Article

Courtroom Discourse of the Hybrid Japanese Criminal Justice System

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Abstract

In the Japanese courtroom, an adversarial orientation is often manifested in the ways in which prosecution and defence counsels each utilize discourse strategies to construct competing narratives, for example, by asking coercive negative questions in cross-examination. Alternatively, counsel's attempt at building a convincing narrative is at times thwarted by the judge's inquisitorial orientation to attempt to elicit 'the truth.'

This paper aims to explore the discourse of Japanese criminal trials, drawing on an ethnographic study of communication in courtroom settings in Japan. The paper specifically focuses on how the hybridity of adversarial and inquisitorial orientations to the justice process are realized in courtroom discourse. Drawing on courtroom observation notes, lawyer interviews and other relevant materials as data, I analyze Japan's 'hybrid' legal system through observing its trial genre structure, narrative construction processes and courtroom discourse strategies.

Analysis suggests that blame, moral preaching and attribution of collective responsibility are sometimes incorporated into the process of questioning the defendant and witnesses in a court of law. Within this paper, the analysis of trial discourses reveals that while operating in the framework of adversarial principles, Japanese criminal trials also allow for a discursive practice particular to these courtroom settings which seeks to maintain moral and social order in Japan as a society that is structured on a hierarchical institutional power structure. The paper concludes that specifically designed language powerfully conveys the delivery and attainment of justice, where further research

anthropological linguistic work can advance our understandings of the legal process, in Japan and beyond.

Keywords: *Courtroom discourse, Narrative, Japanese justice system, Hybridity, Linguistic Anthropology*

Introduction

Throughout its history, Japan has adopted and incorporated into its legal system a range of approaches, from various parts of the world. With the introduction of the lay judge, or '*saiban-in*,' system in 2009, within which citizens participate in trials as a panel of judges alongside professional judges, the Japanese criminal justice system has notably increased in adversarial strength (Reichel & Suzuki 2015). This emergent system, new to Japan, has attracted the attention of the Japanese public, and the criminal justice process has thus been afforded a greater level of prominence in media reports. As language plays such a crucial role as an integral part of the justice system (Gibbons 2003; Tiersma 1993), analyzing legal language assists in the understanding of legal processes such as those in Japan, and similarly, the significance of people's participation in these legal processes. Here, sociolinguistic and linguistic anthropological linguistic research into the legal process can offer insights into the discursive practices and underlying ideologies of the legal process (e.g., Conley & O'Barr 2005; Eades 2008 2010; Philips 1998). Furthermore, many jurisdictions categorized as inquisitorial display adversarial aspects, where 'cross-pollination' between systems occurs (Reichel 2008).

Recent reforms in the global legal system and the relatively rapid expansion of the field of forensic linguistics, or more broadly the study of language and law, globally, has led to an increasing amount of linguistics research into the justice process in Japan, as it has elsewhere. For example, an increasing number of foreigner cases throughout the last three decades have demanded research on and an improved practice in legal interpreting and translation, consequent to which, a substantial amount of research has emerged (e.g., Mizuno 2007; Tanaka 2006). To address potential problems of communication involving lay judges in criminal trials, linguists have worked with legal professionals on improving the comprehensibility of legal language (e.g., Okawara 2008) or the communication between lay judges and professional judges in mock trials (e.g. Hotta 2012). Yoshida's (2011, 2014) anthropological linguistic research into court interpreting offers valuable insights into the practice of interpreter-mediated courtroom discourse and associated ideologies. Similarly, Fudano (2012) draws on courtroom observations and interviews to analyze the use of a regional dialect in the courtroom. However, despite that these studies focus on a specific aspect of courtroom communication practice, there exists a dearth of research that examines ways in which language is employed in the institutional setting of the courtroom in Japan, and how courtroom participants communicate to

achieve their goals in Japanese trials.

Considering this trend in cross-pollination and adversarial trial discourse, which I discuss throughout the paper, I argue that research into a hybrid justice process such as that of Japan employing discourse analytic and anthropological linguistic methods is worth pursuing. As such, in this article, I analyze courtroom discourse data from macro- and micro perspectives, by examining the overall genre structure of the trial, lawyers' questioning strategies, and ritualized courtroom discourse practice. This I combine with an analysis of interviews with lawyers who participate in and prepare for trials in the 'hybrid' system in Japan.

This paper thus aims to develop understandings of how the justice process in criminal trials in Japan is constructed through language. Through an ethnographic approach to communication, I analyze courtroom observation data, interview comments and other relevant materials obtained from my fieldwork in Japan. Findings from my previous research in the field of socio-legal studies also extensively inform this paper.

Background: The Japanese Legal System

The Japanese legal system is often described as 'hybrid,' that is, as a combination of adversarial and inquisitorial systems. The former is characterized as having two opposing parties presenting their respective cases on an equal footing to an impartial party such as a judge or jury, who decides on courtroom verdicts. In this process, the court represents a battleground for competing stories (Bennett & Feldman 1981; Jackson 1991). In the latter, the court works with the prosecution to investigate the case, with the ultimate goal of maintaining social order and of ensuring the safety of the community. The judge constitutes part of the investigative authority that itself engages in the 'truth'-finding process. Japan has adopted facets of various legal traditions, a process which has resulted in its current 'hybrid' system. Following the feudal period in Japan (1185-1869), the first Code of Criminal Procedure was introduced in 1880, as largely based on the French Code, followed by the promulgation of a more German-Law-influenced Code of Criminal Procedure in 1922 (Supreme Court of Japan 2019, p. 4). Thus, the modern criminal procedure was essentially an adopted form of the Continental European system, which is traditionally described as having an inquisitorial orientation (Gibbons 2003).

In the period following World War II, modeling itself on US law, and reflecting "the right to defence and other related rights in the Bill of Rights" (Oda 1999, p. 423), a new Code of Criminal Procedure was introduced in Japan. According to the Supreme Court of Japan (2019), this current Code "can be considered a hybrid of the Continental European and Anglo-American legal systems" (p. 5). Specifically, the courtroom procedure is regarded as reflecting the adversarial system (ibid., p. 5), while the influence of German law is still present in investigations and "in the reliance at trial

on written documents" (Oda 1999, p. 423). However, following the establishment of the Justice System Reform Council in 1999, alterations have been introduced to various aspects of this justice system. These alterations include the introduction of *saiban-in*, the lay judge system, in 2009, wherein cases of serious crimes such as homicide, arson, drug trafficking, rape at the scene of a robbery,[1] and robbery causing injury, are assessed by a panel of three judges and six citizen judges. Japanese courtroom practice conducted jury trials for a brief period prior to World War 2, a change which garnered public attention as lay judges were selected from the electoral register. Regarding the system's impact on courtroom communication, the prosecutors, defence counsel, and professional judges faced emergent challenges by needing to more heavily focus on oral modes of communication, as well as being required to communicate using language accessible to lay assessors within the trials.

Current courtroom procedures in Japan adopt many facets of the US trial system: Defence and prosecution present their cases and witnesses are examined in court. The 'innocent until proven guilty' principle is adopted, where prosecution must prove a defendant's guilt beyond any reasonable doubt. An important difference between the US and Japanese systems thus emerges as one where defendants in the Japanese system who admit to their own guilt must be afforded a trial while they are not necessarily given one in the US (Johnson 2002). As such, Japanese trials are often described as sentencing trials (*ryōkē saiban*). In 2018, in 9.3% of all cases in Japan, defendants pleaded not guilty (Ministry of Justice 2019). Nevertheless, notwithstanding this difference, the conviction rate remains high in Japan (e.g., Johnson 2002; Oda 1999), with a recent figure placing the rate at 99.96% (Ministry of Justice 2018). Discourse expected from a sentencing hearing in Anglo-American common law jurisdictions would constitute part of the trial proper in Japan, where evidence concerning extenuating circumstances (*jōjō)* is examined in order to assess potentially mitigating factors for the determination of penalty.

Courtroom Discourse and Legal Systems

The differences between adversarial and inquisitorial legal systems are manifested in various ways. Courtroom discourse in adversarial systems is guided by the need for the two opposing parties to present more plausible versions of events concerning the case (Bennett & Feldman 1989; Gibbons 2003; Jackson 1991). In the inquisitorial system, the judge—as part of the investigating authority—engages in 'truth finding.' However, research into courtroom discourse in non-adversarial systems has found that narrative construction constitutes an important aspect of the inquisitorial legal process (e.g., Jacquemet 1996 on Italy; Komter 1998 on The Netherlands; Okawara 2012, and Nakane 2017). In both the inquisitorial and adversarial systems, narratives and the evaluation of these narratives, ground and structure the attribution of blame and responsibility. Narratives are constructed through various subgenres in the trial, for example, the opening statement, witness examination, and the closing argument (Gibbons 2003; Maley 1994). Witness examination provides

an opportunity for the opposing counsel to weave into the main narrative, which Snedaker (1991, p. 134) calls "satellite narratives." The counsel requires communication strategies in order to control and fit these satellite narratives into counsel's version of events. The degree to which the judge actively participates in and relies on the construction of courtroom narratives may well vary across jurisdictions. Jacquemet's (1996) work on the Italian context (with inquisitorial orientation) points to judges being able to control defence questions, while prosecutors have more freedom in their courtroom questioning techniques.

Previous studies conducted in common law jurisdictions have identified a range of communication strategies for winning the courtroom battle, and for undermining the other party's narrative. Prosecution and defence both can directly construct prepared monologic narratives with which to present their respective version of events in their opening and closing arguments. However, the satellite- or sub-narratives that are woven into the master narrative require control by the counsel through various questioning techniques during witness examination. Holt and Johnson (2010) discussed such strategies in lay–professional interaction in legal contexts, providing examples of *so*- and *and*-prefaced questions, reformulation and repeated questions. These strategies are employed by the counsel in constructing a preferred version of events. Gibbons (2003) identifies two types of pragmatic strategies for undermining the opposing party. These are idea-targeted and person-targeted strategies, the former challenging the content components of the preferred narrative, and the latter damaging the credibility, status, and power of the witness being examined. Drew (1990) presents the one person-targeted strategy as a 'contrast' tactic where, through questioning, lawyers elicit contradictory statements from the witness, consequently positioning the witnesses as unreliable. Turn taking constitutes another important pragmatic strategy, by which witnesses can be intimidated or undermined. Eades (2008) has shown how Australian Aboriginal youths' credibility as witnesses was undermined by the lawyer's interruptions and negative exploitation of the youths' culturally meaningful use of silence in trials in Australia. Counsel's questions can also appear as highly controlling over the witness, and thus strategically employed to construct a preferred narrative, for example when counsel employs a declarative sentence with a tag question, or when a question assumes detailed information but the defendant does not have an opportunity to address the information in full (Gibbons 2003).

Studies of communication practice in the inquisitorial courtroom have also revealed discourse in trials where competing stories may not be so obviously foregrounded. Komter's (1998) study of Dutch courtroom communication reveals judges' "mitigated format of accusations" aimed at "mobilizing the cooperation of the defendants" (p. 181). However, Komter (1998) reveals that judges display "moral concerns" for the defendants' guilt (p. 177), while the defendants need to be cooperative in the court's investigation of the facts as well as to increase the mitigating aspects of the crime, which thus points to the "combination of the inquisitorial and adversarial elements" in Dutch

criminal procedure (p. 172). Although the traditional role of an inquisitorial court is aimed at determining facts and at maintaining social order, previous studies have also demonstrated that adversarial elements exist in continental law trials. In his study of trials of members from a notorious criminal organisation in Naples, Italy, Jacquemet (1996) discusses a number of narrative strategies employed by judges, defence lawyers and witnesses who were once members of a criminal organisation but collaborated with the Justice Department. Contrary to the expected inquisitorial orientation of a continental law system, Jacquemet (1996, p. 9) states that "courtroom questioning techniques are primarily used to win, not to help the courts to discover fact." However, as Gibbons (2003) indicates, the defence may not have equal opportunity to pursue and attack witnesses to that of prosecutors in continental law trials.

In recent years, debates on problems of the adversarial system and hence arguments for reform toward a less adversarial system have emerged (Murray 2014). This trend has appeared in other common law jurisdictions such as those of England and Wales (Creaton & Pakes 2012). However, countries with an inquisitorial system such as Japan (Feeley & Miyazawa 2002) and Latin America (Shahidullah 2014) have incorporated adversarial elements into their legal procedures. The distinction between these systems has begun to become blurred in several parameters, such as in the participation of citizens as the jury or judge, in the roles of judges, and in weight afforded to oral evidence. The increased focus on orality and immediacy of courtroom questioning in Japanese lay judge trials (Foote 2014) increases the need for the counsel to present the lay judges with convincing narratives. A pertinent question at this point then emerges as whether this inclination toward an adversarial orientation assumes that the adversarial system itself more effectively serves justice. The adversarial system may not necessarily position the opposing parties on an equal footing before the law (Conley & O'Barr 1990; Creaton & Pakes 2012; Eades 2008). Eades (2008), for example, discusses problems with the adversarial legal system in her analysis of courtroom examinations of Australian Aboriginal boys as prosecution witnesses. Eades demonstrates how linguistic trickery was used by the defence to overpower and misrepresent the boys as lying criminals and how the court hearing can frame itself as a very unbalanced contest.

Communication in a Hybrid System

Both traditionally inquisitorial and adversarial jurisdictions have begun to mutually exchange and hybridize their systems. Given this trend, the nature of these hybridities warrants exploration, so as to determine ways in which they are realized, and to conceptualize the semiotics of participation within these systems, drawing on the case of the Japanese legal system. The present study thus explores ways in which hybridity describes and emerges from the Japanese criminal trial procedures, and how this hybridity becomes realized through courtroom language.

The study draws from courtroom observations of 23 trials from the author's fieldwork in

Japanese district courts. I selected the cases from court lists available for public scrutiny at the respective court locations. I did not observe the full duration of all trials , as it was impossible to control the scheduling of trial sessions. I concurrently monitored several cases, the sessions for which overlapped at times. The transcripts in this paper are developed from fieldwork notes taken in the public gallery of the courtroom. As per the decision made in the courtroom note-taking case (Repeta v Japan 1989), note taking in court is permitted and these collected materials may be reproduced in journalistic, scholarly, and general interest publications (e.g., Yoshida 2011; Fudano 2012). Since it is not possible for researchers to access audio recordings and transcripts of trials in Japan, note-taking is the only way to collect courtroom discourse data. As Fudano (2012) argues, it is worthwhile conducting research drawing from the limited resources available in the field of courtroom discourse analysis.

To facilitate an emic perspective on courtroom communication practice, interviews were conducted with 10 lawyers during the fieldwork. These interviews provided ethnographic insights into the legal professionals' understanding of the trial context, as well as the perspectives of the lawyers on communicative practice in the courtroom. To aid the ethnographic intentions of the study, I also draw from advocacy manuals and other materials that provide information on trials and courts. These materials have been made accessible to the public by the court.

Courtroom Discourse in a Hybrid Legal System

Having identified competing narratives as a key feature of trial discourse in adversarial justice systems, I now discuss narrative construction in the Japanese courtroom. For this, I first discuss the structure of the standard court proceeding, and then expand on how orientation to the narrative emerges within the genre structure. I then analyze discourse strategies at the interactional level of questioning, which are used by lawyers to present, control and attack the opposing party's rendition of events. These strategies represent some of the adversarial elements of the Japanese trial. In the second part of this section, I shift the focus to the role of the judge's questioning, and to lawyers' communication for maintaining moral order and reforming the accused. These aspects of courtroom discourse better represent the inquisitorial end of the continuum.

Genre Structure

Examining the genre structure of courtroom proceedings becomes a method with which to approach orientation to the legal process. According to Martin (1984, p. 25), a genre is "a staged, goal oriented, purposeful activity in which speakers engage as members of our culture." Gibbons (2003) claims that the notion of legal genres deepen understandings of the complex legal process, where narratives concerning the crime and the trial itself as a story are interwoven within a framework of institutional

discourse. The structure of the trial proceedings genre below identified in the fieldwork describes criminal case proceedings in the Supreme Court's Outline of Criminal Justice in Japan (Supreme Court of Japan 2019). I present the genre structure of district court trials in Table 1 below.

Stage	**Actions**	**Participants**
Opening	Identification	Judge and defendant
	Charge sheet read aloud	Prosecutor
	Rights communication	Judge and defendant
	Opportunity for statement	Defendant Defence counsel
Examination of evidence	Opening statements	Prosecutor *Defence counsel
	Examination of evidence requested by prosecution	Prosecutor
	Examination of evidence requested by defence	Defence counsel
	Witness examination	Witness Prosecutor Defence counsel Judges (and lay judges)
	Questioning of the defendant	Defendant Defence counsel Prosecutor Judge(s) (& lay judges)
Closing	Closing argument by prosecutor	Prosecutor
*Victim statement	*Presentation of victim statement *Questioning of defendant	Victim Victim's family Victim's associates or Victim's representative
	Closing argument by DC	Defence counsel
	Final statement by defendant	Defendant
Judgment	Judgment	Judge

(*=optional process) **Table 1:** Overall g(*=optional process)

The overall macro genre structure in Table 1 delineates that of trials in adversarial jurisdictions described in studies (e.g. Maley 1994; Gibbons 2003). The prosecution and defence in these trials

present their versions of events, weaving witness examination and other evidence into their 'master narratives (Gibbons 2003). The genre structure in Table 1 occurs in uncontested cases, where witnesses may be examined and cross-examined in the trial before the verdict is handed down, and not in a separate sentencing hearing as in common law jurisdictions. Furthermore, the final statement by the defendant is similar to the 'last word' in the Dutch system, which constitutes "a more or less solemn speech ritual, during which suspects have the right to express their views on anything that may pertain to their case" (Komter 1998, p. 106). In Japanese courts, as in the Dutch system, the defendant's final statement is usually a ritualistic genre for expressing remorse and offering apologies.

Courtroom design is also relevant to the genre structure in Table 1, and symbolically reflects an adversarial orientation. Here, the defence and prosecution tables are located on the right and left sides of the courtroom, directly facing each other. In the Anglo-American system (the US, UK, and Australia for example), the counsel's tables are adjacently placed, facing the judge, where the parties do not face each other. The witness box in a typical US courtroom is placed next to the judge's bench (Yuan 2018). However, in Japan, the judges' bench is elevated and located at the back of the courtroom, opposite the public gallery with the witness stand between these locations. Both witnesses and the defendants testify in the witness box while the defendants sit next to the defence attorney(s) when inactive. The judges' position, directly facing the witness stand, is indicative of 'the trial as a public re-education of a miscreant' (see Section 5.4 below for analysis and discussion), as described by Searcy, Duck & Blanck (2005, p. 48) in their discussion of the structure of Chinese courtrooms. In these designs, the defendants typically sit at the center of the courtroom facing the judge. In Japan, the defendants sit alongside the defence counsel, where the witness stand remains vacant unless a witness or defendant is testifying. The location of the witness stand at the center of the courtroom facing the judges' bench may symbolize the asymmetrical power relations between the judges and the defendant/witness.

Orientation to Narrative

Constructing and presenting a convincing narrative is key to winning adversarial trials (Maley 1994; Snedaker 1991). Japanese advocacy manuals emphasize the importance of telling a story (e.g., Japan Federation of Bar Associations 2013). One manual stipulates that the most effective opening statement is in a form of an animated story, and to achieve this, lawyers must speak honestly, and in chronological order, while using a single perspective and avoiding details (Goto 2009, p. 40). The techniques and rules of trial advocacy in these manuals and in attorneys' advocacy training mostly derive from those endorsed by the US-based National Institute for Trial Advocacy (NITA).[2] The Japan Federation of Bar Associations held regular training sessions on advocacy skills prior to the introduction of lay-judge trials, which included workshops led by NITA advocacy experts from the

US. For this, I turn to Labov & Waletzky's (1967) narrative model. This model comprises the following six stages: *Abstract; Orientation; Complication; Evaluation, Resolution, Coda*.

The *Abstract* stage describes or grounds the narrative. The *orientation* stage 'sets the scene' by providing background information such as time, place and participants. The *complication* stage refers to the sequences of events, the e*valuation* stage offers a narrator's assessment of the occurrences, and the *resolution* stage concludes the story. Finally, in the *coda* stage, the (prosecutor) provides a statement of the implications of the narrative. In Excerpt 1, I provide an excerpt from the courtroom observation data to illustrate counsel's orientation to a narrative structure similar to that identified by Labove & Waletzky (1967). Here, in a professional-judge-only trial (indicated as 'PJT' next to the excerpt number) concerning a violation of the Stimulant Control Act, the examination of a prosecution witness evidences an orientation to narrative. The segments were extracted from the question-answer sequence between the prosecutor and the witness. A witness convicted for use of stimulants and called by the prosecution is questioned by the prosecutor, who generally adheres to the several stages discussed in Labov & Waletzky's (1967) narrative model. The courtroom discourse examples and interview comments below have been translated into English by the author. Pseudonyms are used to conceal the identities of courtroom participants.

Abstract	
PC:	I'm going to ask you about a person called Kazuo Takagi.[3] First of all do you know Kazuo Takagi?
W:	Yes
Orientation	
PC:	When did you meet?
W:	((Year, inaudible)) 2nd of February
	[…]
PC:	Where did you meet?
W:	I met him at my place.
	[…]
Compliation	
PC:	What did you do on 3 February?
W:	On 3 February, because the defendant suggested moving to a different location, we went to Hotel Granvia.
	[…]
	And what did you do the next day, the 4th of February?
	[…]

Evaluation	
PC:	Why did you think there was a risk of being caught?
W:	Because he sells large quantities [...]

Excerpt 1: PJT 3 (PC=prosecution counsel; W=witness)

In one interview, an attorney (not involved in the trial above) discussed the significance of setting the scene ('orientation') prior to asking about actions:

> [Interview comment 1]
> We ask about the setting before asking about actions. After setting the stage, let's ask about actions. Also, once we start asking about actions, we do not stop. In the middle of asking about actions if you ask about the stage setting, then it would be difficult for the listeners to follow. (Lawyer 5)

In several of the observed trials, there were explicit references to *jikēretsu* (a chronological sequence) of events by the prosecutor as in "I will ask questions in a chronological order ..." In the next Excerpt, the prosecutor suggests that the defence counsel ask questions of the defendant which follow a *chronological* order in a lay-judge trial (hereafter abbreviated as LJT). The defence counsel had been asking the defendant about his stress leading up to his assault against the victim, following a chronological sequence of events and his state of mind. The defendant was accused of robbery causing injury, but the defence claimed there had been no intention to commit robbery. The defence counsel obliges as follows:

1 PC:	This is not really an objection, but [...] a little more chronologically. There 2 are a bit too many leading questions.
3 J:	What I want to say is that, the defence counsel, the defence counsel, is trying 4 to construct in his own way, but [...]
5 DC:	First of all, when you saw the victim, what did you think of doing?

Excerpt 2: JLT 3 (J=professional judge; DC=defence counsel)

Throughout, the defence counsel interrogates with questions such as "What did you think of doing when you saw the victim?" (to which the response was "I thought of using violence again"), "Did she have a bag?" and "Did she seem to carry money?" The counsel appeared to (re)construct a story in which the crime was not financially motivated but solely motivated by the defendant's desire to violently vent his stress on the victim. This seemed to be recognized by the judge in his comment in Excerpt 2. However, at the point where the defendant admits to saying "give me money" and to

holding the victim from behind, the defence counsel is warned on leading questions (only allowed in cross-examination in Japan) regarding how he held the victim:

1 DC:	Putting your hand around her neck and drawing her toward you. […] what 2 did you do that for?
3 DF:	Uhm to stop the victim from moving.
4 DC:	To use violence, like you are hitting her from behind?
5 J:	Defence counsel, you are leading. This is a crucial scene.
6 DC:	Oh, I withdraw it. So you thought it wasn't enough to hit?
7 DF:	[…] yes at that time.
8 DC:	Once more, why did you hold the victim's neck?

Excerpt 3: (JLT 3): (DF=defendant)

The judge's description of "a crucial scene" highlights the perception that a story is unfolding in the courtroom. The lawyers shared the assumption that the trial involves competing stories, and that courtroom questioning represents an integral part of the story construction process.

Discourse Strategies

In trials, lawyers employ a range of discourse strategies in order to convince the audience of their version of events. These strategies are at times directed at discrediting the other party's story, as well as at damaging the credibility and character of the witness or the defendant. This was evidenced in the data collected for this study. For example, in Excerpt 5 below, the defence counsel asks a question with which to challenge the witness' credibility, using the negative interrogative "don't you remember," and then reformulates the witness' hesitant response into "Ah, you don't remember." Here, the witness had claimed that he had seen the defendant buy stimulant drugs:

1	DC:	It appears that you went somewhere together, but don't you remember
2		where you went?
3	W:	Well erm
4	DC:	Ah you don't remember. Then do you remember from whom that
5		person ((defendant)) always bought it ((the stimulant))?
6	W:	No.
7	DC:	Did you see him ((buying))?
8	W:	I didn't see it.

9	DC:	That's all from me.

Excerpt 4: PJT 4 (words in double parentheses are the author's supplementary notes)

The defence counsel leaves the assessment of the veracity of the witness' claim to the audience, but the sequence of questions and responses here discredits the witness' account.

Another strategy used by counsel was that of interruption, which was used to control narratives in both friendly and hostile examinations. The defendant in Excerpt 5 begins her response prior to counsel finishing the question, but as the defence counsel was dealing with a sensitive issue of a misunderstanding over money between colleagues, the defence counsel found it necessary to control the narrative carefully by not allowing the defendant to provide a pre-emptive response, which would otherwise damage the defence version of events.

1 DC:	During that time-
3 DF:	Erm in December-
4 DC:	No, after I've asked the whole question.

Excerpt 5: PJT 9

In Excerpt 6 below, the prosecution witness provides a motive for borrowing money from the defendant. However, the question eliciting this response sought to foreground the defendant's kindness toward the witness, which was contradictory to the prosecution's claim that the defendant subserviated the witness. In the excerpt, the counsel interrupts at a time when the witness begins discussing the amount of money, and the counsel elaborates on the earlier question so as to elicit the fact that the witness borrowed money for leisure:

1 DC:	You borrowed money from X ((defendant))
2 DF:	Yes
3 DC:	Why is that?
4 W:	When [...] , there was a talk of lending 5,000 or 10,000, so-
5 DC:	Well let's leave it there. Now my question concerns why
6	you needed money.
7 W:	[...] for leisure

Excerpt 6: LJT 1: Assault casuing death

In this lay-judge trial, the use of metaphors assists to construct competing stories. In the prosecution narrative, the defendant, who like *oosama* (king) treated the deceased victim and the witness above like *geboku* (servant), killed the victim alone with his violent attack.

1 PC:	So there were three of you, Mr A, you, Mr C, subordinates,
2	servants, maidens.
3 W:	Yes.
4 PC:	Didn't you complain amongst yourselves?
5 W:	I was afraid of being dobbed in.

Excerpt 7: LJT 1

In the trial where the interaction in Excerpt 7 occurred, the prosecutors consistently employed reference terms such as *oosama* (king)*, geboku* (servant) to emphasize the defendant's personality as a domineering master. However, the defence argued that the witness, a friend of the defendant, had also contributed to the violent death of the victim. Such use of symbolic reference terms has been found in trials in the US, particularly in capital cases where defendants are called "monsters," "hyenas," "feral pigs" (Kaplan 2012, p. 91) and so forth, while the victim is addressed as the "hardworking son" or the "pure woman" (ibid., p. 80) by the prosecutor. The Japanese prosecutor in Excerpt 7 adopts this referential term strategy, while the defence counsel counteracts with a contrastive referential term "friend" in order to cast the defendant's image in a positive light. In a seminal piece of work by Johnson (2002) on Japanese prosecutorial culture, a survey exposes that prosecutors overwhelmingly considered "discovering the truth about the case" as their primary objective, a statistic which amounted to 99.6% (p. 98). However, given the high conviction rate in criminal cases in Japan, there is enormous pressure for prosecutors to achieve successful convictions. Thus, presenting a convincing case to the judges calls for the deployment of discourse strategies.

Questions in cross-examination are often designed and sequenced to bring out inconsistencies in the witness' story. This discourse strategy is identified as 'contrasting' by Drew (1990), where two contradictory accounts are elicited through the counsel's questioning of the witness, therefore undermining the credibility of the witness' narrative. In the excerpt below, taken from a lay-judge trial of an abduction, confinement and homicide case, the defence counsel leads the prosecution witness to admit that his courtroom testimony concerning the abducted victim wearing an eye mask is contradictory to his earlier statement during an interview by the prosecutor. The defence counsel also interrupts the witness's statement with a coercive negative assertion followed by a tag question:

1	DC:	Uh did you see Mr N wearing an eye mask?
2	W:	Uh I-
3	DC:	You didn't see it, did you?
4	W:	No
5		[…]
6	DC:	But in your statement taken by the prosecutor dated […],
7		it says after getting off the car X and Y were guiding Mr N because
8		he had an eye mask on, do you remember that?
9	W:	Yes
10	DC:	Then a statement was made about something that you did not see.
11	W:	Yes

Excerpt 8: LJT 5

The above Excerpt illustrates the discrediting of the witness by revealing inconsistencies in the witness' narrative.

Another strategy with which to discredit a witness is to attack their character in cross-examination. In the excerpt below, the defence counsel attempts to draw out contradictory descriptions of the witness' relationship with the defendant who was accused of injury causing death. The defendant's instant phone messages to the witness were shown on screen earlier in the trial, but the witness herself testified that she had felt threatened and terrified by the defendant. The defence counsel highlights the incongruence between her dining with him regularly and her feeling abducted.

1	W:	I felt like I was abducted by Mr Z ((defendant))
2	DC:	Abducted
3	W:	[…] I am a good judge of character. […] it was really […] ((crying))
4	DC:	Hang on a minute. You said […] you'd declined and […] when
5		you went to the bar.
6	W:	Yes
7	DC:	Despite the fact that, around March 2017, you started to go out
8		for a meal with him every week, you say you were abducted?

Excerpt 9: LJT 1

In this way, the counsel attempts to construct an image of unreliable character emerging in the prosecution's narrative, where the defendant is described as a domineering and violent bully.

Similar discursive strategies to control narratives and to challenge the credibility of the witness or the accused have also been identified in inquisitorial trials. Jacquemet (1996) discusses the construction of credible narratives jointly achieved by judges and prosecution witnesses in trials of organized crime figures in Italy, where defence counsel employ indirect approaches so as to challenge the credibility of prosecution witnesses within the institutional constraints of the inquisitorial court procedure. Examining trials in The Netherlands, Komter (1998) highlights the struggle between the judge and the defendant. Judges, while having to maintain neutrality, need to conduct an investigation in pursuit of what they deem as the truth, and sometimes find the need to "contest the suspects' versions of events" (Komter 1998, p. 29). Here, a significant difference between inquisitorial and adversarial systems emerges as one where in adversarial systems, judges retain a neutral referee role while competing versions of events are constructed by the prosecution and defence. This now summons discussion of the judge's discourse in Japanese trials, which I examine in the following section.

The Discourse of Judges as 'Investigators'

Unlike in common law adversarial trials, formal and lay judges in Japanese criminal trials are able to take an investigative stance. After the counsel's examination and cross-examination of the witness, the judges have an opportunity to conduct *hojū shitsumon* 'supplementary questioning.' In this supplementary questioning, judges are permitted to ask questions so as to locate truths. The Supreme Court's *Outline of Criminal Justice in Japan* states that "witnesses are first examined by the parties" and this practice "reflects the principles of the adversary system" (Supreme Court 2019, p. 26), but does not describe the required nature of an examination by the judges.

Excerpt 10 below illustrates the judges' investigative stance. Following the counsel's questioning of the defendant, the judge asks her supplementary questions about the 100,000 yen that the defendant claimed to have withdrawn at the request of her colleague:

1 J:As	far as you are concerned, regarding the 100,000 yen, […] did you return it? 2 […]
3 DF:	No in the end we were to cancel it out with the cost I had covered […]
4 J:	No no just answer my question. So you haven't returned the 100,000 yen?
5 DF:	Well because there is the cost I had to cover
6 J:	No, so you have not secured a mutual agreement over that setting-off?
7 DF:	No

Excerpt 10: PJT 9

In earlier cross-examinations, the prosecutor had asked questions regarding the defendant's cash

withdrawals, which the defendant transacted at the request of her colleague. However, the testimony did not clarify the amount of cash given to this colleague. Counsel usually leaves the interpretation of witness (and defendant) responses to the judges without asking questions directly addressing inconsistencies or credibility issues. This reflects Anglo-American adversarial orientation to witness examination, where the presence of the jury allows attorneys to leave contradictions emerging from a cross-examination with the members of the jury, who would then interpret them (Drew 1992). This avoidance of pursuit is motivated by that the questions in hostile cross-examination that explicitly address contradictions would afford the witness an opportunity to explain the contradiction (ibid.). Attorneys in Japan also seem to take this stance, but agree that judges may intervene with counsel's strategic line of questioning, spoiling their effort to damage their targeted versions of events. In an interview, when asked about judges' supplementary questions, one lawyer commented:

> [Interview comment 2]
> Well we talked about stopping before getting to the point. [...] We do that because all the questions used as building blocks for damaging credibility would become pointless, but judges don't have to worry about that ((laughs)) so they sometimes ask without hesitation. And I wish they didn't do that ((laughs)). (Lawyer 6)

Interview comment 2 above points to the lawyer's adversarial orientation to courtroom questioning, while exposing the judge's inquisitorial orientation with their power to investigate matters concerning the alleged crime. A comment by another lawyer (Interview comment 3 below) also indicates that counsel and judges display varying orientations to witness questioning. While talking about Americanized courtroom questioning techniques, lawyer 4 comments on judges' negative perceptions of such styles of questioning:

> [Interview comment 3]
> Judges argue that people should not be misled by that kind of witness examination. [....] Judges regard the courtroom as a place for truth finding, you see. [...] So probably, there are lay judges, and if professional judges think the witness is misled [by the counsel], then I think they might restore the situation by conducting supplementary examination or something. (Lawyer 4)

In Jacquemet's (1996) study of trial discourse in Naples, the inquisitorially oriented court needed to further explore these incongruities to reach judgment. The judges' supplementary questioning in Japan also allows them to move beyond the neutral referee role assumed in common law trials. The attorneys' interview comments above reflect the paradoxical stances emanating from the counsel's adversarial orientation and the judge's inquisitorial orientation that co-exist in Japanese criminal trials.

In a lay-judge trial of a case where the defendant was accused of robbery causing injury, the defendant denied his involvement in the crime until he was charged, but later claimed that he had experienced temporary memory loss. The prosecutor probes the defendant on that point.

1 PC:	You don't remember what you had told ((the police and prosecutor))
2	until you were charged. […] You don't remember at all?
3 DF:	No, I am sorry.
4	[…]
5 PC:	From when do you have memory?
6 DF:	Uhm after the interrogation […].
7	[…]
8 PC:	Then here such details of […] like today, from the neck to the left wrist
9	[…], what is the reason for remembering those details?
10 DF:	Uhm for two days the detectives […] investigated the violence,
11	which brought my memories back and I told them.

Excerpt 11: LJT 3

The prosecutor employs a contrast device to highlight the 'puzzle' (Drew 1992). A pertinent query at this point then becomes why the defendant was able to provide details of the attack in court while claiming he did not remember the details until he was charged. A likely interpretation is that the defendant either did not lose his memory prior to being charged, or that the defendant fabricated the story in court in order to provide an alternative version of events concerning the attack. Unlike the prosecutor, however, the judge, in his supplementary questioning, more explicitly challenges the defendant, even suggesting that the defendant may be lying:

1 J:	[…] and earlier you (said) that you had been saying you didn't remember
2	it until you were charged for this crime. […] Is this correct?
3 DF:	Yes.
	((several turns later))
4 J:	Often […] in order to evade being charged, […] people lie and say
5	they don't remember […] it is common, so is it not the case?
6 DF:	Security camera, […] when I saw the security footage, when

7	I was watching it
8 J:	What brought back your memory?

Excerpt 12: LJT 3

The judge does not directly ask the defendant if he is lying, but summons a common scenario prior to asking the defendant if this may also be the case with the defendant. In this way, the judge avoids directly expressing his doubt about the truthfulness of the defendant's claim, but brings objectivity and legal expertise into his questioning. Nevertheless, the question in lines 4–5 in Excerpt 12 signifies an implicit expression of doubt about the defendant's account, which counsel tends to avoid. The defendant does not directly disagree in his response, but begins to more or less repeat his earlier explanation that watching the security footage triggered his memory, which was given in response to the prosecutor's question.

As the counsel leaves the conclusion from witness examination to the jury in US trials, advocacy manuals in Japan, a theme arising in the lawyers' interview comments above, also suggest that counsel should cease asking questions when they have elicited sufficient responses for the audience to arrive at a negative interpretation, and should not ask confirmation questions (e.g., Satō 2007). On this point, Satō (2007) draws on the American lawyer's classic advocacy manual *The Art of Cross-Examination* (Wellman 1903). Judges in Japan, however, play a dual role of truth-finding investigator and referee. With their examination turn following the counsel's in the conventional practice of the court, and in their privileged institutional capacity, the judges at times fill in the gaps the prosecution and defence leave in the discourse of courtroom examination. Such questioning by the judges focused on truth findings, however, mostly increases in prominence in contested cases, where the judges accept responsibility for locating facts over which the two parties appear to be in conflict. The duality of investigative and objective roles is also identified in Dutch criminal trials (Komter 1998). However, in Japan, the fact that counsel position themselves in a more adversarial framework with more weight on the oral mode of communication in the courtroom renders the Japanese context significantly unique.

Maintaining Moral Order

Courtroom examination serves to function as a process of maintaining social and moral order, where judges, counsel, witnesses and defendants are observed to join in this process. In trials where the defendant admits to having committed a crime, an expression of *hansē* (remorse) is expected. This is described by a lawyer in an interview:

> [Interview comment 4]
> After all, the courtroom is a site of apology in uncontested cases where remorse has to be demonstrated. (Lawyer 4)

Johnson (2002) in his comparative study of Japanese and US justice systems, claims that strong rehabilitative ethos is observed in the Japanese criminal justice system, where prosecutors "aim to invoke remorse in offenders because they believe penitence is the essential first step on the road to reform" (p. 100). In Japanese trials, the defence counsel, whose questioning of the defendant occurs prior to the prosecutor's, often takes a line of questioning which involves chastising and/or preaching in order to create a positive impression of a repentant person with a good prospect for reform. An example from a lay-judge trial below presents a question by the defence counsel which elicits a word of gratitude for the parents of the defendant:

DC:	How do you feel toward your father and mother now? ((long silence))
DF:	I have caused so much trouble for everything, like they had to pay for the compensation, ended up
	[…], so they still have to look after me, and I feel really grateful for that.

Excerpt 13: LJT 3

The defendant expresses remorse for causing trouble to his parents as well as gratitude for their caring for him, in response to the defence counsel's open question "How do you feel … ?" It should be noted that the defendant was not a 'young' offender, as he had graduated from university a number of years prior to the offence. The parents were present in the public gallery throughout the trial, a fact which was mentioned by the presiding judge during his questioning of the defendant:

J:	So is it the case that there is no problem living with them ((parents))?
DF:	Yes
J:	All the time the witness […] your mother has been sitting in on the trial […] your father has also been sitting in all through the trial?
DF:	Yes.

Excerpt 14: LJT 3

In this way, although the defence's motivation for asking the question in Excerpt 14 may largely have been their need to provide a favorable impression to the judges for leniency, the defence counsel creates a context for the judge to reinforce the value of filial piety and to maintain a moral societal order.

The next excerptis drawn from a lay-judge trial where the defendant was accused of attempting to murder her mother in a murder-suicide incident motivated by financial difficulties. The defendant's compulsion to spend her mother's savings on luxury goods so as to de-stress was brought up as a matter of concern in the trial.

J:	How do you think your mother saved that money?
DF:	She would have saved more, but I think she saved and scrimped. We were poor [...] she did save and scrimp.
J:	How do you compare her way of life with yours?
DF:	Deserves respect [...] I think.
J:	Isn't it a total opposite of yours?
DF:	Yes.

Excerpt 15: LJT 4

In this trial, the defendant reported the crime herself, and admitted to committing the crime, but as the defendant reported the incident to the police, the defence counsel argued for the cessation of an attempted criminal act (*chūshi misui*) which would lead to discharge, or a reduced penalty. Throughout the trial, the defendant expressed her deep remorse and resolution to change her approach to life and to make amends with her mother, but her compulsive spending on luxury items, such as jewelry, was highlighted through the prosecution's questioning, and drew the attention of the judges, including a lay judge who asked questions of the defendant regarding the purchase of jewelry. In Excerpt 15, the professional judge employs open questions to elicit an image of a hard-working single mother who withstood adversity for the defendant, before a more restrictive negative question which blames the defendant for her own way of life in contrast to her mother's. Integrating the accusatory tone of the phrase 'total opposite' (*mattaku sēhantai*), the judge attempts to educate the defendant with a moral lesson, and places her on a path toward repentance and reform.

Instilling filial piety is not the only moral reform process of the trial. Parents and partners often appear as witnesses for 'jōjō' (extenuating circumstances) which often concern their willingness and/or ability to support the defendant in their rehabilitation process. While it is not uncommon for the defendant's family members to appear in common law adversarial courts to assess the prospect of reform, for example in cases that involve drug use, family members in Japanese trials have been at times observed to be almost at blame for not sufficiently acting to stop the defendant's crime prior to its occurrence. In the excerpt taken from a professional-judge-only trial below, the judge examines a defendant's mother who had surrendered and submitted to her son's demand, thus continuously provided the son with money for gambling, which consequently drove him to robbery. Here, the

defendant is a mature adult:

J:	If he asks you for money what would you do?
W:	I won't [...] as there is no money.
J:	Can you promise to talk to the police or family members when you find it difficult after refusing ((him money))?
W:	Yes.
	[...]
J:	Can't you understand it would be better to tell him to get a grip on himself or you'll report to the police?
	[...]
J:	I'll also ask your son later but ... can you firmly say no when that happens again?
W:	Yes

Excerpt 16: PJT 7

The judge's first question in the above excerpt attempts to assess the level of influence and support the mother can provide in future in combating her son's gambling addiction. However, the second question not only assesses whether necessary action can be expected from the mother, but also demands a promise from her, which, considering the ensuing questions from the judge, implies that she had failed to control her son's behavior and that she needs to alter her actions. This type of exchange with a family member as a witness, which is also observed in other trials, points to an assumed collective responsibility of family as a unit to maintain social order, as well as the role of parents or partners to supervise the defendant so as to prevent further crimes.

The analysis of courtroom discourse above suggests that criminal trials in Japan are guided by a principle of repentance and reform at an individual level, but also by the underlying assumption that criminal justice constitutes a process of maintaining social and moral order in Japan. Lawyers guide the defendant and their family members along a path toward reform through their courtroom interaction, whether motivated by the need for a practical legal outcome or by a sense of purpose for maintaining stable family values and moral stance in society.

Discussion

Ethnographic insights gained from the fieldwork in this study reveal the varying stances of defence attorneys, prosecutors and judges as they discursively navigate themselves through adversarial and inquisitorial orientations to trial proceedings. The trial, as a speech event, is designed as a theatrical battle in its genre structure. Within the trial, at an interactional level, discourse strategies are

deployed to damage or enhance credibility. Strategies become a set of tools with which to accomplish targeted outcomes, be it winning the trial or securing a desired penalty. As such, the trial procedure follows the principle of the adversarial system. Mainly owing to law reform since the early 2000s, and in particular the introduction of the lay-judge system, courtroom discourse strategies and practices that characterize the adversarial principle have increased in prominence in the Japanese justice system.

Nevertheless, facets of trial discourse which reflect the inquisitorial tradition, such as judges' investigative stance in their 'truth-finding' questioning of witnesses and defendants, and the court's facilitation of social and moral order through their educative discursive processes, emerge, at times shaming the defendant's family members for their failure to prevent the crime. These actions suggest that discourse processes within hybridized Japanese trials invite a hierarchical communicative model of the court as a site of repentance and as a path toward reform with and reintegration into society (Johnson 2002). Thus, within the macro genre structure, different stages of trial proceedings facilitate participant movements between adversarial and inquisitorial stances, a process of selection which becomes predicated on the specific goals of those stages. More so, situated well within current Japanese socio-legal contexts, Japanese courtroom discursive practice generally appears to maintain the court's powerful role as a state institution with moral authority. Whether the power of discursive articulation in the Japanese courtroom will begin to exhibit a tangible impact on the Japanese justice system is yet to be seen.

Conclusion

This article has explored how the hybridity of adversarial and inquisitorial orientations to justice are realized through courtroom discourse in Japan. Japan's justice system, similar to many other justice systems globally, has evolved, and is evolving, with a progressively changing society, and affected by a spectrum of global influences. Over ten years have passed since lay-judge trials were introduced into Japan, which enormously impacted on the justice process and trial discourse throughout Japan. Whether this impact crosses over to professional-judge-only trials, which at present constitute a large majority of criminal trials, and whether this impact skews the Japanese justice system to become more adversarial in its practice of trial discourse, would invite a worthwhile exploration in future research. Furthermore, with the enhanced visibility of the justice process through the publicity of lay-judge trials, and through citizen participation in the justice process, future research exploring how Japanese citizens' understanding of the legal system is being transformed would yield valuable insights into scholarship on language, law, and society. In pursuing such scholarly endeavors, anthropological linguistics can significantly contribute to advancing our understanding of the justice process.

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Endnotes

[1] Only when the rape is combined with another offence that is in the felony case category can it be heard in a lay-judge trial. See Saiban-in Act Article 2, and Court Act Article 26, Section 2, Part 2.
[2] National Institute for Trial Advocacy (2020) About NITA. Retrieved from https://www.nita.org/about-us
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