day and week after week, while prosecutors asked questions to which he did not respond. Goto Sadato, a prominent criminal defense lawyer in Osaka, has said that few criminal defendants are able to withstand this kind of sustained interrogation pressure without confessing. Many other Japanese defense lawyers agree with him.

Ghosn’s case is not unusual. Interrogations by police and prosecutors are often long and arduous, averaging more than 21 hours for all criminal cases, and more than double that for the serious cases that are eligible for lay judge trial (Homusho, 2012; see also Keisatsucho, 2012). In white-collar crime cases, the total length of interrogation often exceeds 100 hours. By contrast, interrogations in serious felony cases in the U.S. average just a few hours in length, and suspects who invoke their Miranda rights cannot be interrogated at all (Leo, 1996).

Interrogation in Japan has been the subject of much good research in English (Foote, 1991; Miyazawa, 1992; Foote, 1993; Takano, 2019). Recent reforms require the electronic recording of interrogations in a limited range of cases, but even in those cases “the problem of the overborne will” that has long plagued criminal justice in Japan has not been eliminated (Johnson, 2002, ch.8). In the U.S., pressure is routinely employed in plea bargaining, by threatening to impose a large “trial tax” on defendants who have the temerity to exercise their right to trial – and who then get convicted (Langbein, 1978; Fisher, 2003; Burns, 2009; Lynch, 2016). Many commentators either do not know about the size of trial penalties or deny their coercive effects, but some observers are clear about this American problem (Rakoff, 2014). As former Chief Judge William G. Young of the Federal District Court of Massachusetts put it in *U.S. v Richard Green et al* (2004):

“Evidence of sentencing disparity [trial penalty] visited on those who exercise their Sixth Amendment right to trial by jury is today stark, brutal, and incontrovertible. Today, under the Sentencing Guidelines regime with its vast shift of power to the Executive, that disparity has widened to an incredible 500 percent [this means the punishment after conviction at trial is five times the punishment prosecutors offered in plea bargaining]...Not surprisingly, such a disparity imposes an extraordinary burden on the free exercise of the right to an adjudication of guilt by one’s peers. Criminal trial rates in the United States and in this District are plummeting due to the simple fact that today we punish people—punish them severely—simply for going to trial. It is the sheerest sophistry to pretend otherwise.”

In sum, both Japan and the U.S. rely heavily on admissions of guilt, and the criminal justice systems in both countries often use high-pressure tactics to achieve that end. Both systems also fail to provide adequate judicial oversight of the processes that are used to pressure defendants into helping the state convict (Foote, 2010; Lynch, 2016). But there is an interesting difference too. While many international legal norms have been instituted to govern the process of criminal interrogation, human rights instruments have little to say about the high-pressure practices that make plea bargaining problematic in the U.S. and in other countries where “trial waiver systems” are expanding (Fair Trials, 2016, pp. 60-69). This gap in international norms may help explain why so much criticism was directed at Ghosn’s interrogations while the routine American practice of imposing pressure through plea bargaining seldom gets recognized.

While there are significant similarities in rates of conviction and in the use of high-pressure tactics to obtain them, Japan and the U.S. are cousins, not twins. Several significant differences concern pretrial detention. In

Japan, there are no detention “hearings” in open court. The decision to allow pretrial detention (which is the outcome in more than 95 percent of the cases requested by prosecutors) is made based on review of a case file that prosecutors send to a judge. The suspect and his or her defense counsel have no right to review the file, and they have little opportunity to exercise meaningful voice before the judge’s decision is made. The judge who makes the detention decision does not need to explain it. The judge typically asserts, perfunctorily, that detention is “necessary” because the defendant presents a flight risk, a crime risk to the community, or (most typically) a risk of tampering with case evidence, which is itself a crime (in Ghosn’s case, there were allegations of witness tampering by his wife; see Inoue, Yamamitsu, and Gall, 2020). The three-judge panels who review defense appeals against pretrial detention decisions do not explain their reasons either.

There are also significant Japan-US differences in the prosecutor’s obligation to disclose evidence to the defense. In Ghosn’s case, much evidence was withheld from defense lawyers – including evidence that might have helped Ghosn’s defense (Dooley, 2019b). In Ghosn’s case as in many others, Japan’s judicial stance was “[don’t worry, you should trust the prosecutors](#)”. It is an old entreaty – and a weak one (Johnson, 2002, pp.272-273).

The contrasts with American criminal justice are stark in other ways as well. Most notably, suspects in Japan do not have the right to have a defense lawyer present during interrogation. This is a right in the U.S. (Leo, 2008), and since the European Court of Human Rights *Salduz* judgment in 2008, in much of the European Union as well, though this right has been restricted in several European countries (Hodgson, 2020, p.177). In American plea bargaining, too, defense lawyers are often deeply involved in negotiations with prosecutors, especially in white-collar crime

cases (see below). And once a suspect invokes his or her right to silence in the U.S., interrogations must cease. Another American contrast concerns Japan's slow pretrial procedures. It was reportedly the failure of a pretrial conference (on December 25, 2019) to move forward with a trial schedule (over a year after Ghosn's initial arrest) that prompted Ghosn to activate his escape plan (Campbell et al., 2020). In Japan, there is also less respect for the attorney-client relationship and attorney-client privilege, as when Japanese prosecutors carried out a search-and-seizure in the law office of Ghosn's main attorney in January 2020 (Goto et al., 2020). These are all important differences, and collectively they suggest that some of Ghosn's criticisms of Japanese criminal justice are valid.

What If?

Although speculative, it is instructive to discuss some scenarios for how Ghosn might have been treated if his case had occurred in the U.S. The following four scenarios explore this question.

First, it is possible that allegations against Ghosn would not be seriously investigated in the U.S. No bankers from America's top financial firms were charged for the malfeasance that led to the 2008 financial collapse, and the problem of non-prosecution of white-collar crime extends far beyond finance. Over the past few decades, corporate lobbying, trial losses, cultural shifts, and other social and legal forces have hindered the ability to prosecute corporate executives in the U.S. As Jesse Eisinger, a Pulitzer Prize-winning reporter at ProPublica has described, the prosecution of white-collar crime in the U.S. is so routinely shirked and avoided that federal prosecutors deserve to be called "the chickenshit club" (Eisinger, 2017). Other scholarly works reach similar conclusions (Coleman, 2002; Garrett, 2014; Coffee, 2020; Taub, 2020).

In a second American scenario, Ghosn's conduct would be investigated, but he is not arrested because a capable defense attorney is able to intervene at an *early* stage of the criminal process (which seldom occurs in Japan). By obtaining access to case information early, and by shaping how that information is disclosed and interpreted, white-collar crime defense lawyers in the U.S. are often able to reframe legal arguments and avoid the detention and conviction of their clients - or at least mitigate the consequences of conviction. This shaping of facts early in the criminal process "lies at the heart of successful defense work" in many American white-collar crime cases (Mann, 1985), and it is more likely to happen in the U.S. than in Japan.

A third scenario is that the SEC initiates an investigation of misleading disclosures under U.S. securities laws (Nissan's American Depositary Receipts (ADRs), that are equivalent to shares, are traded in the U.S.) and then files civil charges against Ghosn. Under this scenario, Ghosn is not arrested and he probably settles with the SEC by paying a fine and agreeing to other sanctions. This, in fact, was how Ghosn (and Greg Kelly and Nissan) were [actually treated by the SEC](#). Ghosn settled by paying a \$1 million fine and agreeing to a 10-year ban on serving as an officer or director of a U.S. reporting company. The two more serious charges of misuse of corporate funds, which had no direct connection to the U.S., were not considered in the SEC case - and this is presumably why the SEC did not refer the Ghosn case to prosecutors for criminal investigation.

Finally, the fourth scenario is that American prosecutors investigate all of Ghosn's alleged crimes and indict him on much the same counts that Japanese prosecutors charged. In this eventuality, Ghosn would be arrested, and he might be detained pretrial if prosecutors could establish a clear flight risk, but he otherwise would likely be released on bail. On the advice

of his defense attorney (who may be present at interrogations), Ghosn asserts his right to remain silent and interrogations end. If he is found guilty at trial, there is the potential for a much longer prison sentence in the U.S. than in Japan (perhaps 8 to 20 years). Facing the likelihood of a large trial tax if he does go to trial, Ghosn might try to cut his losses by pleading guilty. Considering the enormous sums of (alleged) undisclosed compensation (\$80 million) and retirement benefits (\$60 million), an American plea bargain could also lead to a substantial term of imprisonment (perhaps 4 to 6 years).

In the fourth scenario, there would likely be considerable pressure placed on Ghosn to reach a plea agreement with prosecutors in the U.S. American prosecutors might also grant immunity to other Nissan offenders in order to obtain testimony against Ghosn - as happened in Ghosn's case in Japan. In the U.S. such grants of immunity often lead to miscarriages of justice (Natapoff, 2011), and in Japan, too, many observers worry about this risk under the plea-bargaining law that took effect in 2018 (Ibusuki, 2020; Ohno, 2020). The pressure to plead guilty in the American system would come from the "system" (sentencing guidelines and trial taxes), not just from prosecutors, who might "overcharge" Ghosn in order to increase their own leverage in plea negotiations. If Ghosn resists this attempt at let's-make-a-deal (as he resisted pressure in Japan to confess), American prosecutors could ratchet up the pressure, by indicting or threatening to indict family members who allegedly benefited from his misuse of corporate funds and who may have aided Ghosn (his wife, Carole, was indicted in Japan for perjury following Ghosn's flight to Lebanon, for allegedly making false statements about her contacts with Ghosn's associates in the Mideast; Inoue, Yamamitsu and Gall, 2020). In this scenario, it is not at all obvious that Ghosn's treatment in the U.S. would be better than his actual treatment in Japan.

Conclusion

Although Ghosn has fled to Lebanon, he remains a lurking presence in the trial of his aide, Greg Kelly, which began in Tokyo in September 2020. The strength of the prosecutors' case will eventually be revealed in court, at least with respect to the two counts of false information disclosure. Ironically, the defense and the prosecution seem to agree on the basic facts of the case (both Ghosn and Nissan kept careful track of his remaining undisclosed "compensation"), but they disagree on the meaning of the facts and on the intent of the parties involved. A criminal investigation in France and a civil lawsuit filed by Nissan against Ghosn in Yokohama are also ongoing.

Ghosn himself continues to proclaim his innocence. In September 2020 he announced that he would be coaching top executives at a Lebanese business school on how to "make yourself invaluable" in a company (Reuters, 2020), and in November 2020 he filed a formal declaration in a U.S. federal court supporting two Americans (who aided his escape from Japan) who are opposing their extradition to Japan to stand trial, stating that they could face "human rights abuses" by the Japanese government (Yaffe-Bellany, 2020). Ghosn's own role in Nissan's turnaround was significant, but it may have been exaggerated because of the media's fondness for images of the "CEO as superstar." His story is also a cautionary tale of how a CEO who starts out being an effective company leader may, over time, end up being surrounded by yes-men and develop an attitude of entitlement that company assets are his own resources.

Ghosn's case illustrates several serious weaknesses in Japanese criminal justice--not only the problems of prolonged detention and interrogation without attorneys that have been characterized as "hostage justice," but also lesser known but important issues of limitations

on the role of defense attorneys, a lack of judicial transparency and accountability, and failures to disclose relevant evidence to the defense.

We should also view this case in perspective. The workings of criminal justice systems are often controversial, for they attempt to achieve a balance between many values that are in tension, from crime control and public safety to power control and individual rights. There are also significant gaps between the high ideals that underpin criminal justice systems and the messy realities of criminal procedure in practice. In the end, it is hard to call Japan's criminal justice system a "failure" (or the like) when the country in which it operates has some of the lowest crime rates in the world and relatively few of the problems that afflict America's "unusually cruel" system of criminal justice (Howard, 2017) -- such as the world's highest incarceration rate (16 times higher than Japan's) and harsh jail and prison conditions, high rates of arrest (more than 30 percent of Americans are arrested at least once by age 23) and of killings by police (three persons a day, on the average, compared to about three a year in Japan), and large racial and class disparities throughout the American system (Garland, 2020).

Much of the commentary on Ghosn's case has relied on implicit or inapt comparisons and lazy caricatures. The impressions thereby created have been simplistic and misleading. Japanese criminal justice has many weaknesses, but if Ghosn's case had occurred in the U.S., it is not obvious that he would have fared better, nor is it clear that the interests of justice would have been better served. The ultimate impact of Ghosn's case remains uncertain - in Japan and other countries, it is not over yet. We hope that the increased attention it has stimulated will aid efforts to reform Japanese criminal justice. We also hope it motivates sound comparative research about criminal justice practices and problems in Japan and the U.S.

Appendix - Timeline for the Carlos Ghosn Case

- May 2018 Internal investigation begins. Whistleblowers provide specific information about Ghosn's personal use of corporate funds—Nissan creates a small internal investigation team that discovers suspicious use of funds.
- June 2018 Investigation team goes to prosecutors. Investigation team consults with lawyer (retired prosecutor) and then provides documents to Special Investigation Department of Tokyo District Prosecutors Office.
- Aug. 2018 Plea bargain. Two senior executives, Nada Hari and Onuma Toshiaki agree to cooperate with prosecutors.
- Nov. 19, 2018 Ghosn and Kelly separately "lured" to Japan to attend board meeting, arrested on Count 1, and taken to Tokyo Detention Center. At a news conference that evening, Ghosn's successor as CEO, Saikawa Hiroto, accuses Ghosn of wrongdoing and concentrating too much power.
- Nov. 21, 2018 Tokyo District Court approves prosecutors' request for Ghosn's detention for 10 days.
- Nov. 22, 2018 Nissan dismisses Ghosn as chairman and strips Kelly of his representative-director role. Mitsubishi Motors ousts Ghosn as chairman on Nov. 26. Renault names Thierry Bollore interim CEO on Nov. 20, but Ghosn remains as formal chairman and CEO of Renault.
- Nov. 30, 2018 Tokyo District Court approves prosecutors' request for a 10-day extension of Ghosn's detention.
- Dec. 10, 2018 Ghosn indicted on Count 1 and re-arrested on Count 2. Kelly and Nissan are also indicted.
- Dec. 11, 2018 Tokyo District Court

- approves prosecutors' request for Ghosn's detention for 10 days based on Count 2.
- Dec. 20, 2018 Tokyo District Court (unusually) refuses prosecutors' request for a 10-day extension of Ghosn's detention based on Count 2. Prosecutors' appeal is rejected and the court's decision raises hopes of a quick release for Ghosn.
 - Dec. 21, 2018 Ghosn arrested again on Count 3. This is a more serious crime. It keeps Ghosn in detention and ends any possibility of an early release.
 - Dec. 23 Tokyo District Court approves prosecutors' request for Ghosn's detention for 10 days based on Count 3.
 - Dec. 26, 2018 Kelly released on bail upon payment of 70 million yen (\$700,000) for medical reasons (must remain in apartment in Tokyo).
 - Dec. 31 Tokyo District Court approves prosecutors' request for a 10-day extension of Ghosn's detention.
 - Jan. 8, 2019 Ghosn's first court appearance at his request concerning detention and bail. Ghosn declares his innocence. Judge states that Ghosn's continued detention is necessary due to flight risk and the possibility he could conceal evidence.
 - Jan. 11, 2019 Ghosn indicted on Count 2 and Count 3. Kelly and Nissan indicted on Count 2.
 - Jan. 23, 2019 Ghosn resigns as chairman and CEO of Renault. The following day Renault appoints Jean-Dominique Senard as chairman and Thierry Bolloré as CEO.
 - Feb. 13, 2019 Ghosn changes lawyers. Ghosn replaces a retired former prosecutor, Otsuru Motonari (former head of the Special Investigation Department) with a more aggressive defense team headed by Hironaka Junichiro, nicknamed "The Razor" and a well-known bail specialist, Takano Takashi.
 - March 6, 2019 Ghosn released on bail, in his third attempt (the first by his new legal team). Ghosn is released upon payment of 10-billion yen (\$10 million) bail under strict conditions including house arrest. He famously leaves the detention center dressed as a manual laborer. He was in detention for 108 days.
 - April 3, 2019 Ghosn speaks out. Ghosn opens Twitter account and announces press conference on April 11 to "tell the truth."
 - April 4, 2019 Ghosn arrested for the 4th time on Count 4. Ghosn is returned to Tokyo Detention Center.
 - April 5, 2019 Tokyo District Court approves prosecutors' request for Ghosn's detention for 10 days.
 - April 8, 2019 Ghosn removed as director at extraordinary Nissan shareholders' meeting.
 - April 9, 2019 Ghosn video alleges "plot" and "conspiracy." Ghosn's lawyers release video (made prior to his most recent arrest on April 4) at Foreign Correspondents' Club of Japan.
 - April 12, 2019 Tokyo District Court approves prosecutors' request for Ghosn's detention for 8 days from April 15 based on Count 4.
 - April 22, 2019 Ghosn indicted for Count 4. Nissan announces it has filed a criminal complaint with prosecutors over payments to overseas companies that were allegedly "directed by Ghosn for his personal enrichment."
 - April 25, 2019 Ghosn released again on bail of 5 billion yen (\$5.0 million) with strict conditions, including limiting contact with his wife. He was in detention for 22 days.
 - April 26, 2019 Prosecutors decide not to indict Saikawa Hiroto, Ghosn's handpicked successor as Nissan's CEO. The decision not to prosecute Saikawa is later affirmed by a citizen's review panel

on Jan. 28, 2020.

- May 23, 2019 Pretrial conference procedure begins at Tokyo District Court.
- June 2019 French investigation. Renault investigation uncovers 11 million Euros of questionable expenses by Ghosn, mainly related to a Netherlands-based Renault-Nissan holding company. The French state opens its own investigation.
- Sept. 9, 2019 Saikawa's resignation as Nissan's CEO is announced immediately after a board meeting. Uchida Makoto (former head of Nissan's joint venture in China) becomes new CEO of Nissan on Dec. 1, 2019. At his first press conference he says changes are needed in the Renault-Nissan-Mitsubishi alliance to spur sales and earnings.
- Dec. 31, 2019 Email announcement from Ghosn that he fled Japan and is in Lebanon. Forfeits combined bail of 1.5 billion yen (\$15.0 million).
- Jan. 2, 2020 Interpol arrest warrant for Ghosn. Lebanon receives arrest warrant and Turkey begins investigation into illegal chartering of plane.
- Jan. 7, 2020 Arrest warrant issued for Ghosn's wife. Japanese prosecutors allege Ghosn's wife committed perjury.
- Jan. 8, 2020 Ghosn holds press conference in Lebanon.
- Jan. 29, 2020 Prosecutors conduct a search and seizure at the law office of Ghosn's lawyer, Hironaka.
- Feb. 12, 2020 Nissan files a civil lawsuit in Japan (Yokohama District Court) against Ghosn for 10 billion yen (\$100 million) in damages relating to Nissan's fines, Ghosn's use of company funds for personal expenses and the costs of investigation.
- Feb. 19, 2020 French prosecutors announce they have opened a criminal investigation concerning Count 4 (the Oman route) and 11 million Euros of questionable expenses cited in the 2019 Renault investigation.
- Feb. 29, 2020 Japan's Financial Services Agency finalizes and issues an order to Nissan to pay a fine of 2.4 billion yen (\$24 million) for underreporting the compensation of Ghosn and other executives.
- May 21, 2020 Michael Taylor and Peter Taylor, who assisted in Ghosn's escape from Japan, are arrested in Massachusetts at the request of the Japanese government.
- Sept. 15, 2020 Trial of Greg Kelly begins in Tokyo concerning Count 1 and Count 2. Kelly pleads not guilty.
- Sept. 27, 2020 Ghosn announces his plan to launch a management and business training program at the Universite Saint-Esprit de Kaslik (USEK), a private university near Beirut, stating that "The role model is my experience, what I think are the basic needs of a top executive in a very competitive environment."
- Nov. 10, 2020 Ghosn intervenes in extradition case of Michael and Peter Taylor. Files formal declaration supporting their opposition to extradition to Japan, stating that the Taylors could face "human rights abuses" by the Japanese government.
- Nov. 11, 2020 First hearing held in Yokohama District Court in Nissan's civil lawsuit against Ghosn.
- Nov. 20, 2020 The U.N. Human Rights Council's Working Group on Arbitrary Detention, an independent panel of experts, issues a nonbinding opinion that Ghosn's detention in Japan was arbitrary. It recommends that Ghosn be awarded a right of compensation as a remedy. It does not address the merits of the substantive charges. The Japanese government rejects the opinion.

References

- Abdallah, Issam and Tim Kelly. 2019. "Ghosn says he Escaped 'Injustice' in Japan; Lebanon Calls Arrival a Private Matter." Reuters, December 30, at <https://www.reuters.com/article/us-renault-nissan-ghosn-lebanon/ghosn-says-he-escaped-injustice-in-japan-lebanon-calls-arrival-a-private-matter-idUSKBN1YY1FM>
- Aronson, Bruce E. 2019. "Chapter 10: Japan," in Bruce Aronson and Joongi Kim, editors, *Corporate Governance in Asia: A Comparative Approach*, pp. 267-296. Cambridge: Cambridge University Press.
- Aronson, Bruce E., Souichiro Kozuka and Luke Nottage. 2016. "Corporate Legislation in Japan," in Parissa Haghirian, editor, *Routledge Handbook of Japanese Business and Management*, pp. 103-113. London and New York: Routledge.
- Associated Press. 2018. "Carlos Ghosn's Detention puts Japan's Justice System under Microscope," CNBC, December 23.
- Associated Press. 2020. "[France Steps Up Investigation around Carlos Ghosn and Omani Car Dealership](#)." February 19, at
- Boudette, Neal E. 2020. "Carlos Ghosn and the Roots of Nissan's Decline." *New York Times*, January 15.
- Burns, Robert P. 2009. *The Death of the American Trial*. Chicago and London: The University of Chicago Press.
- Campbell, Matthew et al. 2020. "How Carlos Ghosn Became the World's Most Famous Fugitive." *Bloomberg*, January 6.
- Coffee, John C., Jr. 2020. *Corporate Crime and Punishment: The Crisis of Underenforcement*. Oakland, CA: Berrett-Koehler Publishers, Inc.
- Coleman, James William. 2002. *The Criminal Elite: Understanding White-Collar Crime*. New York: Worth Publishers.
- Congressional Research Service. 2019. Mail and Wire Fraud: A Brief Overview of [Federal Criminal Law](#). February 11.
- Croydon, Silvia. 2016. *The Politics of Police Detention in Japan: Consensus of Convenience*. Oxford: Oxford University Press.
- Dooley Ben. 2019a. "Carlos Ghosn Hasn't Seen his Wife in Months. Japan's Prosecutors Want it that Way." *New York Times*, August 7.
- Dooley, Ben. 2019b. "Ghosn Team Not Allowed to Review Nissan Files." *New York Times*, October 25.
- Eisinger, Jesse. 2017. *The Chickenshit Club: Why the Justice Department Fails to Prosecute Executives*. New York: Simon & Schuster.
- Ezoe, Hiromasa. 2010. *Where Is the Justice? Media Attacks, Prosecutorial Abuse, and My 13 Years in Japanese Court*. Tokyo: Kodansha.
- Fair Trials (an international human rights organization). 2016. "[The Disappearing Trial: Towards a Rights-Based Approach to Trial Waiver Systems](#)", pp.1-82.
- Financial Services Agency. 2010. "[Cabinet Office Ordinance on Partial Amendment of the Cabinet Office Ordinance on Disclosure of Corporate Information, etc. \(2010 Cabinet Office Ordinance No.12\)](#)."
- Fisher, George. 2003. *Plea Bargaining's Triumph: A History of Plea Bargaining in America*. Stanford, CA: Stanford University Press.
- Foote, Daniel H. 1991. "Confessions and the Right to Silence in Japan." *Georgia Journal of International & Comparative Law*. Vol.21, pp.415-488.
- Foote, Daniel H. 1993. "[Policing in Japan](#)"

- [book review of Setsuo Miyazawa's *Policing in Japan: A Study on Making Crime*, 1992]. *Journal of Criminal Law & Criminology*, vol.84, no.2 (summer), pp.410-427.
- Foot, Daniel H. 2010. "Policymaking by the Japanese Judiciary in the Criminal Justice Field." *Japanese Journal of Legal Sociology [Hoshakaigaku]*, No.72, pp.6-45.
- Garland, David. 2020. "Penal Controls and Social Controls: Toward a Theory of American Penal Exceptionalism." *Punishment & Society*, Vol.22, No.3 (July), pp.321-352.
- Garrett, Brandon. 2014. *Too Big to Jail: How Prosecutors Compromise with Corporations*. Cambridge, MA: The Belknap Press of Harvard University Press.
- Gevurtz, Franklin. 2006. *Global Issues in Corporate Law*. St. Paul, MN: Thomson/West.
- Goto, Akira et al. (panel discussion, part 2). 2020. "[Ghosn Jiken Bengoshi Jimusho no Sosaku Sashiosae to Oshu Kyozeitsu](#)."
- Hodgson, Jacqueline S. 2020. *The Metamorphosis of Criminal Justice: A Comparative Account*. New York: Oxford University Press.
- Homusho [Japan's Ministry of Justice], 2012. "[Torishirabe ni kan suru Kokunai Chosa Kekka Hokokusho](#)." August, pp.1-95.
- Horie, Masatsugu. 2020. "Nissan Sues Ghosn in Japan, Seeks \$91 Million in Damages." *Bloomberg*, February 12.
- Howard, Marc Morje. 2017. *Unusually Cruel: Prisons, Punishment, and the Real American Exceptionalism*. New York: Oxford University Press.
- Ibusuki, Makoto. 2020. "Nihongata Shiho Torihiki Seido no Gaiyo to Nissan Jidosha Jiken kara Mita Unyojo no Mondaiten." *Bujinesu Homu*, July, pp.141-146.
- Ibusuki, Makoto, and Lawrence Repeta. 2020. "[The Reality of the 'Right to Counsel' in Japan and the Lawyers' Campaign to Change It](#)." *The Asia-Pacific Journal/Japan Focus*, Vol.18, Issue 13, No.4, pp.1-11.
- Inoue, Makiko, Eimi Yamamitsu and Carlotta Gall. 2020. "Japan Issues Arrest Warrant for Carlos Ghosn's Wife." *New York Times*, January 7.
- Jiji Press. 2019. "Plea Deal Talks with Nissan Executives over Ghosn Charges began Month prior to his Arrest." *Japan Times*, March 10.
- Jiji Press. 2020. "Panel Upholds Decision not to Indict Ex-Nissan Chief Hiroto Saikawa." *Japan Times*, January 28.
- Johnson, David T. 2002. *The Japanese Way of Justice: Prosecuting Crime in Japan*. New York: Oxford University Press.
- Johnson, David T. 2017. "The Best Defense Lawyer in Japan" ["Nihon no Saiko no Keiji Bengonin"]. In Kitani Akira, Cho Seiho, Yoshida Kyoko, and Takayama Iwao, editors, *Kempo teki Keiji Bengo: Bengoshi Takano Takashi no Jissen* [Constitutional Criminal Defense: The Practices of Defense Lawyer Takano Takashi]. Tokyo: Nihon Hyoronsha, pp.225-240.
- Johnson, David T. 2018. "Comparative Reflections on American Crime Declines." *Berkeley Journal of Criminal Law*. Vol.23, No.2, pp.25-45.
- Johnson, David T., Hiroshi Fukurai, and Mari Hirayama. 2020. "Reflections on the Tepco Trial: Prosecution and Acquittal after Japan's Nuclear Meltdown." *Asia-Pacific Journal/Japan Focus*, Vol.18, Issue 2, No.1 (January 15), pp.1-36.
- Johnson, Nicholas. 2019. "[Ghosn, Yamashiro, and the United Nations - Japan's Coercive Police Practices in the International Spotlight](#)." *The Asia-Pacific Journal/Japan Focus*, Vol.17,

Issue 19, No.4, pp.1-5.

Keisatsucho [Japan's National Police Agency], 2012. "[Keisatsu ni okeru Torishirabe no Jitsujo ni tsuite.](#)" October, pp.1-11, at

Konishi, Yusuke. 2019. "Ghosn Case looks to Shake up Japan's 'Hostage Justice'." *Nikkei Asian Review*, March 7.

Kostov, Nick and Sean McLain. 2019. "Nissan Probes Whether Ghosn Channeled Company Money for Personal Use." *Wall Street Journal*, April 3.

Kurabe, Yosuke, Kaoru Yamada and Masahisa Yuzawa. 2018. "Prosecutors Sharpen Offensive on Ghosn with New Allegations: Ex-chairman Suspected of Arranging \$15m Nissan Payment to Cover Personal Losses." *Nikkei Asian Review*, December 22.

Kyodo News. 2019a. "Ghosn Charged with Aggravated Breach of Trust over Nissan Allegations; Lawyers Launch Long-shot Bail Bid." *Japan Times*, January 11.

Kyodo News. 2019b. "Nissan CEO Hiroto Saikawa Won't be Charged over Ghosn's Underreported Pay, Sources say." *Japan Times*, May 17.

Kyodo News. 2019c. "Ghosn's Lawyers Renew Criticism of Japan's Judicial System." *Nikkei Asian Review*, November 19.

Langbein, John. 1978. "Torture and Plea Bargaining." *University of Chicago Law Review*. Vol.46, No.3, pp.3-22.

Leo, Richard A. 1996. "Inside the Interrogation Room." *Journal of Criminal Law and Criminology*, Vol. 86, No. 2, pp. 266-303.

Leo, Richard A. 2008. *Police Interrogation and American Justice*. Cambridge, MA: Harvard University Press.

Lynch, Mona. 2016. *Hard Bargains: The*

Coercive Power of Drug Laws in Federal Court. New York: Russell Sage Foundation.

Lynch, Timothy. 2003. "The Case against Plea Bargaining." *Regulation*, Fall issue, pp.24-27.

Ma, Jie and Masatsugu Horie. 2016. "Nissan Seals \$2.3 Billion Mitsubishi Motors Stake Acquisition." *Bloomberg*, October 20.

Mann, Kenneth. 1985. *Defending White-Collar Crime: A Portrait of Attorneys at Work*. New Haven and London: Yale University Press.

McLain, Sean. 2019. "Nissan Ousts CEO Saikawa as Car Maker Seeks to Revive Business." *Wall Street Journal*, September 9.

Milken, John P. and Dean Fu. 2005 "The Global Leadership of Carlos Ghosn at Nissan." *Thunderbird International Law Review* Vol. 47, No. 1, pp. 121-137, Jan.-Feb.

Miyazawa, Setsuo. 1992. *Policing in Japan: A Study on Making Crime*. Albany, NY: State University of New York Press.

Morck, Randall and Masao Nakamura. 2007. "A Frog in a Well Knows Nothing of the Ocean: a History of Corporate Ownership in Japan," in *A History of Corporate Governance around the World*, Randall Morck, editor, Chicago: University of Chicago Press.

Motivans, Mark, Bureau of Justice Statistics, U.S. Department of Justice. 2019. [Federal Justice Statistics, 2015-2016](#).

Naito, Edo. 2019. "Examining Carlos Ghosn and Japan's system of 'hostage justice'" *Japan Times*, April 17.

Natapoff, Alexandra. 2011. *Snitching: Criminal Informants and the Erosion of American Justice*. New York University Press.

Neily, Clark. 2019. "Prisons are Packed Because Prosecutors Are Coercing Plea Deals. And Yes, It's Totally Legal." *Wall Street*

Journal, August 8.

Nelken, David. 2010. *Comparative Criminal Justice*. London: Sage.

Nikkei. 2018. "Ghosn and Prosecutors Battle over Validity of Top Secret Documents." *Nikkei Asian Review*, December 1.

Nissan Motor Co., Ltd.. 2020. "[Improvement Measures Status Report](#)" (submitted to Tokyo Stock Exchange as ordered by the Exchange), January 16,

Nissan Motor Corporation. 2020. "[Nissan Seeks 10 billion yen in Damages from Former Chairman Carlos Ghosn over Misconduct and Fraudulent Activity.](#)"

Nissan Motor Corporation Global Website. 2020. "[Company Development/Heritage.](#)"

Ohno, Kotaro. 2020. "[Kigyo to Shiho Torihiki.](#)" *International Civil and Commercial Law Center News*, vol.70 (May), pp.3-23.

Rakoff, Jed. 2014. "Why Innocent People Plead Guilty." *New York Review of Books*, November 20.

Reuters, 2020. "'Make Yourself Invaluable': Carlos Ghosn Offers Executive Training in Troubled Lebanon." *The Asahi Shimbun/Asia & Japan Watch*, September 30.

Saiki, Shoko and Yusuke Konishi. 2018. "Prosecutors Press Ghosn over 'Fixed Remuneration' Document." *Nikkei Asian Review*, December 19.

Sebag, Gaspard and Tara Patel. 2020. "Ghosn says French Investigators will Quiz him in Lebanon in 2021," *Bloomberg*, November 2.

Securities and Exchange Commission. 2019. [Complaint, United States Securities and Exchange Commission v. Carlos Ghosn and Gregory L. Kelly, No. 1:19-CV-08798](#) (Southern

District of New York, Sept. 23, 2019).
Supreme Court of Japan. 2019. [Outline of Criminal Justice in Japan 2019](#).

Tabuchi, Hiroko. 2013. "Suspended Sentences in Olympus Fraud Case." *New York Times*, July 3.

Takano, Takashi. 2006 - present. "[Keiji Saiban o Kangaeru: Takano Takashi @ Burogu.](#)"

Takano, Takashi. 2019. "[Hostage Justice System in Japan: How It Works, and Why?](#)" Paper presented at the annual meeting of the Asian Law & Society Association in Osaka, December 14.

Tanaka, Akito. 2018. "After Ghosn, Auto Alliance Faces Uncertain Future: Tensions between Renault and Nissan Burst into Open." *Nikkei Asian Review*, November 28.

Taub, Jennifer. 2020. *Big Dirty Money: The Shocking Injustice and Unseen Cost of White Collar Crime*. New York: Viking.

Truong, Alice. 2018. "Carlos Ghosn is up against Japan's 99.9% Conviction Rate." *Quartz*, December 10.

Wall Street Journal Editorial Board. 2020. "Ghosn, Baby, Ghosn." January 9.

Woodford, Michael. 2012. *Exposure: Inside the Olympus Scandal: How I Went from CEO to Whistleblower*. New York: Portfolio/Penguin.

Yaffe-Bellany, David. 2020. "Ghosn Says Escape Accomplices Would Face Abuse in Japan." *Bloomberg*, November 10.

Yamashita, Terutoshi. 2020. "[Is Japanese Criminal Justice Still in the Middle Ages?](#)" *Asia Crime Prevention Foundation Mail Magazine* (4 parts).

Bruce E. Aronson is Resident Affiliated Scholar, U.S.-Asia Law Institute, New York University School of Law (ba1525@nyu.edu). His main area of research is comparative corporate governance with a focus on Japan. Recent publications include *Corporate Governance in Asia: A Comparative Approach* (with J. Kim, eds., Cambridge University Press, 2019).

David T. Johnson is Professor of Sociology at the University of Hawaii at Manoa (davidjoh@hawaii.edu). He is the author of many works on criminal justice in Japan, including *The Culture of Capital Punishment in Japan* (Palgrave, 2020), which is available by open access.