

ROLES OF DEFENSE COUNSEL: ETHICAL ISSUES IN CRIMINAL DEFENSE

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Professor Feeney has just made it clear to us that defense counsel face ethical issues in their everyday practice even in the adversary system on which the Due Process Model of the Criminal Justice in the United States is based, and that, behind these ethical issues, there is a serious clash of competing interests between the duty to guarantee confidentiality of the privileged communication and the duty to be candid with the court as officers of the court.

Since Japan adopted in form the same adversary system under the current Constitution, the ethics of defense counsel seem to be fundamentally identical.

However, I regret to say that the actual practice is different from what one would have predicted for the system from its underlying theoretical basis. In theory, I understand that the idea of the adversary system requires the defendant to stand at a position of defense party in the criminal procedure, not to be treated as a mere instrument of evidence, but in reality, this is not the case here in Japan.

As a result, the most fundamental issue on the role of defense attorneys, which is one of the primary premises of the adversary system, is controversial among the legal profession including judges and prosecutors.

From now on, I will illustrate the difference of the background of the ethical issues between Japan and the United States by introducing the controversy on roles of defense counsel in Japan and the gap of understanding in the adversary system itself.

I. Background of the Controversy

In the 1990s, the Japan Federation of Bar Associations started to provide “the guiding hand of counsel” with the suspect in custody on a voluntary basis under the “Toban Bengoshi” program or the duty attorney program following the example of the “duty solicitor scheme” in England. Because, under the current regime, the ‘suspect’ in custody, who is clearly distinguished from the ‘defendant’ after prosecution, has no constitutional guarantee to have access to free assistance of counsel, in contrast to the defendant who has the right to request free assigned counsel.

Nowadays, 1 out of 5 detainees succeeds in obtaining the free advice of counsel. It means that “the informal closed-door investigation” in practice has been challenged by legal advice.

As a result, some investigators feel uncomfortable and consider the aid of counsel as an obstacle to smooth interrogation. Then, the most shocking crimes committed by the Aum came to light. In these particular circumstances, some pre-indictment activities by defense attorneys were severely blamed to have overstepped the bounds of propriety in seeking to obstruct investigation. One case has led to disciplinary proceedings.

It is the activities by attorneys who belong to "the Miranda Association" (active group of lawyer supporting the so-called Miranda rights) that the most severe condemnation has been targeted at by the prosecution.

They are convinced that the ongoing practice in obtaining a confession from a suspect who is held incommunicado and actual practice for investigators to prepare a summarized confession statement instead of a verbatim account of the suspect's words are strongly against the constitutional rules which require voluntariness of confession under the protection of the right of silence. They are also convinced that attendance at interrogation sessions by defense counsel should be inevitable in achieving the goal of the right of silence, which the United States Supreme Court found in the Miranda Case.

In actual practice, however, defense attorneys are never permitted to attend interrogation sessions.

Then, they have adopted an alternative way to advise the suspect to refrain from signing any written statement if his request seeking the attendance of counsel is rejected. This tactic has had a great impact on the traditional way of thinking. It makes it clear that it is not the investigator but the defendant that has the ultimate powers to decide whether the defendant's written statements are admissible as evidence to the court.

For, the Code of Criminal Procedure in Japan requires the signature and seal of the defendant when his written statements can be used as evidence against him, unless the defendant or his counsel gives consent to the documents.

The prosecution, on the other hand, considered these challenging tactics to be an interference with the prosecutor's investigation and blamed the attorney concerned for abuse of procedural rights.

II. *"Proper Defense" Asserted by the Ministry of Justice*

These cases of confrontation between the prosecutor and the defense counsel have generated issues of what is "proper defense."

The Ministry of Justice is keen to show its ideal model to the Bar, which is followed by supporting messages from the chief of each district public prosecution office, editorial articles and opinions even in the academic forum.¹

"Proper defense" the Ministry of Justice is now thinking is as follows:

Article 1 of the Code of Criminal Procedure stipulates that, "The purpose of this law is, regarding criminal cases, to clarify the true facts of cases and to apply and realize criminal laws or ordinances fairly and speedily, while thoroughly accomplishing the maintenance of public welfare and security of fundamental human rights of individuals."

In sum, the first is to clarify the truth, which means to pursue a substantive truth. In other words, its purpose is to avoid making a mistake to punish an innocent person. The second is to punish an offender with the appropriate sanction and the third is to stick to the principle of due process of law.

Therefore, the criminal justice officers have not only the negative obligation not to intrude

¹ See, e.g., Hiroshi Ozu (Director of the General Affairs Division of Criminal Affairs Bureau, Ministry of Justice), 55 Horitsufujo Dayori (Legal Aid Journal) 6 (1997).

on the human rights of individuals, but also a positive responsibility to maintain public order through the informal administrative fact-finding process followed by speedy and proper punishment.

Article 1 of the Lawyers Law (or Attorneys Act) stipulates that lawyers shall endeavor to maintain public order and improve the legal system.

Therefore, "proper defense" activities mean that defense counsel, as a member of the administration of criminal justice, would be cooperative with the authorities in the fact-finding process and protect "legitimate interests" of the accused. As a consequence, the criminal justice authorities and the attorneys should reconcile investigatory activities purporting the purposes mentioned above and defense activities protecting the accused's human rights by mutual understanding of both the role of defense counsel and the importance of discovery of substantive truth.

In summary, since both the prosecutor and the attorney are the same agents as officers of the court whose responsibility is to clarify the truth, defense attorneys can protect only "legitimate interests" of the accused without interfering with the investigation.

III. *History of the Discussion on the Duty of Loyalty to the Client*

It is not a new idea that defense counsel should play a cooperative role in the fact-finding process in favor of the state. One of the typical explanations is the "ellipse doctrine".²

An ellipse has two focuses. Similarly, defense counsel have also two focuses upon which defense activities depend. A focus based on the responsibility of an independent agent of the administration of justice on the one side, and another based on the confidential relationship between the lawyer and the client on the other.

The defense counsel are always in a fundamental dilemma as to whether to be candid with the court or to be loyal to the client between the two competing focuses.

According to the textbook 'Criminal Defense Practice --- 4th edition' used 25 years ago for legal trainees during the course of legal apprenticeship, it is clearly described that defense attorneys have a role to be cooperative with the court in the fact-finding process.

It continues that, in this sense, they have a public or social status, they have the duty to clarify the true facts in accordance with protection of legitimate interests of the accused. For example, if the defense attorney comes to know that the defendant is acting as a substitute for a real criminal, he should reveal the truth to the court.

This instruction, apparently, acknowledges that the third principle shall be superior to the second of the three basic principles by Professor Monroe Freedman.

By contrast, according to the new textbook published in 1993, this example and instruction are completely deleted. Only the general guideline says that the defendant's proper interests which defense counsel should protect are to try to find the truth in favor of the accused and to watch the performance of due process.

Therefore, in case of the previous example, defense counsel should stick to the duty of confidentiality to keep privileged communications, not to the duty to be candid with the court.

This conclusion, on the contrary, shows that the second principle shall be superior to the

² See, Masao Ohno, *Daen no Ronri* (Logic of Ellipse), 528 Hanrei Taimuzu 7(1984).

third one by Prof. Freedman.

I gather that substantial change in understanding the role of defense counsel must have caused the balance to shift between the two focuses. In other words, as the idea of the adversary process is gaining familiarity within the legal profession, especially among attorneys, the understanding of the role of defense counsel has been changed from one of being an officer of the court to be cooperative in the fact-finding process to 'a hired gun' for the defendant who is the original party.

Two focuses of the ellipse doctrine are equally synthesized in theory, but in practice, emphasis has been gradually put on the point based on the confidentiality of the lawyer-client relationship, and the other point based on the public nature of officers of the court has been understood as an aspect of the defense right exercised by the counsel in the adversary process, rather than as an independent focus.

It is to protect the client's interest with complete loyalty that defense attorneys are expected to act as juridical agents in the administration of justice.

This argument, as a matter of course, reaches the assertion that defense counsel have no duty to uncover the truth. Emphasis is put on the duty to be loyal to the client from the viewpoint of what can be done for the defendant's benefit.

Let's follow the argument. Defense counsel have only duty to be loyal to the client on the basis of the confidentiality of privileged communication. They do not have any duty to be candid with the court in the fact-finding process at trial. Nor have they any duty to be cooperative with the investigating authority who is the opposite party in the adversary system.

Under the current legal regime, counsel are only requested to perform in accordance with the rules and due process of law.

On the other hand, the prosecutor will be very keen in pursuit of the true facts of the case because the prosecutor has a heavy burden of proving "beyond a reasonable doubt" in the adversary system.

Therefore, defense counsel have a negative obligation not to interfere with the prosecutor's investigation, but they do not have a positive responsibility to discover the substantive truth against the defendant.

I support this conclusion. The concept of the duty to be loyal to the client contains a broader meaning than the duty of confidentiality guaranteed by law enforcement. We call this broader duty "the duty of loyalty to the client."

This naming is supported by many legal documents.

For example, Article 1.2 of the Lawyers Law (Attorneys Act)³ or Principle 15 of Basic Principles on the Role of Lawyers by United Nations⁴, or Article 9 of Code of Attorneys Ethics by Japan Federation of Bar Associations.⁵

All of them have focused on the lawyer-client relationship as the most essential part of the Criminal Justice system.

Now, I will try to answer the three most difficult questions raised by Prof. Freedman from this viewpoint.

³ Article 1.2: "Lawyers shall perform loyally their legal activities."

⁴ Principle 15: "Lawyers shall always loyally respect the interests of their clients."

⁵ Article 9: "Attorneys shall always devote their best efforts to performing of their defense activities in order to protect the proper interests of the accused."

Question 1: The answer is the same as Prof. Freedman's.

Defense counsel should try to persuade the defendant not to tell a lie, not because they have the duty to clarify the truth, but because it is counsel's duty as legal experts to make him understand that the court will never be deceived by such a false story. However, if he insists on telling a lie, counsel have no choice but to make him tell his story in a disinterested manner as usual and to represent him on that result.

It is the defendant himself that has the final decision powers to decide how to defend himself.

Question 2: It is also counsel's duty to cross-examine a prosecutor's witness to determine the credibility of its testimony even if the counsel thinks it to be truthful.

Because, the truth on which the Criminal Justice depends in the adversary system is not something like an absolute truth, but a presumptive truth created by numerous pieces of facts coming up through the filter of due process of law. (We call this concept of the truth 'litigational truth').

In the adversary process, there are plural viewpoints from different positions, the prosecution and the defense. Only the facts coming up through mutual criticism from both sides can be regarded as a "truth." It might be different from the absolute truth.

Therefore, it is necessary for defense counsel to determine the credibility of the witness as the performance of the duty of loyalty to the defendant.

Question 3: The duty of loyalty, however, is not unlimited. Of course, it is not allowed for counsel to commit a crime or breach a rule underlying the adversary system. Counsel must avoid becoming involved in any crime as an accomplice by their legal advice.

Even so, it is worth noting that counsel are expected to give the client legal advice regarding the matter and an explanation about the possible effect of the selection. In this connection, the defendant's right of self-determination is also a key to solve this question.

I do not think that any defense counsel who gives his client advice will necessarily breach the ethical rules even though the advice will lead to the committal of a crime afterwards.

As the preceding discussion shows, these solutions seem inevitable to me so long as we remain confined by the idea of the adversary system, because the role of defense counsel is regarded as 'a hired gun' which is an essential attribute of the adversarial process.

Then, is this core value of defense counsel shared by the legal profession engaged in criminal justice in Japan? The answer is 'No'. Unfortunately, the adversary system in a real sense has not been rooted into the Japanese practice where the ideology of principle of substantive truth is still dominant to due process of law. The assertion of 'proper defense' by the Ministry of Justice is a typical manifestation. What is worse, even Bar Associations have failed to achieve consensus on the role of defense counsel among practicing attorneys. To my regret, it reflects a lack of acknowledgment of the defendant's status as a defense party with autonomy and dignity.

IV. Characteristics of Japanese Criminal Justice

After World War II, Japan adopted the American adversary system in form under the newly established Constitution. In order for the system to function, it was inevitable to provide premises such as

- ① a complete guarantee of the right to counsel
- ② a formal, adjudicative, adversary fact-finding process in open court.
- ③ Complete discovery and disclosure of the prosecutor's evidence.

Yet, these fundamental reforms have still not been fully accomplished.

As a result, the criminal justice authorities, especially the prosecutor have the superior strength of the powers, causing Japanese practice, the so-called 'pseudo-adversary system' (or 'quasi-adversary system').

In sharp contrast to American practice, it is characterized by these facets.

- ① thoroughgoing investigation to explore the suspect's personal circumstances and character.
- ② Prosecution with certainty of conviction through the wide discretion with respect to whether or not to prosecute.
- ③ Trial by dossier etc.

Professor Daniel Foote labels Japanese Criminal Justice "the Benevolent Paternalism", pointing out that its goal is to achieve reformation and reintegration into society of the defendant on basis of an ethos of 'specific prevention'.⁶

In summary, once having a sincere confession evidencing acceptance of moral responsibility from the suspect through intensive interrogation, the Japanese officers turn benevolent in achieving the suspect's reformation and reintegration within discretion over deposition of cases.

Prof. Foote imagines that the Almighty Nation like Father with both severity and benevolence would clarify the truth.

And, he puts a very fundamental question towards proposals of reforms by Bar Associations, "Whether the proposed reforms are compatible with the animating premises of the existing system?"⁷ --- that is to say, a paternalistic approach to get at the 'truth' through intensive investigation and questioning.

For example, he predicts that any proposed limits on questioning will fail because inducing a 'confession' from the suspect is a crucial means of achieving the repentance and moral catharsis which are essential elements in the reformation of the accused.

With respect to the role of defense counsel, he insists that emphasis on the adversary process in ensuring due process by Bar Associations seems to lack internal consistency with actual practice in defense activities because the primary duty of defense attorney in Japan turns out to be cooperative in fact-finding and constructive in aiding the suspect's rehabilitation process.

In sum, so long as the core idea supporting Japanese practice is the national desire to demand the truth through inquisitorial interrogation by the authorities, any activities by defense counsel are regarded as useless - even harmful - to the prosecutor who are vested great powers to scrutinize all relevant evidences - of innocence or guilt.

⁶ See, Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 Cal. L. Rev. 317 (1992).

⁷ *Id.* at 377.

V. Difference of the Circumstances Surrounding Ethical Issues Between Japan and the United States

Apart from whether the “benevolent paternalism” model labeled by Prof. Foote is appropriate to Japanese Criminal Justice, we have to admit the reality in practice he pointed out. Although it is said repeatedly that the Japanese system is distinctly adversarial in form, the inquisitorial approach in pursuit of the substantive truth still remains dominant in practice.

Now I am convinced that the reason why the activities by “the Miranda Association” have been severely condemned by the prosecution is not because they constitute any breach of ethical rules, but because there is a more fundamental collision between the ‘pseudo-adversary system’ and the ‘real adversary system’.

What “the Miranda Association” wants to realize is to facilitate the defendant to exercise the right of silence and to get back the defendant’s right of self-determination to put his written statement into the court as evidences against himself.

In other words, defense counsel urge the investigating officers to accept the suspect’s status with autonomy and dignity as a defense party.

In the United States, ethical issues appear to be very personal and subjective matters such as how to reconcile the ‘truth’ the counsel know with the duty of confidentiality on the immobile premise of the lawyer-client relationship as ‘a hired gun’.

While in Japan, whether defense attorneys play a role as ‘a hired gun’ in general is most controversial in ethical issues.

VI. How to Achieve Consensus on the Role of Defense Counsel

According to the preceding discussion, it is clear that the most important task for the attorney to tackle is to establish the adversary system in reality, notwithstanding the negative predictions of the reforms by Prof. Foote. In order to make the reform come true, the ‘pseudo-adversary system’ is precisely the target that we must challenge and overcome by replacing the real adversary system.

In this connection, it is crucial to reach a consensus on the role of defense counsel among the legal profession, because it is counsel that have the key to make the adversary system function in a real sense.

In my view, it seems most important for us to prove, not in rhetoric but by facts, that to perform loyally to the client means at the same time to achieve the public role of essential agents in the administration of justice.

We understand that an attorney who represents a particular defendant promotes at the same time rights of every citizen because everyone in the community may be a defendant and that defense activities by the attorney to protect the due process of law are inevitable to acquire public faith in the propriety of Criminal Justice.

But how can we persuade the opponents by proving it in a tangible way?

Professor Akira Goto points out that defense counsel can make criminal perceive the merits of the legal system.

“counsel who vigorously advocate the defendant’s right can show them that the legal system not only oppresses them but also protects them. If a criminal realizes this function of law, it may change his behavior”⁸

These cases piled up are clean evidence in proving the important role of counsel by facts.

And if the Japanese criminal justice authorities fail to give up the traditional way of thinking such as the paternalistic approach in the fact-finding process and the obsession of certainty of punishment, effective external checks by defense counsel are inevitable to avoid increasing possible miscarriages of justice.

These activities are another tangible proof of the public role of the counsel in ensuring the state interest not to punish an innocent person.

The ethical issues are deeply connected with the understanding of the role of defense counsel. Prof. Feeney has made it clear in his presentation that even in the United States, the constitutional right of counsel has been criticized in the context of ethics, and the battle is not won.

As mentioned earlier, here in Japan, a more fundamental issues of the role of counsel in the adversary system has been focused in the severe controversy. The battle in establishing the defendant’s right to counsel and a real adversary system has just begun.

I gather that many obstacles lie in front of us in achieving the goal for the reform from the pseudo-adversary system to the real one.

Nevertheless, I am very much convinced that today’s symposium will be the first step for the reform of Japanese Criminal Justice.

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⁸ See, Akira Goto, *The Right to Counsel and Roles of Attorneys in Japan*, 9.4 Hogaku Ronshu (Chiba Journal of Law and Politics) 200 (1995).