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LEGAL ADVICE AND LEGAL AID IN CRIMINAL CASES IN JAPAN

ITSUHIRO NAMAZUGOSHI

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I. *The Background of the Debates on Legal Advice and Legal Aid in Criminal Cases in Japan.*

Every jurisdiction has its own criminal legal system in which the scheme of legal advice and legal aid is required and is working. Therefore, making a sense about the essential features of the Japanese Criminal Justice System might be useful in understanding the issues on legal advice and legal aid in Japan.

The prominent feature of the Japanese Criminal Justice System is an incredibly high conviction rate which is more than 99% of the cases tried at the District Court and Summary Courts (see, Table 1).

TABLE 1. DISTRICT COURT & SUMMARY COURT: CASE RESULT

Year	District Court		Summary Court	
	Total Number [Contested Case]	Acquital (%)	Total Number [Contested Case]	Acquital (%)
1991	46,994	0.38	8,723	0.26
	[3,425]	[6.39]	[509]	[5.30]
1992	46,409	0.11	9,078	0.24
	[3,378]	[3.02]	[508]	[4.72]
1993	48,123	0.22	9,552	0.33
	[3,505]	[4.42]	[461]	[6.72]
1994	49,325	0.09	9,797	0.15
	[3,620]	[2.27]	[408]	[4.41]
1995	50,816	0.08	9,286	0.18
	[3,452]	[2.08]	[444]	[3.83]

(ref. Hoso Jiho (Lawyers Association Journal) Vol.49. No.2. p.97.)

I think there are three main reasons for this phenomenon.

Firstly,there is little doubt that the prosecution policy applied in Japan has a crucial bearing. It is claimed that Public Prosecutors in Japan would never prosecute suspects unless they feel they have 100% confidence that they have enough evidence to convict the suspect.

The Second reason for the high conviction rate may be related to the Trial System in

Japan. As you know, we have no Jury Trials in Japan.[1] Every criminal cases are decided by career judges. Researches into jury trial in Japan, U.S. and U.K. show that a jury is less likely to convict the accused than a judge.[2]

The third reason is related to the confession rate. More than 90% of the accused tried at the Distrct Courts and at Summary Courts have confessed (see, Table 2). The conviction rate in cases involving confessions is undeniably higer than in cases in which the accused denied committing the offences (See, Table 1).

TABLE 2. DISTRICT COURT & SUMMARY COURT: CONFESSION RATE

Year	District Court Confessed (%)	Summary Court Confessed (%)
1991	91.8	90.0
1992	91.8	91.1
1993	91.8	91.7
1994	91.9	92.2
1995	92.1	90.9

(ref. Hoso Jiho (Lawyers Association Journal) Vol.49. No.2. p.76.)

I have pointed out three main reasons for high conviction rate in Japan. However I would like stress two of those factors: namely the Public Prosecutor's confidence to win the cases and the Judge's decision to convict the accused based on the accuseds' confessions.

We can conclude that the use of confessions is still considered to be the best and most efficient way of obtaining a conviction.

However, if we regard a confession as the Queen of Evidence during the process of investigation and at trial, and we consider a confession to be the most important evidence, the risk of miscarriages of justice as a result of false confessions must be increased.[3]

These facts shall be taken into account when we discuss the necessity and importance of criminal legal aid.

II. *Kokusen-Bengonin-Seido*

We can divide our discussion about the Japanese system of the criminal legal aid into pre-prosecution and post-prosecution phases.

The accused may ask a lawyer in oder to help with legal advice and to give legal representation. Any poor accused who can not afford the expense of a lawyer, is entitled to

[1] We had jury trial from 1928 to 1943. It has been suspending from 1944 because of the difficulty to sustain it by the aggravation of Second World War.

[2] See, Mamoru URABE, "Wagakuni ni okeru Baisin Saiban no Kenkyu, Shihou-Kensyusho Chousa Sosyo No.9. (1968) Tokyo; Kalven, Jr. & Hans Zeisel, "American Jury" Little Brown & Co. (1966); John Baldwin and Michael MacConville, "Jury Trial" Clarendon, (1979).

[3] In fact, we have many cases involving miscarriage of justice based on false confessions. For example, the Menda case, the Saitagawa case, the Matuyama case, the Shimada case in which the accused was *sentenced* to capital punishment.

have a defence lawyer who is paid by the State.[4] This is so called Kokusen-Bengonin-Seido.

Criminal Statistics show that 97% of all accused tried at the District Court have a defence lawyer, in which 31.5% are Shisen-Bengonin and 66.8% are Kokusen-Bengonin (see, Table 3). Shisen-Bengonin means a defence counsel appointed by the accused him- or herself or his or her relative. This ratio shows us that most accused depend on the Kokusen Bengonin Seido.

TABLE 3. DISTRICT COURT & SUMMARY COURT: ASSIGNMENT OF LAWYER

	District Court		Summary Court	
Year	Kokusen (%)	Shisen (%)	Kokusen (%)	Shisen (%)
1991	59.6	38.8	78.9	18.6
1992	61.7	36.6	80.3	16.7
1993	63.7	34.7	81.2	16.5
1994	66.1	32.5	83.6	14.1
1995	66.8	31.5	82.9	14.5

(ref. Hoso Jiho (Lawyers Association Journal) Vol.49. No.2. p.52.)

When the accused asks for a Kokusen Bengonin to be assigned, the Court asks the Bar in the jurisdiction to nominate a lawyer. The Bar asks a lawyer who is registered as a Kokusen-Bengonin if he or she would like to accept the duty of the Kokusen Bengonin following the order in the list of the Kokusen-Bengonin. When a lawyer accepts the offer, the court assigns him or her as a Kokusen-Bengonin.

A related question may be how many lawyers have registered as a Kokusen-Bengonin and how many registered lawyers have actually worked as a Kokusen-Bengonin. The number and rate is different in each Bar.[5]

Generally speaking, we can say that lawyers in major cities are less willing to register than lawyers in small cities. The first reason for this phenomenon is that the Bar in bigger cities can have large enough numbers of Kokusen-Bengonin to meet the demand because the Bar has a larger number of lawyers.

Secondly, the willingness to register as a Kokusen-Bengonin comes from awareness of the duties of a lawyer. Lawyers in local districts recognise that the work of Kokusen-Bengonin is thier fundamental duty of lawyers, but lawyers in bigger cities do not.

The third factor influences lawyers to register as a Kokusen-Bengonin is that the payment for this sort of work is not so good. I think this is the most important reason why lawyers are reluctant to work as a Kokusen-Bengonin.

The fact that a lawyer can not survive on the income available from purely criminal work should be emphasised as a basic problem of the criminal defence system in Japan.

I do not know about America, but I have friends who are professional criminal lawyers in Canada and England. They told me that they could earn enough money to survive and pay

[4] The Constitution of Japan, Art.37 provides that at all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

[5] For example, 29% of all lawyers in three Bars in Tokyo have registered as a Kokusen-Bengonin, 75% in Satpporo, 84% in Aomori, but only 19% of all registered lawyers in Tokyo have actually accept the job as a Kokusen-Bengonin, 70% in Sapporo, and 74% in Aomori.

the running costs of their law firm thanks to Criminal Legal Aid.

It is obvious that the poor payment of the Kokusen-Bengonin makes their work unappealing.[6]

Professor Goto points out that the system of calculating payments for the service of the Kokusen-Bengonin is a comparatively serious problem. This is because it does not account for the effort and time involved in the preparations for the trial.[7]

We can find a more basic reason why Japanese lawyers are reluctant to work as a Kokusen-Bengonin. As I have already commented, provided there is a high conviction rate, a criminal defence lawyer can play a very limited role *at the trial*. In other words, as the public prosecutor in fact plays a role of not only the representative for the prosecution but also judges and defence lawyer, the trial procedure becomes a sort of ceremony. Therefore the performances of the defence counsel becomes a player to perform his part in the ceremony.

These factors cause the phenomenon that Japanese lawyers lose a interest in criminal cases and make it difficult for us to have professional criminal lawyers.

In conclusion, we can say that we have *legal aid* for the accused after prosecution even if it is not enough. However as I have already commented, I can dare to say that the stage of the investigation by police and public prosecutor is the conclusive stage in Japanese criminal cases.

It is in the nature of the things that many lawyers turn their eyes to the discussion about legal aid before prosecution, especially about legal aid for the suspects undergoing police interrogation.

III. *The Importance of Legal Aid before Prosecution and Toban-Bengosi-Seido*

We, of course, have the Constitution and the Criminal Procedure Law which introduced the evidential rule of the admissibility of the confession.[8]

We must consider if it is possible for the detained suspect to remain silent. The police may detain the suspect up to 23 days before prosecution. We have no strict rule which governs the right to access to counsel before interrogation, refreshment, meals or sleeping time for the suspect during police interviews. The suspect is normally detained in a so called Daiyo-Kangoku, meaning a cell in the police station. I think it is almost impossible for the suspect to remain silent.

In comparison with the conditions in U.S.A. and England, I think that as the protection for the detained suspect is weaker in Japan, it is more important for us to consolidate the defence at the stage of investigation.

In theory, as no person shall be deprived of the right to access to counsel at any stage in

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[6] According to the research by Professor Ohkubo at Kurume University, the amount of net payment for each case is 66,880 yen as a fee and 18,880 yen as allowances for traveling costs etc. It is said that this payment is lower than that of Shisen-Bengonin. See, Satoshi Ohkubo, 'Kokusen-Bengo-Hokokusyo kara mita Kokusen-Bengo no Jittai (Fukuoka)' in Kikan Keiji-Bengo No.6 Summer 1996., p.38.

[7] Akira **GOTO**, 'Kokusen-Bengonin e no Kyuhutaikei no Gorika ni tuite' in HUTOU-Teramoto Yoshihiro Hanji Taikan Kinen Ronbunsyu- (1997), pp.57–58.

[8] Article 38 of the Constitution provides that no person shall be compelled to testify against himself; Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. Article 319 of the Criminal Procedure Law provided that Confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not to have been made voluntarily shall not be admitted in evidence.

criminal process, every person can ask a lawyer to help him or her even at the investigation stage. We have no rule concerning time when the suspect could actually has the right to see his or her counsel. When the suspect is arrested, he or she shall be informed about the right to counsel. But most suspects do not know the name of a lawyer and do not know what they should do to ask for a lawyer.

This means that in practice, most suspects can not obtain enough legal help from a lawyer. In fact, the access rate of the accused to a competent lawyer might be 20% at most. This is because in the cases where the accused asks for a Kokusen-Bengonin to be assigned, he or she did not have a lawyer at the investigation stage.

Even in cases in which suspects have a lawyer at the investigation stage, the services that can be offered by their lawyers are more limited in Japan than in U.S.A and England.

For example, in England, when the suspect wants to have the legal advice, the police officer does not start to interview the suspect until he or she meets his or her lawyer. Far from it, as the police investigation is given priority in Japan, a police officer can stop the defence lawyer from going to see his or her client.[9]

The defence lawyer is not permitted to be present at police interviews with his or her client. The detained suspect is forced to fight against a possible unlawful or unfair treatment by the police officer by him- or herself during the interogation process.

It is well known that even innocent people sometimes give false confessions because he or she feels helpless after giving up to telling the true story. If such a person could see his or her counsel and at this time recognise the importance telling the truth, the risk of false confession may be reduced.

I hope you can understand the importance of the right to counsel before prosecution. If the suspect can not use the right, it is meaningless. It is the reason *why* we should set up a legal aid scheme before prosecution in Japan, *when* a poor person can not afford the costs for the defence lawyer.

As I have already commented, we have had no legal aid scheme for poor suspects.

Our central government has been giving more than a thousand million yen each year to Horitsu-Hujo-Kyokai; that is the voluntary association for legal aid. But the money coming from central government is not available for the criminal defences.

In order to supplement this lack of the scheme for legal aid for the suspect, Japanese lawyers created the Toban-Bengoshi-Seido; the voluntary organisation for free legal advice at police stations or at detention centers. The idea of this scheme was borrowed from the English Duty Solicitor Scheme.

The Oita Bar Association was the first who started this scheme in 1990. Toban-Bengoshi-Seido has been well-recieved and has expanded rapidly to the other Bar Associations and becoming nation wide scheme during following two years. More than 5,000 lawyers had registered as a Toban-Bengoshi at the beginning of October 1992.[10]

The fact that the Toban-Bengoshi-Seido has been growing shows that there had been

[9] Article 39(3) of the Code of Criminal Prosedure provided that the public prosecuter, secretary of public prosecuter's office and judicial police official may, when it is necessary for investigation, disignate the date, place and time (for the lawyer to see his or her cliant.). The interpretation of the Supreme Court about "necessary for investigation" is unfairly in favor of the prosecution. see, William B. Cleary, The Law of Criminal Prosedure in Contemporary Japan, Hokudai-Hogakuronshu, vol.41 pp.1337–1335.

[10] Nihon-Bengoshi-Rengokai (Japan Federation of Bar Associations) "Keiji-Bengo o kaeru Toban-Bengoshi-Seido (Toban-Bengoshi-Seido shall change the Criminal Defence)", (Feb. 1993 Tokyo) p.13.

demand for free legal service for the suspect and there is such a possible demand.

The detail of the application of the system of the Toban-Bengoshi-Seido varies with each Bar Association, but we can say that individual Bar Associations have been running their schemes on a Rota basis or on a Panel basis.[11]

Where the Bar Association has applied the Rota-System, the Association put the lawyers on the alert in order to meet requests from the suspect. The lawyers on duty as a Toban-Bengoshi are ready to visit the police station and give legal advice to the suspect.

Where the Bar Association has applied the Panel System, the clerk of the Association seeks a *available* lawyer for the Toban-Bengoshi following the order of the registration list.

The lawyer who can perform the duty, visits the police station to see the suspect.

IV. *The Obstacles against the Improvement of the Defence of the Suspects.*

As I have mentioned before, in spite of the greater needs for a legal aid scheme for detainees at police stations in Japan than in U.S.A. or in England, we have no scheme financially supported by the central government.

The Toban-Bengoshi-Seido which is a voluntary project created by the efforts of Japanese lawyers, is also facing several obstacles to improvement.

Firstly, this scheme faces financial difficulty. As there is no financial support from the government, the Japan Federation of Bar Associations has collected contributions from its members. The Japan Federation has succeeded in collecting 3 thousand million yen for the Toban-Bengoshi-Scheme Fund. However this momey is not enough to meet the demand. We have already had some Bar Associations which have delayed in paying the fees and allowances to the Toban-Bengoshi.

The reasoning by the central government for rejecting payment for criminal legal aid for the defence before prosecution, is, firstly, that there is no express provision making it compulsive for the goverment to pay.

Most lawyers have interpreted Article 37 of the Constitution such as that the accused in this article does not include the suspect before prosecution.[12] Recently, such an intepretation is criticised. For example, Professor Murai argues that this article should apply to suspects.[13] I agree with his opinion and I think that it should apply at least to detained suspects because Article 203 of the Criminal Procedure Law makes it obligatory for the police officer immediately to inform the suspect of the essential facts of the crime and the fact that the suspect is entitled to select a defence counsel when the police arrest the suspect. In my opinion, imforming the suspect of the essential facts of crime is the same meaning as the charge in English Law.

Unfortunately our argument has not been supported by the judges and the officers of Ministry of Justice.

The second reason why the government is against paying is in the fact that as the debates

[11] ibid., pp. 16–17.

[12] Makoto MITSUI, Keiji-Tetsuzuki-Ho(1) [Sinpan] (Yuhikaku, Tokyo, 1997) pp.151–152. However, Professor Mitsui argues that new legislation for the Kokusen-Bengonin-Seido for the suspect is urgent.

[13] Toshikuni MURAI, Keiji-Bengo no Rekishi to Kadai, Jiyu to Seigi (Liberty & Justice) Vol.44. No.4, pp.8–10.

in Japan are too heavily focused on the trial stage of the case, the importance of the defence at the stage of investgation has been neglected. In other words, defence and the legal aid at the court is enough protection against false confessions and miscarriges of justice.

Thirdly, because of indifference and lack of understanding about the criminal justice system by the public, the government has not found favour with the public to support legal aid for the detainee. As we have not Jury system or lay magistrate system, an ordinary citizen in Japan has little chance to participate in Criminal Justice. As a matter of course, Japanese citizen has not been able to recognise the substantial value of the criminal defence.

A final reason is related to the high conviction rate. Supposing all accuseds are convicted, so called "presumed innocent rule" does not work well. The ordinary citizen in Japan easily believes the suspect is a criminal when he or she is arrested. If every suspect is a criminal, the argument that the tax payer should not pay for the protection of the suspect is strongly persuasive.

The second issue related to the development of the Toban-Bengoshi-Seido is a lack of the means to give information about the scheme to the individual detainee. Every Bar Association has made efforts to advertise the Toban-Bengoshi-Seido to the public by using the media and by distributing leaflets. However, each individual suspect has not enough knowledge as to when he or she can ask for a Toban-Bengoshi or how to contact him or her.

The best way to resolve this difficulty is by making it obligatory for the police to inform the detainee of the availability of the Toban-Bengoshi. But some police forces have been reluctant to do so.

The third issue concerning the difficulty of running the Toban-Bengoshi-Seido is caused by the shortage of the number of available lawyers in local places where it is difficult for the Bar Association to send a lawyer to help the detainee. It is a serious problem for those Bar Associations which have a large region such as in Hokkaido or which have several detached islands as Nagasaki prefecture.

V. *Conclusion*

The criminal legal aid in Japan has neither developed from a financial point of view nor from the point of view of quality of the services.

The Bar Associations in Japan have started to improve on the Toban-Bengoshi-Seido, even under the poor condition for the legal aid for detainees. This is the first step for legal help and legal advice for suspects.

The Japan Federation of Bar Associations has drafted a plan for expanding the Kokusen-Bengonin-Seido into pre-prosecution stage. I hope that the central goverment accepts the proposal from the Federation.

In order to push the government to accept the plan drafted by the Federation, I would like to expect the development to several associations which is organised by ordinary sitizens to support the Toban-Bengoshi-Seido.[14] Because we need the support from public to use the tax

[14] These associations have been organized in Hukuoka (1994), Tokyo (1995), Ohsaka, Sattporo and Ohita (1996) and there are plans to set up the association in several places. The most sucsessful association in Ohita has more than 300 active members to support the performance of Toban-Bengoshi.

for the criminal legal aid for suspects.

I would like to say a few final words. The Legal Aid in Japan is not enough to meet the needs to protect human rights in criminal cases. However we have been learnning from developed countries.

The Miranda Rule in U.S.A. encouraged Japanese lawyers to fight against unfair or illegal treatment of the detainee by the police. The several schemes created under the PACE in Englad gave Japanese lawyers the concepts of how to improve the investigation process in Japan.

I think international cooperation and the solidality of legal action groups will exert enough influence to expand the protection of human rights, especially, in the legal aid scheme.

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