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WRONGFUL CONVICTIONS AND RECENT CRIMINAL JUSTICE REFORM IN JAPAN

*Kazuko Ito**†

I. INTRODUCTION

“The Japanese criminal justice system is rather hopeless.”¹ This famous diagnosis given by the Japanese criminal law scholar Ruichi Hirano in 1985 provoked a huge sensation among the judiciary because his remark revealed the truth of the Japanese criminal justice system. Even after this remark, the Japanese criminal justice system has been judged as “hopeless” in the context of defendants’ human rights and the principle of the “presumption of innocence.” The Japanese jury system was suspended before World War II and was never revived. Bureaucracy inhibits the Japanese judiciary so that it keeps courts from taking the role of the “justice for people.”

In response to several criticisms toward the Japanese judicial system, the Japanese government commenced a comprehensive judicial reform in 2000.² As one of the reform projects, a bill was enacted in 2004 to introduce a quasi-jury system (the so-called *Saiban-in* system) and to

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1. Ryuichi Hirano, *Genkō keijisoshō no shindan [Diagnosis of Current Criminal Procedure]*, in DANDŌ SHIGEMITSU HAKUSHI KOKI SHUKUGA RONBUNSHŪ [COLLECTION OF WORKS TO COMMEMORATE THE SEVENTIETH BIRTHDAY OF DR. SHIGEMITSU DANDO] 407, 407 (Yasuhara Hiraba et al. eds., 1985), translated in 22 *LAW IN JAPAN* 129, 129 (1989).

2. Judge Sabrina McKenna described the Judicial Reform Council as a council created in mid-1999 comprised of law professors, professional attorneys, university presidents, an author, and the Secretary General of the Housewives Association. The mandate of the JRC is “to clarify the appropriate role of the justice system in the twenty-first century, and to investigate and consider fundamental measures necessarily related to the realization of a justice system that is more user-friendly to citizens, allow for participation of citizens in the justice system, considers, improves and strengthens ideals for the legal profession, as well as related reforms and fundamental requirements of the justice system.” Sabrina McKenna, *Proposal for Judicial Reform in Japan: An Overview*, 2 *ASIAN-PAC. L. & POL’Y J.* 20, 132-133 (2001).

revise the Code of Criminal Procedure.³

This new system has come into force in 2009. This is the first time since the end of the World War II that Japan has introduced a system of citizens' participation in the court system.

However, although this system includes several progressive aspects, we cannot achieve comprehensive criminal justice reform through the reform process in terms of human rights and the prevention of wrongful convictions of innocent people. This study describes the reality and causes of wrongful conviction as well as the recent criminal justice reform process in Japan. It also argues for the next agenda to prevent wrongful convictions and to incorporate international human rights standards into the Japanese system.

II. OVERVIEW OF THE JAPANESE JUSTICE SYSTEM

A. History

In 1890, Japan set forth its first Code of Criminal Procedure, based on Germany's traditional civil law system.⁴ This system didn't employ an adversary system, nor did it incorporate due process or human rights protections. However, in the wake of the elevated democratic movement during the Taishou Era, the Japanese government introduced a jury system in 1928.⁵

Although only men could be jurors, and jury verdicts had only an advisory character, the introduction of the jury system was epoch-making for the modernization of the Japanese criminal justice system. Japan's judiciary employed this jury system until 1943 when the government decided to suspend it.⁶ Due to the number of men mobilized during World War II, the government decided that there was no capacity to continue the jury system.

After Japan's defeat in World War II, Japan established the New Constitution, which articulated human dignity, democracy, human rights, and the independence of the judiciary as main principles.⁷

As for criminal procedure, the former Code of Criminal Procedure was modified to incorporate the principle of due process, a fundamental bill of rights, and an adversary model of procedure, all of which were

3. KEISOHŌ [C. CRIM. PRO.] 2004 (Japan).

4. KEISOHŌ [C. CRIM. PRO.] 1890 (Japan).

5. BAISHINHŌ [JURY SYSTEM ACT] 1923 (Japan); Baishinho no Teishi ni Kansuru Horitsu [An Act to Suspend the Jury Act] 1943 (Japan).

6. While some critiques argue this jury system did not establish in Japanese Society, other critiques emphasize its positive aspect.

7. See KENPŌ [CONSTITUTION] 1946 (Japan).

influenced by common law.⁸

The new justice system started as a safeguard for human rights and inspired significant public hope. Tadahiko Mibuchi, the first president of the Supreme Court, articulated the following in his inauguration:

“Under the democratic Constitution, the judiciary must be a thoroughly honest tool for the people. The Constitution demands judges to deny completely their bureaucratic status that they had under the old Constitution.”⁹

However, in practice Japan’s judicial system ended up far from its aspiration of being the “court for the people” and has found itself deeply hampered by the malady of bureaucracy. The reasons may be analyzed as follows.

The jury system did not revive after WWII, and since that time, all judicial decisions have been made by professional judges without any citizen participation until the *Saiban-in* system was introduced in 2009.

At the same time, most Japanese judges have been appointed from a pool of young legal trainees who had passed the national bar examination only around two years before their appointment. Once such young elites are appointed as judges, they are trained and groomed as professional judges within a career system operated by the Supreme Court, without any social experience and little attachment to society. Elites kept apart from society for the length of their careers can hardly understand the real world, ordinary people’s lives, or common sense.

In addition, the Judge-Appointment system has sometimes been managed arbitrarily. In the 1970s, for example, the Supreme Court started rejecting the appointments of many judicial candidates and discriminating against several judges in terms of promotion and compensation because of membership in a lawyer’s association that was promoting judicial activism.¹⁰ Such control measures by the Supreme Court had a chilling effect on the entire judiciary.¹¹

As a result, the Japanese judiciary lost its initial aspirational vision and became bureaucratic. For example, the percentage of plaintiff victories in lawsuits against the government—which used to be approximately 10% in the late 1960s—dropped to 2%-3% in the period

8. KEISOHŌ [C. CRIM. PRO.] 1948 (Japan).

9. Tadahiko Mibuchi, Inauguration Speech (Aug. 4, 1947).

10. The Youth Lawyer’s Association was established by leading Japanese scholars and young lawyers in 1954, and has been promoting judicial activism ever since. In 1971, the Supreme Court started rejecting the appointments of judge candidates who had membership in this association.

11. In addition, the Supreme Court rejected the re-appointment of Judge Yasuaki Miyamoto because of his membership of Youth Lawyer’s Association in 1971. In 1994, the Supreme Court rejected the appointment of a legal trainee Fuyuki Kamisaka because of his background such as plaintiff of Constitutional Litigation. In 1998 Supreme Court affirmed the inner punishment toward Judge Kazushi Teranishi because of his participation in a civic meeting against Wire-Tapping Act.

from 1980 to 2000.¹² In criminal justice, the acquittal rate has been decreasing and has become less than 1% in recent times.¹³

B. A Serious Problem in Criminal Justice

After WWII, the Code of Criminal Procedure was drastically revised in 1949 in accordance with the 1946 Constitution. Article 1 of the Code of Criminal Procedure recognized the purpose of criminal justice as both finding truth and guaranteeing human rights. On the basis of the American model, the 1949 Code incorporated the adversary system, due process, and human rights such as the right to remain silence, the right to defense, the right to counsel, and the principle of a presumption of innocence.¹⁴

According to the Court Act enacted after WWII, the tasks of professional judges include presiding, fact-finding, sentencing, and applying and interpreting statutes in criminal proceedings. According to the law, three judges preside in felony cases; one judge presides in misdemeanor cases.¹⁵

In spite of the progressive reforms of the Code of Criminal Procedure, the Japanese criminal justice system has been evaluated as “hopeless.”

1. Fact-Finding

In Japan, without any citizen participation in trial procedures, only judges had the power to decide guilt until the *Saiban-in* system was introduced in 2009. Although the Japanese Code of Criminal Procedure prescribes the principle of a presumption of innocence,¹⁶ it is very formalistic with little effect in practice. In Japan, astonishingly, the conviction rate is more than 99.0 percent.¹⁷

Judges tend to rely on the prosecutor’s argument. One arguable explanation for this tendency is the frequent exchange of personnel between judges’ and prosecutors’ offices. Judges sometimes become prosecutors or officers of the Ministry of Justice. We also sometimes find that the conviction judgment runs contrary to common sense. Critics argue that it is natural for judges to trust people within their same bureaucratic circle, rather than the defendants who are usually living in a

12. The Resolution for Judicial Reform, JFBA 39th General Assembly (May 25, 1990).

13. *Id.*

14. KEISOHŌ [C. CRIM. PRO.] 1948 (Japan).

15. SAIBANSHO HŌ [COURTS ACT] 1947, art. 26 (Japan).

16. KEISOHŌ [C. CRIM. PRO.] 1948, art. 336 (Japan).

17. Japan Federation of Bar Associations, *Proposal for the Criminal Justice Meeting People’s Expectation*, at 4 (July 25, 2000).

completely different society from elites.¹⁸

2. Structural Problems

Hirano said, “In Western countries, the court is the place where guilty or not guilty is judged, whereas in Japan, the court is the place where guilty is confirmed.”¹⁹

According to Hirano, the root of the problem stems from the focus of criminal justice being on the investigation and interrogation of defendants instead of on trials. This has led to the preeminence of defendant statements as well as an obsession with self-incrimination and long custodial interrogations.

a. Pretrial Interrogation and Custodial Interrogation

If a person is arrested in Japan, the person can usually be detained twenty-three days under the control of police authority.²⁰ Within these twenty-three days, suspects have been obliged to face interrogation in a confined, locked room with neither electronic monitoring systems nor any Miranda warnings. The attorney is not permitted to attend the interrogation. Continuing an interrogation for more than eight hours is a common practice.

The former Japanese Supreme Court Justice, attorney Masao Ouno, described his experience as a defense attorney of a Tokyo Art University professor in a 1981 case:

During 16 days from arrest to the end of interrogation, I could meet the professor, my client, only 7 times, each 20–30 minutes, totaling 3 hour 15 minutes. On the contrary, the prosecuting attorney interrogated him all day long every day. The sum of the interrogation totaled 161 hours and 17 minutes, averaging 8 hours and 50 minutes per day. Interrogation ended later than 10pm on 9 days.²¹

18. Kaku Imamura, ENZAI TO SAIBAN [WRONGFUL CONVICTION AND COURT PROCEDURE] (2012, Kodan sya); Toshiki Odanaka, ENZAI HA KOUSITE TSUKURARERU [THE CAUSE OF WRONGFUL CONVICTION] (1993, Kodan sya); Kenzo Akiyama, SAIBANKAN HA NAZE AYAMARUNOKA [Why Judges Make Wrong Decisions] (2002, Iwanami Shoten).

19. Hirano, *supra* note 1.

20. In accordance with article 60 of the Code of Criminal Procedure, police can restrain suspects within three days by writ of arrest. Judges can issue the writ of pre-trial detention which empowers detention of suspects within ten days upon a prosecutor’s request when the danger of escape or manufacture of the evidence can be recognized. This detention can be extended no more than ten days. However, the percentage of the dismissal of writs made by judges has been less than one percent. In 1996, the dismissal of the writ of arrest was 0.02%, and the dismissal of the writ of pretrial detention was 0.31%. See Tsuyoshi Takagi, Report for the criminal justice meeting people’s expectation, JRC 25 Sess. (July 11, 2000).

21. Ouno Masao & Yasuo Watanabe, *Shine and Shadow of Criminal Justice* (1989) (Yuhikaku).

Such practice undermines a suspect's right to be silent and leads to misconduct and torture, and ultimately to coerced and false confessions.

Confessing is the only way for suspects to escape from prolonged detention and endless interrogations. It is as if suspects themselves are taken hostage by police, and the condition of release offered by police is to "tell the truth," which really means, "confess, no matter whether true or false." Thus, the Japanese criminal justice system is sometimes described as "hostage-taking justice."

b. Misconduct

Police interrogations sometimes entail serious misconduct to force self-incrimination. In many Japanese wrongful conviction cases, exonerated innocent people claimed police misconduct such as verbal violence, intimidation, psychological pressure, coercion, and deceit.²² Such circumstances naturally force a significant number of false confessions.²³

c. The Preeminence of Confessional Statements

The Japanese constitution and law provide safeguards to prevent wrongful conviction based on confession.

Article 319 of the Code of Criminal Procedure prescribes the following:

- (1) Confession under compulsion, torture, threat, after unduly prolonged detention or when there is doubt about it being voluntary may not be admitted as evidence.
- (2) The accused shall not be convicted when the confession, whether it was made in open court or not, is the only piece of incriminating evidence.²⁴

Article 38 of the Japanese Constitution states the same principle.²⁵ In practice, however, self-incriminating statements made under the foregoing practices have become the main source of evidence for

22. For instance, the author defended 5 defendants in Chofu Station case. The Supreme Court found indictment was illegal (September 18, 1997), and the Tokyo appeal court found all defendants not guilty (December 12, 2001). All the defendants who once confessed complained police coercion and deceit (5 defendants submitted statements with regard to the interrogations).

23. As for 4 innocent-death cases which the author will discuss later, the period from arrest to confession was 113 days in Saitagawa case, 5 days in Menda case, 5 days in Matsuyama case, and 3 days in Shimada case. In all these cases, defendants were detained in the supplemental detention center where long interrogations were conducted until after midnight and confessions were eventually obtained.

24. KEISOHŌ [C. CRIM. PRO.] 1948, art. 319 (Japan).

25. KENPŌ [CONSTITUTION] 1946, art. 38 (Japan).

convictions in Japan.²⁶

As common Japanese practice, until recently, prosecutors submitted an enormous number of statements. Despite the principles prescribed in Article 38 of the Constitution and Article 319 of the CCP, most judges rely excessively on confessions as proof of guilt. Although substantial defendants contend at their trial that their confessions were forced under pressure, intimidation, or deceit, judges find the confessional statement admissible and reliable in most cases.

The preeminence of confessional statement seems to be a pervasive epidemic within the Japanese judiciary. Thus, statements made in police interrogations control the entire criminal justice system, and, as Hirano said, trials become “the place where guilty is confirmed” based on police interrogations.²⁷

d. Lack of Disclosure to Defendant

Furthermore, until the revision of the Code of Criminal Procedure in 2004, the Code had no provision that requires the prosecution to disclose evidence, including exculpatory evidence and the defense had no general right to ask the prosecutors for disclosure.²⁸

In 1969, the Japanese Supreme Court recognized that courts can order prosecutors to disclose particular evidence to defendants as part of their power of presiding.²⁹ However, in accordance with this ruling, courts were able to make such orders only under the following conditions:

- 1) disclosure is especially important for the right of defense and,
- 2) there is no danger of either destruction of evidence or a threat toward witnesses and,
- 3) disclosure can be recognized as adequate.

Usually, judges were unlikely to find all of abovementioned conditions fulfilled. In addition, courts recognized that the decision whether a judge should order disclosure or not belongs to the wide discretion of judges.

Under such conditions, Japanese defense attorneys have been having a hard time obtaining affirmative evidence seized by police and in the

26. The United Nations has observed this phenomena and recommended measures be taken to avoid it. U.N. HUMAN RIGHTS COMMITTEE, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding Observations of the Human Rights Committee: Japan, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008).

27. Hirano, *supra* note 1.

28. U.N. HUMAN RIGHTS COMMITTEE, Concluding Observations of Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add. 102 (Nov. 19, 1998).

29. Saiko Saibansho [Sup. Ct. 2d Petty Bench] Apr. 25, 1969, (Japan).

control of prosecutors. The history of Japanese wrongful conviction cases clearly shows that one of the main reasons for wrongful convictions was the concealment of exculpatory evidence by prosecuting attorneys. Famous wrongful conviction cases such as *Matsukawa*, *Oume*, *Matsuyama*, *Saitagawa*, and the *Tokushima radio-shopkeeper* cases showed that disclosure of evidence possessed by the prosecutor is a key element in the reversal of wrongful convictions and findings of innocence.³⁰

The UN Human Rights Committee accurately described the foregoing Japanese practices and expressed deep concern of the violations of the International Covenant on Civil and Political Rights (ICCPR) in their Concluding Observations in its Sixty-fourth session:³¹

21. The committee is deeply concerned that the guarantees contained in Articles 9, 10 and 14 are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-days period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defense counsel under Article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect.

23. The Committee is concerned that the substitute prison system (Daiyo Kangoku), though subject to a branch of the police which does not deal with investigation, is not under the control of the separate authority. This may increase the chances of abuse of the rights of detainees under article 9 and 14 of the Covenant. The Committee reiterates its recommendation, made after consideration of the third periodic report, that the substitute prison system should be made compatible with all requirements of the Covenant. . . .

25. The committee is deeply concerned about the fact that a large number of the convictions on criminal trials are based on confessions. In order to exclude the possibility that confessions are extracted under duress, the Committee strongly recommends that the interrogation of the suspect in police custody or substitute prison be strictly monitored, and recorded by electronic means.

26. The Committee is concerned that under the criminal law, there is no

30. Especially, in *Matsukawa* (1949), the prosecuting attorney was concealing a memo written by a third party which showed the defendants' alibi clearly (this famous memo was called '*Suwa memo*') and this memo turned out to be a key element for the Supreme Court to reverse the convictions and death sentences and acquit all 20 defendants (Sept. 12, 1963).

31. U.N. HUMAN RIGHTS COMMITTEE, Concluding Observations of Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add. 102 (Nov. 19, 1998).

obligation on the prosecution to disclose evidence it may have gathered in the course of the investigation other than that which it intends to produce at the trial, and that the defense has no general right to ask for disclosure of that material at any stage of the proceedings. The Committee recommends that, in accordance with the guarantees provided for in Article 14, paragraph 3, of the Covenant, the State party ensure that its law and practice enable the defense to have access to all relevant material so as not to hamper the right of defense.

In 2008, the Human Rights Committee reiterated its grave concern on criminal justice in Japan in its Ninety-fourth session.³²

The Committee notes with concern the insufficient limitations on the duration of interrogations of suspects contained in internal police regulations, the exclusion of counsel from interrogations on the assumption that such presence would diminish the function of the interrogation to persuade the suspect to disclose the truth, and the sporadic and selective use of electronic surveillance methods during interrogations, frequently limited to recording the confession by the suspect. It also reiterates its concern about the extremely high conviction rate based primarily on confessions. This concern is aggravated in respect of such convictions that involve death sentences (arts. 7, 9 and 14).

The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance, ensure the systematic use of video recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations, with a view to preventing false confessions and ensuring the rights of suspects under article 14 of the Covenant. It should also acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations.

In spite of the Human Rights Committee's grave concern, the practice has continued for more than 10 years. Neither prosecutors nor courts have reviewed their practice.³³ There is almost no implementation of recommendations made by the UN human rights body.

3. Wrongful Convictions

Because of these structural illnesses of Japanese criminal justice, Japan has witnessed significant numbers of wrongful convictions against

32. U.N. HUMAN RIGHTS COMMITTEE, Consideration of Reports Submitted by States Parties Under Article 40 of the Covenant Concluding Observations of the Human Rights Committee: Japan, U.N. Doc. CCPR/C/JPN/CO/5 (Dec. 18, 2008).

33. Even since 1998, the foregoing practice has not changed.

innocent people.

From 1983 to 1989, four death row cases, *Menda* case, *Saitagawa* case, *Shimada* case and *Matsuyama* case were recognized as wrongful conviction cases by the Japanese court, and four innocent people were exonerated from death row, which called for social rethinking.³⁴ The defendants spent between twenty-eight and thirty-three years in prison before their vindications.³⁵ All of the defendants were forced to confess after long, coercive police interrogations. In addition to these cases, Japanese society recognizes at least 50 serious, and famous, wrongful conviction cases in which defendants were finally exonerated in the wake of long struggles.³⁶

Nevertheless, wrongful convictions have not ended. The Japan National Relief Association,³⁷ for example, is currently helping 20 wrongful conviction cases, most of which are defendants sentenced to the death penalty or to life sentences.³⁸

I would now like to describe a victim of the foregoing Japanese practices. Masaru Okunishi, 86 years old, has been on death row since 1969 and is a victim of the foregoing Japanese practices.³⁹

On March 28, 1961, in a village on the border of Mie prefecture and Nara prefecture in Japan, five women were killed and twelve women injured by poisoned white wine served at a reception of village anniversary meeting held at the village community center.

Although there was no evidence linking Okunishi to this tragedy, he was restrained without any writ of arrest and forced to submit to coercive interrogation in a confined room at the police department. He was subsequently forced into self-incrimination. Once he confessed, he was formally arrested and, led by police officers, was almost daily forced to make false statements that described the details of the crime. Neither a monitoring system nor any *Miranda* warning was provided

34. *Menda* case (Kumamoto Chihō Saibansho [Kumamoto Dist. Ct.] Jul. 15, 1983, Shō 47 (ta) no. 1, 1090 Hanrei Jihō [Hanji] 21 (Japan)); *Saitagawa* case (Takamatsu Chihō Saibansho [Takamatsu Dist. Ct.] Mar. 12, 1984, Shō 51 (ta) no. 1, 523 Hanrei Taimuzu [Hanta] 75 (Japan)); *Shimada* case (Sizuoka Chihō Saibansho [Sizuoka Dist. Ct.] Jan. 31, 1989, Shō 58 (ta) no. 1, 700 Hanrei Taimuzu [Hanta] 114 (Japan)); and *Matsuyama* case (Sendai Chihō Saibansho [Sendai Dist. Ct.] Jul. 11, 1984, Shō 48 (ta) no. 2, 540 Hanrei Taimuzu [Hanta] 97 (Japan)) are called four innocent cases.

35. From arrest to acquittal, the *Menda* and *Simada* cases took thirty-four years, the *Saitagawa* case took thirty-three years, and the *Matsuyama* case took twenty-eight years.

36. See Zihakuno, *Shinyousei* [*The Credibility of Confession*], SHIHOKENSYUZO [THE LEGAL TRAINING AND RESEARCH INSTITUTE OF JAPAN] (1988) (written by three leading criminal judges and studied 49 exonerated cases where the credibility of the confessions was finally denied).

37. The purpose of the Japanese Civic Organization is to protect human rights, save wrongfully convicted people, and fight suppression.

38. JAPAN NATIONAL COMMITTEE ON RELIEF, <http://www.kyuenkai.gr.jp/>.

39. This case is known as the “Nabari Poisoned Wine Murder Case.” See Amnesty International, *Japan: 40 years on death row*, AMNESTY INTERNATIONAL, Mar. 27, 2012, available at <https://www.amnesty.org/en/news/japan-40-years-death-row-2012-03-27>.

during the entire interrogation. During his more than thirty days of custodial interrogation, he had not been allowed counsel with an attorney.

Because of his innocence, Okunishi's forced statements were incoherent and lacked objective corroboration. However, relying on the self-incriminating statements, the prosecutor indicted him without any material evidence. Some witness testified that only the defendant had a chance to poison the wine, but these witnesses' statements and testimonies changed over time and were in contradiction with other witness statements. In the wake of the three-year trial, the Tsu District Court, the first-instance court of this case, acquitted the defendant in 1964.⁴⁰ The court found that the self-incriminating statements were incoherent and not credible, and that the statements of other witnesses were "the fruits of the prosecutor's great effort."

The prosecutor responded to the trial court verdict by appealing on the claim of an error in fact-finding in accordance with the Code of Criminal Procedure, which allows appeals of not-guilty decisions. In 1969, the Nagoya Appeal Court reversed the trial court's decision, finding the defendant guilty and sentencing him to death.⁴¹ The appeal court declared that both the defendant's statements and the witnesses' statements were credible. In the appellate proceeding, the prosecutor submitted false scientific evidence made by a state-appointed scientist. The appeal court found that this evidence was credible and corroborated the defendant's confession. Although Okunishi appealed the case to the Supreme Court, the Supreme Court affirmed the appeal court's decision in 1972.⁴²

Since then, Okunishi, everyday facing the fear of execution, has been claiming his innocence for more than 40 years.⁴³ In the post-conviction litigations, his defense attorneys have proven that the scientific evidence on which the appeal court relied was falsified. Although there are large amounts of evidence and statements held by the prosecutor, presumably including exculpatory evidences, the prosecutor has not disclosed this evidence at all. As noted above, in Japan, a defendant has no right to demand the disclosure of exculpatory evidence, even if his execution is imminent.

In April 2005, in his seventh post-conviction challenge,⁴⁴ Okunishi

40. Tsu Chihō Saibansho [Tsu D. Ct.] Dec. 23, 1964, (Japan).

41. [Nagoya App. Ct.] Sept. 10, 1969, (Japan).

42. Saiko Saibansho [Sup. Ct.] June 15, 1972, (Japan).

43. SHOUKO EGAWA, BUNGEISHUNJYU [THE SIXTH VICTIM] (describing many contradictions of this conviction).

44. The Human Rights Committee of the JFBA recognized Okunishi as a victim of human rights violations and decided to help him as well as create a special committee in 1973. More than twenty attorneys, including the author, set up legal counsel and handled the 5th-7th challenges of post-

finally got an affirmative decision by the Nagoya Appeal Court. Based on new forensic evidence that proved the identification of the poison was erroneous, the court declared that the grounds of Okunishi's conviction were lost and ordered a new trial as well as a stay of execution.⁴⁵ The court found that Okunishi's confession was not reliable, and that new forensic evidence raised reasonable doubt as to his guilt.

However, in 2006, based on the prosecutor's appeal, the Nagoya Appeal Court reversed the decision and denied Okunishi's motion for retrial.

The Appeal Court relied extensively on his confession during the police's custodial interrogation, stating "When a suspect confesses a serious crime without any proven coercion, the confession is voluntarily and reliable." The finding shows how seriously Japanese judges believe in confessions obtained during custodial interrogations. Without learning anything from past wrongful conviction such as the *Menda* case, etc., judge believes confession as if myth.

The defense team of Okunishi put in extensive effort to persuade the Supreme Court that even innocent people provide confessions.⁴⁶ In April 2010, the Supreme Court remanded the case to the Appeal Court based on grave doubt of the conviction.⁴⁷ To date, however, his case is still pending and he is still on death row desperately waiting for a retrial. I wonder who could compensate Okunishi for 50 years of lost life.

This case is only the tip of the iceberg of injustice in Japanese criminal justice. There are many people claiming their innocence in prison and on death row.

IV. INTRODUCTION OF THE *SAIBAN-IN* SYSTEM

A. Comprehensive Reform Proposal

Recognizing the foregoing problems in the judicial system, the Japan Federation of Bar Associations (JFBA)⁴⁸ proposed a comprehensive

conviction procedure. JFBA also helped several serious wrongfully convicted defendants to proceed post-conviction litigation as recognition of defendants' innocence.

45. [Nagoya App. Ct.] Apr. 5, 2005, Heisei 14 (o) no. 1, (Japan).

46. The Center on Wrongful Conviction in Northwestern Law led by Professor Steven Drizin submitted the amicus brief arguing the Appeal Court finding on confession is doubtful based on proven false confessions in the United States. The defense team of Okunishi also submitted Japanese translation of the article Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891 (2004).

47. Saiko Saibansho [Sup. Ct. 3d Petty Bench] Apr. 5, 2010 (Japan).

48. The Japan Federation of Bar Associations (JFBA) is an autonomous body comprised of the fifty-two local Bar Associations in Japan and their members, founded in 1949. Its purpose is the

judicial reform in 1999.⁴⁹

The objective of the reform proposed by JFBA was to drastically transform the bureaucratic justice system into a judicial system for the people. In order to realize the democratic reform of the judiciary, the JFBA proposed two major reforms.

First, JFBA proposed a complete reform of the judicial appointment system. The JFBA demanded that judges should be appointed among experienced lawyers who have been practicing for at least ten years in order to change the bureaucratic character of the judiciary. Second, the JFBA proposed to introduce a jury system in order to realize a democratic judicial system.

B. Expectations Toward the Jury System

The introduction of the jury system had become one of the main objectives of Japanese judicial reform.⁵⁰ Among several styles of civic participation, Japanese civil society supported a jury system for the following reasons.

First, the jury system was assumed to be the most democratic citizen's participation system. In order to transform the bureaucratic judicial system and realize social change in Japanese society through the judicial arena, the jury system was expected to be a strong tool.

Second, the jury system was expected to be a strong vehicle to reform Japanese criminal justice. If ordinary people participate in fact-finding, trial testimony would naturally become the center of fact-finding rather than the large amounts of statements made in the investigation stages.

Third, it was expected that the presumption of innocence would be taken much more seriously in a jury system than in the current system. In the jury system, judges have no power to intervene in the jurors' fact-finding. Judges must concentrate on presiding over trials to ensure the fair operation of the judicial procedures, and they must instruct jurors about the fundamental principle of the presumption of innocence. It was expected that ordinary people living in the same community as defendants would think twice before convicting them.

protection of fundamental human rights under the Japanese Constitution and the realization of social justice.

49. JFBA, SHIHOKAIKAKUZITSUGEN NI MUKETE NO KIHONTEKITEIGEN [THE FUNDAMENTAL PROPOSAL TOWARD REALIZATION OF JUDICIAL REFORM] (1999).

50. In early 1990s, the Supreme Court, led by the chief judge Kouichi Yaguchi, started an extensive research of the jury and lay judge systems. Many judges went to the US and European countries to research citizens' participation systems. However, the Supreme Court did not reach the decision to introduce citizens' participation system into Japan and took a rather negative position toward citizens' participation.

C. Commencement of Judicial Reform

1. Saiban-in System

In the late 1990s, public criticism against the bureaucratic judicial system was escalating, and civil society called for a comprehensive judicial reform that included civic participation. In response to these demands, the Japanese government commenced comprehensive judicial reform and established the Judicial Reform Council (JRC or the Council) in 1999. The Council consisted of law professors, prominent law practitioners, leader of labor unions, members of business sector, women's organizations, journalists, and other experts. Introduction of a citizens' participation system into the courts was one of the biggest issues for the Council.

On June 12, 2001, the JRC issued its final report in which it proposed the creation of a new citizens' participation system, named the "*Saiban-in* system," into the criminal justice. As a result of national debate on structure of the proposed system, in May 2004, the Japanese parliament has enacted a law to introduce the *Saiban-in* system.⁵¹ The basic structure of the *Saiban-in* system is as follows.

a. Saiban-in

Citizens who participate in the criminal judgment are called "*Saiban-in*." The citizens who will be summoned as *Saiban-in* are ordinary people elected randomly by an electoral roll. Like American juries, *Saiban-in* are selected among summoned citizens through a *voir dire* process.

b. Power and Structure of the "Saiban-in" Panel

In principle, three judges and six citizens (*Saiban-in*) constitute a *Saiban-in* panel and together will be involved in the decision-making process of a felony case.⁵²

Both fact-finding and sentencing shall be decided by the three judges and the six citizens. Judges and *Saiban-in* have equal votes and equal voices in their deliberation. The verdict shall be decided by a simple

51. SAIBANIN NO SANKA SURU KEJISAIBAN NI KANSURU HÖRITSU [SAIBANINHÖ] [AN ACT CONCERNING PARTICIPATION OF LAY ASSESSORS IN CRIMINAL TRIALS], (2004) (Japan); K. Anderson and E. Saint, *Japan's Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL'Y J. 233-83 (2005), see also Ingram Weber, *The New Japanese Jury System: Empowering The Public, Preserving Continental Justice*, 4 EAST ASIA L. REV. 125, 126 (2009).

52. In exceptional cases, a panel comprised by one judge and four citizens is proposed.

majority rule. However, verdicts against the defendant shall not be decided by a majority formed by exclusively judges or exclusively *Saiban-in*.

The power of legal judgments, interpretations of the law, and the presiding over trial procedure remains with the professional judges.

2. Evaluation of the New System

To be honest, the composition of the *Saiban-in* system was the fruit of compromise.

First, there was serious debate on the structure of the *Saiban-in* system. JFBA proposed the introduction of an American-type jury system. However, the Supreme Court and the Ministry of Justice strongly opposed the introduction of the jury system and insisted on the judge's involvement in the decision-making process. This resulted in the adaptation of a mixed-panel system of judge and citizens instead of a pure jury system.

Second, the number of judge and citizens in the *Saiban-in* panel was another controversial issue. In this regard, the Supreme Court strongly insisted on preservation of the status quo, namely, the involvement of three judges in the panel. On the other hand, civil society insisted on meaningful and autonomous participation of citizens instead of formalistic participation, and thus demanded an overwhelming majority of citizens on a panel, such as a panel consisting of one judge and eleven citizens. After a long political debate, the governmental committee proposed panels consisting of three judges and six citizens, and this proposal was ultimately adopted by the legislature.

The enactment of the *Saiban-in* system is not drastic enough to change the problems of the Japanese criminal justice system and the bureaucracy of the judicial system as a whole.

First, unlike the jury system in the U.S., the *Saiban-in* system can be dominated by judges' strong opinions. It is anticipated that the three judges will carry much influence in the decision-making process of the panel. Thus, citizens might hesitate to articulate their opinions to three professional judges and would be overly influenced by the judges' opinions.

Second, serious human rights problems throughout the criminal justice system have not been solved. During the reform process, civil society and the JFBA demanded to address the root cause of wrongful convictions, such as custodial interrogations, forced confessions, and the preeminence of statement evidence. In particular, civil society demanded the introduction of videotaping an entire custodial interrogation as well as progressive reform of the discovery rules of

evidence. However, following strong resistance of law enforcement against these reforms, the process failed to address these issues.

Third, the *Saiban-in* system is applied only to felony criminal cases. Regarding civil cases, there is no citizens' participation system.

At the same time, the reform process failed to change judges' appointment system, which was one of the two major proposals of the JFBA. The Supreme Court merely started the appointment of limited numbers of lawyers as judges in local civil and family courts.

In this regard, the reform is far from satisfactory from the perspective of democratizing the bureaucratic judicial system as a whole.

3. Suggestions for the *Saiban-in* System

Despite the deficiency of the reform, the new system is a first step towards improving the "hopeless" criminal court system. The common sense of citizens, if properly introduced into the criminal justice system, can be a vehicle for proper fact-finding and a reconsideration of the presumption of innocence. Furthermore, citizens' participation may facilitate a public rethinking of the illness of the criminal justice system and cause future reform of the system. In this regard, critics requested the following in the operation of the system to further the potential of the system.

First, the new system should realize an "autonomous and meaningful participation" of citizens. Judges should not dominate or lead discussion but let ordinary citizens participate autonomously and positively. The judiciary should make the whole criminal process understandable and accessible for ordinary citizens.⁵³ Judges and attorneys should choose more understandable words in court, modify their bureaucratic and authoritative attitudes, and listen to citizens' opinions with due respect.

Second, citizens' experiences should be utilized to improve the system, such as by changing judges' attitudes toward *Saiban-in* and the courts' treatment of *Saiban-in*. If there is no system to listen to the *Saiban-in*'s voice, the judicial system will never sufficiently improve. If a judge dominates discussion and suppresses the *Saiban-in*'s opinions, nobody can change such practices unless the system introduces a feedback mechanism to hear the *Saiban-in*'s voice. The law requires *Saiban-in* to keep secret the content of deliberation and criminalizes the breach of secrecy;⁵⁴ however, the experience of *Saiban-in* should be

53. In this regard, Japan can learn from jury reform in the United States. For instance, the New York State judiciary continues the effort to reform jury instruction in order to make it more understandable for jurors.

54. SAIBANIN NO SANKA SURU KEJISAIBAN NI KANSURU HÖRITSU [SAIBANINHŌ] [AN ACT CONCERNING PARTICIPATION OF LAY ASSESSORS IN CRIMINAL TRIALS], (2004) (Japan); K. Anderson

opened up as far as possible without threat of penalty.

Third, the fundamental principle of the presumption of innocence should be fully respected in the entire trial process. In order to deliver proper judgment, ordinary citizens shall be fully educated and be requested to adhere to this fundamental principle of criminal justice. Although the Supreme Court of Japan adopted an example of explanation of the rule of judgment for *Saiban-in*, in accordance with Article 39 of *Saiban-in* Law, the term regarding the proof of guilt is ambiguous and no exact explanation of “presumption of innocence” is given.⁵⁵ The *Saiban-in* must be given instructions including an explanation of the fundamental principle of “presumption of innocence” both prior to and after trial in open court, just as U.S. jurors are given jury instructions.

V. CRIMINAL JUSTICE REFORM

Introduction of the *Saiban-in* system cannot by itself make the difference in preventing reoccurrences of miscarriages of justice and wrongful convictions. It was expected that the new system would entail comprehensive criminal justice reform.

Indeed, the introduction of the *Saiban-in* system opened the door not only to citizens’ participation but also to substantial discussions on criminal justice reform. Along with the enactment of *Saiban-in* Law, the Code of Criminal Procedure was revised in 2004. In the course of the drafting process of the revision, criminal justice reforms were discussed by an expert committee appointed by the government.

Although the civil society groups insisted on a comprehensive criminal justice system reform, the achieved reforms are incomplete and cosmetic. The so-called reforms are far from satisfactory, mainly because of the resistance of the Ministry of Justice and the police. The Supreme Court failed to play a positive role in conducting a thorough reform of the criminal justice system.⁵⁶

and E. Saint, *Japan’s Quasi-Jury (Saiban-in) Law: An Annotated Translation of the Act Concerning Participation of Lay Assessors in Criminal Trials*, 6 ASIAN-PAC. L. & POL’Y J. 233–83 (2005).

55. Article 39 of *Saiban-in* Law stipulates that judges shall explain to *Saiban-in* their power, duty, and all other relevant matters. In accordance with this article, the Supreme Court adopted an example explanation of the rule of judgment.

56. The reason behind the decision was that both the Ministry of Justice and the Supreme Court strongly believed that Japanese criminal justice has operated very well and there is thus no problem to address. They recognize the purpose of judicial reform as “strengthening the system and gaining more public support” rather than resolving the problems of justice system. This reflected the provision of the *Saiban-in* Law, which underscores the purpose of the system, is “to enhance the understanding and trust for justice system of public.”

A. Transparency of the Interrogation

As previously explained, forced confession under custodial interrogation is one of the major causes of wrongful conviction in Japan. Thus, critics demanded a sweeping reform to address the problem.

The reform agenda included guarantees of a right to the presence of lawyers in the interrogation room, and shortened durations of interrogations. However, one of the most powerful reform proposals was videotaping entire custodial interrogations. It is reported that the U.K., Australia, Italy, some parts of the U.S., and several Asian countries have achieved this reform, and that this reform changed the culture of interrogation in each of the countries.⁵⁷ Thus, the introduction of recording systems into interrogations became a top priority among the agendas of comprehensive criminal justice reform.

Regrettably, because of strong opposition toward introduction of the recording system among prosecutor offices and police departments, audio or video recording systems were not successfully introduced in the course of the CCP's 2004 revision.

However, there is a reasonable concern that ordinary people serving as *Saiban-in* would have enormous difficulty in deciding the admissibility of statements without knowing what is going on during the entire interrogation when the defense alleges abusive interrogation. While "successful operation" of the new system was a common interest in judicial circles, the offices of prosecutors and police could not ignore the concern that ordinary people might have enormous difficulty deciding the admissibility of statements without knowing what went on throughout the interrogation.

In April 2009, after 3 years of test operations, the Supreme Public Prosecutor office commenced partial videotaping of interrogations in all prosecutor offices in Japan for cases that will be decided by *Saiban-in* panels. In April 2009, after 7 months of test operations, the National Police Agency commenced partial videotaping of interrogations in all police offices in Japan for cases that will be decided by *Saiban-in* panels.

In January 2008, the police published a new policy directed to the improvement of interrogations.⁵⁸ The new policy includes the establishment of a supervising section over interrogations in national headquarters and in all prefecture headquarters, as well as requiring

57. David. T. Johnson, *You Don't Need a Weather Man to Know Which Way the Wind Blows: Lessons from the United States and South Korea for Recording Interrogations in Japan*, 24 RITSUMEIKAN L. REV. 13 (2007).

58. National Police Agency, KEISATSUSOUSA NI OKERU TORISHIRABE TEKISEIKA SHISHIN [THE GUIDING PRINCIPLES TOWARD APPROPRIATE METHODS OF POLICE SEARCH] (Jan. 2008).

interrogators to make written reports of their interrogations. Also, the new policy exemplified the types of acts during interrogation which may be barred, and prohibited “midnight interrogations” (10pm–5am), as well as interrogations lasting more than eight hours without previous permission from the head of police office.

However, all of these reforms are not enough to change the practice of interrogation. In particular, partial videotaping is misleading and dangerous to fact-finding, since police and prosecutors can arbitrarily select the best parts of an interrogation to persuade a *Saiban-in* panel while hiding coercive or abusive parts. Thus, it is fair to say that partial and arbitrary recording may become a new cause of wrongful conviction.

B. Disclosure

1. New Rule of Disclosure

As explained, until 2004, there were no discovery rules of evidence in the Japanese criminal justice system. However, the introduction of the *Saiban-in* system gave a compelling interest to reform this practice. In order to ensure successful operation of the *Saiban-in* system, the court needed clear rules to avoid time-consuming debate on discovery by parties at the trial. Thus, the discovery rules have become one of the agendas of criminal justice reform.

During the reform process, the JFBA, scholars, and civil society proposed a system requiring prosecuting attorneys to disclose to defendants all evidence in their possession in advance of the trial.⁵⁹ On the other hand, the Ministry of Justice and police departments took a strong position against the “all” discovery rule.⁶⁰ They insisted that pretrial discovery would facilitate perjury or the intimidation of prospective witnesses.

As a result, the revision of the Code of Criminal Procedure set forth new provisions, Articles 316-14–27 with regard to disclosure (in summary).⁶¹

59. JBFA, PROPOSAL FOR THE CRIMINAL JUSTICE MEETING PEOPLE’S EXPECTATIONS (2000).

60. On September 24, 2002, the Ministry of Justice submitted its opinion to the governmental expert committee. The opinion articulated in summary that the purpose of the discovery rule is just to ensure speedy and consecutive trial, and opined that the proposal of full discovery is against this purpose, as well as against the adversarial system. The report therefore concluded that there is no possibility of incorporating the full discovery rule into the Japanese criminal justice system. It also indicated that discovery would facilitate intimidation, perjury, and abuse of witnesses, as well as forgery of evidence.

61. KEISOHŌ [C. CRIM. PRO.] 1949, art. 316-14 -27 (Japan).

(1) Article 316-14

A prosecuting attorney has the absolute obligation of disclosing:

- All material evidences or statements which the prosecuting attorney will submit to trial as proof of guilt,
- The name and address of persons the prosecutor intends to call as witnesses or expert witnesses at trial.
- Relevant written statement which can show the substance of the testimony,

(2) Article 316-15

A prosecuting attorney shall disclose the following information upon the defendant's specific request when the request meets the following two conditions,

[Conditions]

- a) it is recognized as important to examine the credibility of the evidence which the prosecuting attorney intends to submit and,
- b) the disclosure is adequate in light of the importance and necessity for preparation of defense as well as the extent of possible harmful effect of the disclosure,

[Information]

- a) material evidence
- b) result of inspection by court, scientific tests and experiments
- c) Relevant written statement of witnesses whom the prosecutor intends to call at the trial or whose testimony is related with proof of guilt
- d) defendant's statements
- e) written document which police officer and prosecuting office are obliged to write with regard to the situation of interrogation toward defendant

(3) Article 316-20

A prosecuting attorney shall disclose the evidence related to the defendant's allegation of the trial, upon defendant's specific request, when the prosecuting attorney recognizes that the disclosure is adequate in light of the importance and necessity for preparation of defense as well as the harmful impact of the disclosure.

(4) Article 316-26

The court shall make order of disclose evidence when it recognizes that the prosecutor does not disclosure the evidence in accordance with the article 314-14, 16 and 20 upon the request of parties.

2. Evaluation

Although the new provisions require prosecutors to disclosure certain

types of evidence to the defense, it is still far from full discovery. According to the abovementioned provisions, the absolute discovery obligation is quite limited, and the conditions allowing discovery are quite vague, enabling a judge to exercise wide discretion in deciding whether to order disclosure through the interpretation of the abovementioned provisions. In particular, there is still no obligation for a prosecuting attorney to disclose exculpatory evidence.

However, if there is no difference between practice under the 1969 Supreme Court decision and the interpretation of above provisions, then there is no meaning to the new provisions. In this regard, the new provisions must be interpreted progressively to broaden the scope of disclosure in the context of the defendant's right to a defense. The 1998 UN Committee shares this opinion.⁶²

3. The Supreme Court Decisions Under the New Discovery Rules

Based on defense motions in accordance with the revised Code of Criminal Procedure (CCP), the courts in Japan are actively engaged in discovery rulings and have issued a substantial number of discovery rulings.

Since 2007, the Supreme Court passed three significant judgments⁶³ in response to motions based on the revised Code. Importantly, in the interpretation of the CCP in these cases, the Supreme Court has broadened the scope of evidence that the prosecutors are required to disclose.

a. Supreme Court Third Petty Bench Decision, 2007.12.25

On December 25, 2007 the Supreme Court handed down a landmark decision that confirmed that memos and notebooks of the police are public documents that are more than just personal notes and, as such, are discoverable documents.

In the case, the defense counsel argued that the confession statement of the defendant was false and unreliable, and requested to disclose "memos and notes made by the police related to the interrogation" as evidence relevant to the defendant's allegation. In response, the prosecutor denied the existence of the memos and notes, as well as denying any general obligation to produce such documents in discovery.

62. U.N. HUMAN RIGHTS COMMITTEE, Concluding Observations of Human Rights Committee: Japan, U.N. Doc. CCPR/C/79/Add. 102 (Nov. 19, 1998).

63. Saiko Saibansho [Sup. Ct. 3d Petty Bench] Dec. 25, 2007, Hei 19 (Shi) no. 424, (Japan); Saiko Saibansho [Sup. Ct. 3d Petty Bench] June 25, 2008, Hei 20 (Shi) no. 159, (Japan); Saiko Saibansho [Sup. Ct. 1st Petty Bench] Sept. 30, 2008, Hei 20 (Shi) no. 338, (Japan).

The Supreme Court ruled the following:

[I]t is reasonable that the scope of discovery is not necessarily limited to evidence stored by the prosecutor and includes evidence which is made or obtained in the course of investigation of the said case, stored by public officers as a matter of duty and that the prosecutor can easily obtain.⁶⁴

Recalling that Article 13 of the Rules of Criminal Investigation stipulates that the police need to make and store notes when interrogating the accused, the Court ruled that memos that are made by police officers in charge of an interrogation pursuant to the article and are stored by the investigating authority should be regarded as official documents related to investigation rather than personal records. The Court concluded “these notes would fall within the scope of discovery.”⁶⁵

b. Supreme Court Third Petty Bench Decision, 2008.6.25

In a drug case, the defense counsel argued that a urine test result related to the defendant’s use of a drug should be inadmissible because the collection of the defendant’s urine was coercive, thus making the investigative process illegal. Based on this allegation, the defense counsel requested the discovery of memos made by police regarding the process.

The Supreme Court, following the above-mentioned judgment, ruled that notes made by police officers pursuant to the Article 13 of the Rules of Criminal Investigation and stored by the investigating agency, which records the course of the investigation and other relevant information, would fall in the scope of discovery evidence. The Supreme Court clearly stated that notes made in the course of *all* investigative processes, not only in the course of interrogation, would fall within the scope of discovery.⁶⁶

c. Supreme Court First Petty Bench Decision, 2008.9.30

In this case, the defendant was indicted for robbery based on an eyewitness statement. At the trial, the defense counsel questioned the credibility of the eyewitness’s identification of the perpetrator and requested the discovery of the policeman’s private notes made in the course of the identification process. Unlike the abovementioned two cases, the note was not official but instead privately purchased by the

64. Saiko Saibansho [Sup. Ct. 3d Petty Bench] Dec. 25, 2007, Hei 19 (Shi) no. 424, (Japan).

65. Saiko Saibansho [Sup. Ct. 3d Petty Bench] June 25, 2008, Hei 20 (Shi) no. 159, (Japan).

66. Saiko Saibansho [Sup. Ct. 1st Petty Bench] Sept. 30, 2008, Hei 20 (Shi) no. 338, (Japan).

policeman in charge and stored at his home.

The Supreme Court concluded that the memos fell within the scope of discovery since “the memos were made in a course of investigation of the crime, actually stored by public officers as a matter of duty, and it is also easy for the prosecutor to obtain the memos.”⁶⁷

Thus, this judgment further expands the scope of discovery. First, the Court ordered the discovery of notes and memos regarding the eyewitness’s identification process. Second, the Court ordered discovery of notes and memos privately owned by an individual police officer.

4. The Reaction of the Prosecutor’s Office

As described, the Supreme Court adopted liberal interpretations of the discovery clause of the CCP. These trends make it possible for defense attorneys to make the process of investigation and interrogation by law enforcement more transparent despite other enormous limitations.

In response to these decisions, the Supreme Public Prosecutor’s Office, in the name of the Criminal Affairs Bureau Section Chief, on July 9 and October 21, 2008, sent memos to all District Attorney Offices requesting 1) that the memos in question be handed over to the leading prosecutors of the cases in question, and 2) that the prosecutors properly store the memos for a sufficient period of time.

However, in reality, the Supreme Public Prosecutor’s office immediately employed measures to prevent the discovery of memos and notebooks that prosecutors were unwilling to disclose.

a. Memorandum No. 199 and Supplementary Explanation Issued by the Supreme Public Prosecutor’s Office on July 9, 2008

The memorandum itself informed all prosecutors and prosecuting office staff members that memos regarding interrogations and interviews can be the objects of discovery and thus should be properly maintained and preserved in the office.

However, there was an attached supplementary explanation, which called upon all prosecutors and prosecuting office staff members to dispose of memos unless there was specific necessity to maintain the memos to prove the circumstances of interrogations.

67. Saiko Saibansho [Sup. Ct. 1st Petty Bench] Sept. 30, 2008, Hei 20 (Shi) no. 338, (Japan).

b. Memorandum No. 296 and Supplementary Explanation Issued by the Supreme Public Prosecutor's Office on October 21, 2008

The memorandum reiterated the policy of Memorandum No. 199 and recalled the Supreme Court Decision of September 30, 2008, which ordered discovery of private memos made and maintained by individual police officers. The memorandum informed all prosecutors and prosecuting office staff members that all memos, including private ones regarding interrogations and interviews, shall be properly maintained in the office.

However, there was again an attached supplementary explanation that again called upon all prosecutors and prosecuting office staff members to dispose of memos unless there was specific necessity to maintain the memo to prove the circumstances of interrogations, further noting that “this policy won’t change after the Supreme Court Decision.”⁶⁸

c. The Attitude of the Supreme Public Prosecutor's Office

Through the two memoranda, the Supreme Public Prosecutor's Office pretended as if the office were willing to disclose memos and notebooks in accordance with the Supreme Court's decisions; however, the public displays were fake, and, astonishingly, the true policy was just the opposite, as articulated in the attached confidential supplementary explanations. In sum, the Supreme Prosecuting Office encouraged the disposal of “unnecessary” memos related to the processes of interrogation and investigation in order to prevent disclosure through “supplementary explanation”; this actual policy was followed by all prosecutors' offices in Japan. The existence of the “supplementary explanation” was hidden by the Office until revealed in October 2010.

VI. RECENT DEVELOPMENTS

A. Commencement of Saiban-in System

1. Concern over the New System

After the enactment of *Saiban-in* law, there was substantial opposition to participation in the criminal justice system among the general public. Polls always showed that a majority of people in Japan did not wish to be summoned as a *Saiban-in*. These negative feelings

68. Supplementary Explanation attached to the Memorandum Issued by the Supreme Public Prosecutor's Office, (Oct. 21, 2008).

included simple resistance to a new burden and hesitation to participate in the serious judgment of defendants, such as sentencing a person to death.

As a response, the Supreme Court made efforts to minimize the *Saiban-in*'s duty such as by shortening the schedule of trial by controlling both parties' argument and proof. In order to finish trials within one week, the court started managing schedules and strongly suggested both parties minimize the time of trial activity and refrain from unnecessary proof. However, such control suppresses the defendant's right to a defense and undermines the values of the criminal justice system, such as protection of the defendant's human rights, finding truth, and preventing wrongful conviction.

It seems the court prioritized the ease of the *Saiban-in*'s burden over the actual purpose of the system—justice, truth, and the protection of the defendant's rights. As such, many lawyers started to express serious concerns on such judicial practices.

B. Practice of the System

The *Saiban-in* system began its operation in August 2009. Since then, *Saiban-in* panels all around Japan have dealt with significant numbers of felony cases. Since most media have covered the operation of the *Saiban-in* system in positive manner, public feeling toward the system has gradually been changing in a supportive way.

One positive aspect of the operation is that several *Saiban-in* panels delivered “not guilty” verdicts based on strict application of the fundamental principle of the presumption of innocence. Although a judge's explanation for the *Saiban-in* on the rule of judgment may not be strict on this fundamental principle, we find that some *Saiban-in* panels fully respect the principle. We also found that the reasons for acquittal in several cases reflect citizens' sound common sense,⁶⁹ and such reasoning can rarely be expected of judge's decision.

On the other hand, the short duration of trial (from three days to one week) sometimes causes very serious problems by making it difficult for courts to examine enough evidence and issues of concern. Sometimes, a judge suppresses the defense's demand to examine its own evidence. This practice may undermine the fundamental purpose of the criminal justice system, that is, finding truth, protecting human rights, and preventing wrongful convictions.

69. JFBA, *Comment on Judgment of Acquittal in Saiban-In Trial*, JAPAN FEDERATION OF BAR ASSOCIATIONS (June 23, 2010), <http://www.nichibenren.or.jp/en/document/statements0/year/2010/20100623.html>.

C. *Successive Acquittals and Exonerations*

In addition to the new system, Japanese criminal justice experienced another interesting development. Since 2007, false charges leading to wrongful convictions have been revealed in Japan.

1. The *Shibushi* and *Himi* Cases

In the *Shibushi* case (in which all defendants were acquitted in February 2007), the police used various techniques of physical and psychological tortures in order to obtain confessions. In this case, local village people and a politician were arrested for violations of election law, but it turned out the police made up the story of a crime that did not actually exist at all.⁷⁰

In the *Himi* case (in which the defendant was retried and acquitted in April 2007), the defendant was accused of committing a rape and was forced to confess. Based on the confession, the court convicted the defendant. However, it turned out to be a wrongful conviction since the actual perpetrator was later identified.

2. The First DNA Exoneration

The more shocking incident was the *Ashikaga* case, the first DNA exoneration in Japan. In 1991, an innocent man, Mr. Toshikazu Sugaya, was forcibly taken to the police station as the suspect of the rape and murder of a fourteen-year-old. After a severe and long interrogation, he was forced to confess the crime. Based on the confession and an inaccurate and old DNA test result, the court convicted Mr. Sugaya in 1993 and sentenced him to life in prison.

Recently, however, new and sophisticated DNA tests proved that he was not the actual perpetrator; the court granted retrial and acquitted him in March 2010. Mr. Sugaya spent nineteen years in custody for a totally false charge and wrongful conviction; his story should be more than enough to raise public awareness of the danger of forced confessions and wrongful convictions.⁷¹

3. Review of Serious Conviction Cases

The above trend led to serious judicial review on two serious

70. Norimitsu Onishi, *Coerced Confessions: Justice Derailed in Japan*, N.Y. TIMES, May 7, 2007, available at <http://www.nytimes.com/2007/05/07/world/asia/07iht-japan.1.5596308.html>.

71. Setsuko Kamiya, *All Interrogations Must be Taped: Sugaya*, JAPAN TIMES, Mar. 27, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100327a5.html>.

conviction cases. First, in December 2009, the Supreme Court granted a retrial of the *Fukawa* case. The 1967 charges were for burglary and murder; two men were convicted based on confessions and were sentenced to life in prison. The court found reasonable doubt on the convictions against them and expressed serious doubt as to the reliability of the confessions. In May 2011, a court found the two men not guilty on retrial and acquitted them.

Second, in April 2010, the Supreme Court remanded a case and ordered the Nagoya Appeal Court to undergo an in-depth investigation of the *Nabari* case, in which a death row inmate, Mr. Okunishi, has been claiming his innocence for 49 years since 1961.⁷² A villager, Mr. Okunishi was forcibly taken to police and confessed after 40 hours coercive interrogation to poisoning wine that killed several women. As described earlier, although the trial court acquitted him based on reasonable doubt, the confession, and other evidence, the high court convicted him and sentenced him to death based primarily on the confession.

These incidents are followed by the most scandalous incident, the Postal Abuse Case, which has recently been revealed.

4. New Scandal: Postal Abuse Case

In 2009, the former Chief of Equal Employment Opportunity, Children and Families Bureau of the Ministry of Health, Labour, and Welfare, Ms. Atsuko Muraki, was arrested and indicted for violations of the Postal Services Act and fabrication of official documents. The Special Investigations Bureau of the Osaka District Public Prosecutor's Office alleged that Atsuko Muraki had been involved in the illegal use of the special benefit system provided for disability groups by issuing fabricated official documents that certified an inactive organization as a disability group. Although she claimed her innocence and never confessed, her former colleague Mr. Tsutomu Kamimura was also arrested and confessed that he fabricated the document as ordered by Ms. Muraki, his superior.

a. Statement

At the trial, the prosecutor submitted Kamimura's statement as one of the major pieces of evidence. Kamimura testified at the trial that Muraki was not involved in the fabrication, and that his statements were false and forced by the prosecutors. Both Muraki and Kamimura described

72. Saiko Saibansho [Sup. Ct. 3d Petty Bench] April 5, 2010, (Japan).

detailed situations of abusive interrogations committed by the prosecutors in order to extract false confessions.

At the discovery stage, the defense attorney requested the disclosure of memos taken during the course of investigations, to which the prosecution replied that there were “absolutely no memos.” However, at the trial, six prosecutors and staff members of the special investigations department testified that “[b]ecause all relevant information was included in witness statements, the memos were disposed of.”

The Court criticized the disposal of all the memos relevant to the interrogations, gave due regard to the testimony of Kamimura, and then denied the admissibility of most of Kamimura’s statement. Thus, the court denied the admissibility of major pieces of evidence.

On September 10, 2010, the Court then acquitted Ms. Muraki. The Osaka District Public Prosecutor’s Office did not appeal the case.

b. Fabrication of Evidence

In the wake of acquittal, it was revealed that the leading prosecutor of the *Muraki* case, Mr. Tsunehiko Maeda, fabricated the case’s evidence. The prosecutor fabricated a floppy disk seized by Kamimura’s office and updated the final date in order to conform to the prosecutor’s scenario at the trial. The floppy disk was not used as evidence and was returned to the defense, who examined it and proved that the disk’s final date was changed.

The Supreme Public Prosecutor’s Office started investigating the case and arrested the case’s leading prosecutor, who admitted to fabricating the data in order to fit the evidence into the prosecutor’s story.⁷³ The Office later arrested the Chief and Vice Chief of the Special Investigations Bureau of the Osaka District Prosecutor’s Office.

c. Revealed Policy of Disposal of the Memo

In this case, the Supreme Public Prosecutor’s Office, while actively investigating the fabrication of evidence made by Mr. Maeda and others, kept silent regarding the disposal of memos. However, the supplementary explanation that directed the disposal of memos recently came to light.

The Supreme Public Prosecutor’s Office deliberately adopted the policy to destroy the “unnecessary” memos in the course of interrogation in order to hide all exculpatory statements and memos

73. *Lead Prosecutor in Muraki Case Arrested*, JAPAN TIMES, Sept. 22, 2010, available at <http://search.japantimes.co.jp/cgi-bin/nn20100922a1.html>.

while preserving only affirmative evidence for prosecutors.

Clearly, this policy puts a defense team into an extremely disadvantageous position and undermines the defendant's rights to access to evidence, which is a prerequisite of a fair trial. The Supreme Public Prosecutor Office could not avoid strong criticism from the public.

d. Summary

The case clearly shows that law enforcement has falsely charged innocent people and has wrongfully convicted them via coercive interrogations and the fabrication of material evidence. The public is shocked by the revelation of the terrible misconduct of prosecutors, escalating criticism on the criminal justice and investigation systems.

D. Public Support for Criminal Justice Reform

Successive exonerations and acquittals are extensively covered by media and attract public attention. All of the above cases involve false and forced confessions as a result of coercive interrogations. In this regard, it becomes clear to the public that the methods of interrogation need drastic changes in order to prevent wrongful convictions. Also, most of the cases involve the withholding of exculpatory evidence or evidence fabrication by prosecutors. In particular, the general public was horrified by the fabrication of evidence in the *Muraki* case.

The cases show a compelling necessity for the introduction of videotaping systems and full discovery of evidence in order to prevent abusive interrogations and the fabrication of evidence. Since people have started to participate to the *Saiban-in* system, people's attention toward the criminal justice system has increased more than ever. People are starting to look carefully at the lessons of wrongful convictions and false charges.

No one wants to be a part of decision-making in a fraudulent criminal justice system that could lead to wrongful convictions. Thus, there is currently a strong trend of public demand for comprehensive criminal justice reform to prevent wrongful convictions.⁷⁴ This escalated concern of the people can be a vehicle to change the criminal justice system in Japan.

74. On Oct. 4, 2010, the Mainichi News Paper published a poll indicating that eighty percent of people support the videotaping of an entire custodial interrogation.

E. Next Stage of Criminal Justice Reforms

After the *Muraki* case, the Ministry of Justice set up a review commission regarding the prosecutor's misconduct. The commission issued a final report in March 2011, which includes numerous recommendations for the reform of prosecutorial work, such as the videotaping of entire custodial interrogations of the mentally retarded as well as in certain special cases, such as corruption cases. Upon the publication of the recommendations, the Justice Minister requested the prosecutor's office introduce the videotaping of entire custodial interrogations for cases in which the prosecutor's office is in charge of the entire investigation. The prosecutor's office started the practice in May 2011.⁷⁵

Also, in April 2011, the Ministry of Justice announced the creation of a new study commission on comprehensive criminal justice reform based on the recommendation made by the final report of the above commission. The new commission was set up and started its work in June 2011. In order to achieve a comprehensive criminal justice system to prevent wrongful convictions, I suggest the commission discuss the following issues:

- Introduction of videotaping in entirety custodial interrogation
- Shorten the duration of interrogation
- Eliminate the practices that oblige suspects to endure interrogation⁷⁶
- Introduction of full discovery law (both pretrial and post-conviction)
- Rule of DNA evidence⁷⁷
- Reform of forensic science⁷⁸

VII. CONCLUSION

It is still too early to evaluate the operation of the *Saiban-in* system, but it is fair to say that the introduction of a citizens' participation system opened the door to changes in the problems of Japanese criminal procedure.

75. *Grillings of Suspect Get Taped in Entirety*, JAPAN TIMES, May 26, 2011, available at <http://search.japantimes.co.jp/cgi-bin/nn20110526a5.html>.

76. This practice is based on authoritative interpretation of the CCP.

77. In Japan, DNA evidence is exclusively used and tested by law enforcement, and it is not preserved for future re-examination of the court and defendants. The process of the DNA test is not recorded and disclosed to the defense. Neither law nor court finding recognizes that defendants have a right to DNA testing for their vindication.

78. In Japan, police labs do most of the scientific testing for criminal cases. There is no independent criminal laboratory. There is no standardized quality control of the forensic evidence.

In order for the system to work for truth and justice, the Japanese judiciary should address unresolved reform subjects, such as whole discovery and the transparency of interrogation based on the painful lessons of wrongful convictions as well as increasing public demand. The new system should separate itself from the poor past practice of the police's obsession with, and pressure for, self-incrimination, which distorts the criminal justice system as a whole.

It is also important to realize independent, impartial, and reliable systems for dealing with forensic evidence such as DNA evidence, as well as to establish the defense's right to have access to all forensic evidence. In order to prevent wrongful convictions, Japan must achieve comprehensive criminal justice reform and remove all causes of wrongful convictions.

It is necessary for Japanese lawyers and relevant experts to make all efforts to develop the new citizens' participation system as a valuable key for justice and human rights, and to achieve a comprehensive criminal justice system.