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Asian Legal Conversations — COVID-19

Asian Law Centre
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Responses to COVID-19 and Japanese Criminal Justice

Reegan Grayson-Morison* and Stacey Steele**

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A/Professor Stacey Steele and Reegan Grayson-Morison discuss Japanese criminal justice in this second post on the Japanese justice system and responses to COVID-19. In this post, they consider detention applications (勾留 kōryū), bail (保釈 hoshaku), the management of detention houses (拘置所 kōchisho, 留置施設 ryūchisisetu) and prisons (刑務所 keimusho, 少年刑務所 shōnen keimusho), and the ability of lawyers to interact with clients. Reegan also offers some comparative insights into the measures being taken in Victoria in relation to these matters.

A/Professor Steele is Associate Director (Japan) of the Asian Law Centre and Ms Grayson-Morison is an Associate of the Centre and barrister, practicing primarily in trusts, equity and probate.

Reegan Grayson-Morison (RG): Stacey, thanks for taking the time to discuss responses to COVID-19 in Japan and criminal justice. Today, I particularly want to focus on detention applications and bail, as well as the management of detention houses (拘置所 *kōchisho*, 留置施設 *ryūchishisetsu*) and prisons (刑務所 *keimusho*, 少年刑務所 *shōnenkeimusho*), and the ability of lawyers to interact with clients.

Stacey Steele (SS): Thanks for taking an interest. My friends and colleagues in Japan have also been asking me about the situation in Victoria and it will be great to hear your thoughts on the measures being taken in Victoria too.

RG: Let's start by setting the scene… There are a number of famous statistics about Japanese criminal justice, including comparatively high conviction and confession rates, but Japanese criminal justice has also been perceived as "benevolent" — at least in certain circumstances. How do these contradictions play out in the context of detention applications and bail in Japan?

SS: The situation in relation to detention and bail applications in Japan is interesting and evolving. Detention applications refer to applications by public prosecutors to detain a suspect beyond an initial 72-hour period. According to statistics published by the Supreme Court, courts are regularly dismissing applications (勾留請求 *kōryū seikyū*) by public prosecutors to detain the accused more than ever before — albeit from a very low base. The rate of dismissal of detention applications was 0.7% in 2006 and 5.89% in 2018 — in other words, about eight times the rate of 2006. The dismissal rates started to increase noticeably from 2014 after the Supreme Court of Japan handed down a significant decision setting out its thinking about detention. Since then judges have tried to follow the precedent with the result of more dismissals.

Simultaneously, the rate at which courts grant bail (保釈申請 *hoshaku shinsei*) to an accused person has also increased. The rate was 14.41% in 2006 and 33.69% in 2018 — more than a twofold increase. Courts began to grant bail increasingly especially from 2009, when Japan introduced the lay judge system (*saiban-in seido*). Arguably one of the unintentional consequences of the lay judge system, courts started to focus more on the disadvantages for preparing for a trial while the accused was in detention after the introduction of the system. In cases involving lay judges, it is mandatory for courts to hold pre-trial conferences with defence counsel and prosecutors to narrow down the contentious issues presented at trial. For criminal cases which are not dealt with under the new system, cases continue to be heard in accordance with a predetermined calendar set down by the court, which often involves monthly, short directions meetings — those cases are not heard over consecutive days.

RG: These are interesting developments. Is there any evidence that the people granted bail have gone on to commit further crimes whilst on bail?

SS: It's difficult to say. One newspaper's analysis of recent "White Papers on Crime" (犯罪白書) published by the Ministry of Justice and court statistics suggests that there may be an upward trend in the number of cases where the accused has committed other crimes while on bail and were subsequently prosecuted for those crimes. However, we would need to analyse the way that the statistics are collected and presented by the Ministry and courts, as well as seek other evidence from other sources, to really say what is going on. It does seem that there is a community perception in Japan that having people out on bail can lead to reoffending.

RG: Carlos Ghosn, the former Chairman of Nissan Motors, was on bail when he fled Japan in December 2019. Has the Carlos Ghosn case impacted this area of criminal justice?

SS: To some extent. The Ministry of Justice was already discussing the introduction of new measures to prevent people on bail from fleeing or committing other crimes. For better or worse, the Carlos Ghosn case accelerated these discussions. According to some commentators, community expectations also need to be considered. In another recent case, the accused, who is a former administrative vice-minister of the Ministry of Agriculture, Forestry and Fisheries, killed his son after he and his wife suffered from family violence for several decades. He was sentenced to 6 years' imprisonment in the first instance and appealed. The Court granted bail to him in December 2019. The decision was controversial in light of the seriousness of the crime and the conviction at first instance.

RG: In some Australian jurisdictions such as New South Wales, measures such as early prison release have been implemented due to COVID-19 on the grounds of it being 'reasonably necessary' due to 'the risk to public health or to the good order and security of correctional premises'. One major concern lies in prison overcrowding and the potential for COVID-19 and illness generally to spread quickly within the prison system. Notably, serious offenders are excluded from consideration for early release, including prisoners convicted of murder, serious sex offences and terrorism, as well as prisoners convicted of high-level drug and property offences. These measures are supported by Liberty Victoria, although the Victorian government has not enacted similar legislation to the measures in New South Wales. Corrections Victoria, a government department, have published its guidelines during COVID-19 online, which provides for increased access to phone calls and technology but no early release. Have there been any similar measures in Japan?

SS: Not to my knowledge. One explanation for the lack of such measures suggested to me by a well-informed Japanese person is the ample capacity in Japanese detention houses and prisons. 'Correctional Statistics' (矯正統計 *kyōsei tōkei*) published by the Ministry of Justice, suggest that the number of remandees and prisoners in detention houses and prisons has decreased recently. There were less than 50,000 detainees as of October 2019, which represents 60 percent of operational capacity of detention houses and prisons according to authorities. Therefore, if a detainee has flu-like symptoms, these facilities have moved the detainee to a solitary cell or another facility. The correctional officers have taken other measures such as wearing masks.

RG: How are lawyers managing to access their clients in this new situation? In Australia, many facilities have video conferencing facilities which enable people to speak to their lawyers without the lawyers having to physically go to the facility. Is this type of interaction possible in Japan?

SS: Interviews with defence counsel during the COVID-19 pandemic at all custodial facilities, detention houses and prisons are allowed, but defence counsel usually has to visit these facilities in person to conduct such interviews. The facilities are concerned to ensure that they are being seen to comply with article 39(1) of the Code of Criminal Procedure which states:

> The accused or the suspect in custody may, without any official being present, have an interview with, or send to or receive documents or articles from defense counsel or prospective defense counsel upon the request of a person entitled to appoint defense counsel (with regard to a person who is not an attorney, this applies only after the permission prescribed in Article 31, paragraph (2) has been obtained).

This provision was enacted to facilitate the exercise of the right given by article 34 of the Japanese Constitution, which states:

> No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.

Japanese detention houses and prisons do not typically use web conferencing systems so that remandees or prisoners can talk with their lawyers remotely. Recently, the Osaka Detention House tried to use a web conferencing system to facilitate meetings after several officers at the Osaka Detention House contracted the coronavirus. According to one remandee in the detention house, however, the length of time of the interview with his/her lawyer via the system was limited to a maximum of 20 minutes. In the Tokyo Detention House, remandees have been able

to talk with their legal representatives via telephone since 16 April 2007. However, these telephone interviews are considered different from the "access to interview" (接見 *sekken*) required by article 39(1) of the Code of Criminal Procedure. As such, these telephone interviews are also limited to a maximum of 20 minutes. As a result, in practice, almost all defense counsel have to visit clients in person even during the COVID-19 pandemic.

RG: In Australia, I think that attitudes to these types of issues are changing quickly in light of COVID-19, and new measures and procedures are being introduced to reflect social distancing requirements, which rely heavily on technology solutions. Do you think that the situation in Japan will change in future?

SS: I am not sure. These issues have been long-standing concerns for advocates of prison reform in Japan, but certainly the current situation with COVID-19 provides an opportunity to accelerate thinking in this area. Prison reform is a concern in Japan, but I worry that budgetary constraints and other priorities will hinder reform efforts. There have also been recent concerns expressed publicly about the conduct of public prosecutors in Japan, and it's not clear as to the extent to which these developments may help to create an atmosphere for further reform in Japanese criminal justice.

RG: Please tell us more about these recent developments…

SS: It's a complicated situation, but the debates have intensified as a result of proposals to change the retirement age for public prosecutors. Currently, the retirement age for public prosecutors other than the Public Prosecutor-General is 63 years old. Mr Hiromu Kurokawa, who was a Superintending Prosecutor at the Tokyo High Public Prosecutor Office and is said to enjoy close links with politicians, was due to retire from his position in February 2020, when he turned 63. However, in January 2020, the Cabinet decided to prolong his retirement age for 6 months until August 2020, although the legal basis for this decision was not clear. More recently, the Government considered legislation to formally increase the retirement age for all public servants, but it looks like that proposal stalled in light of COVID-19.

RG: With an ageing population in Japan, why are people concerned about increasing the retirement age for public prosecutors?

SS: Yes, I know what you mean! By 2018, the proportion of Japanese people aged 65 years old or more was almost 30 percent. On this occasion, I think that the controversy relates to the way in which the increase in the compulsory retirement age has been introduced in a manner which appears to favour Mr Kurokawa. The incumbent Public Prosecutor-General is likely to retire from his position in August 2020, at which point 2 years will have passed since he took up the appointment (it is a usual practice for the Public Prosecutor-General to retire 2 years after appointment). As a result of the Cabinet decision, Mr Kurokawa had an opportunity to be appointed as the next Public Prosecutor-General. If he had retired at the age of 63 years old, Mr Kurokawa would have missed out on that opportunity. Opposition parties and people, including celebrities, accused the Cabinet of favoritism. On 21 May 2020, Mr Kurokawa suddenly resigned from his position. One weekly magazine published an article which raised suspicions that he gambled at mah-jongg with several newspaper journalists 4 times, despite the COVID-19 restrictions. Mr Kurokawa and the journalists accepted that the article was mostly true. Mr Kurokawa's behaviour is likely to constitute a violation of the COVID-19 restrictions and also potentially the Criminal Code. The adverse publicity created by these recent developments and the COVID-19 situation could spur support for further reforms to criminal justice…

RG: Stacey, thanks for taking the time to consider the situation in Japanese criminal justice in light of COVID-19 and other recent developments. It has been interesting to compare the situation in Japan with developments in Victoria too.

Stacey and Reegan's first interview post on 'Judicial Responses to COVID-19: Japanese and Victorian Courts' Use of Technology' may be found here.

Stacey's co-authored publication about lay participation on Japanese criminal justice will be published soon as: S. STEELE / C. LAWSON / M. HIRAYAMA / D. T. JOHNSON, 'Lay Participation in Japanese Criminal Justice: Prosecution Review Commissions, the Lay Judge System, and Penal Institution Visitation Committees', Asian Journal of Law & Society (forthcoming 2020).

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