論文 JAIS

Non-Japanese Speaking Suspects/Defendants and the Criminal Justice System in Japan

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Over the last two decades, Japan's justice system has seen a tremendous change because of the increase of non-Japanese speaking suspects, defendants, witnesses and victims, especially in the criminal procedure. The number of cases that required interpreters and translators so increased in the early part of the last two decades that literally anybody who spoke a foreign language and Japanese were appointed by the Police Headquarters, the Bar Association, the Public Prosecutors' Offices, the Courts, and the Prisons. While there have been substantial improvements in the recruiting, training and listing of the interpreters by these institutions of justice, they remained uncoordinated with each other, and thus the mechanism and standards have not been standardized at all. There is no system in Japan for certifying interpreters or translators in this field, or for monitoring the quality and ethics of these people. This paper intends to describe and critically analyze this situation not only from a practitioner's point of view but also from the perspective of international comparison.

1. Introduction

Japan has been considered a leading member of the international community and has always presented itself as a firm supporter of the ideals of the United Nations in fostering mutual understanding. However, there is a visible gap in the principles that Japan seeks for the world and those it practices at home. As the country's workings have become more transparent to the outside world, it has become clearer that a contradiction has emerged between the international standards that Japan has accepted and the way in which their contents are implemented on its own turf.

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This paper evaluates Japan's policies and practices of criminal procedure, in particular the right to interpretation in court from the perspective of internationally recognized norms on human rights, mainly the *International Covenant on Civil and Political Rights* (ICCPR). This paper also focuses on the serious challenge posed by the increasing number of foreigners in Japan in regards to its criminal justice system.

An example of this contradiction can be found in the treatment of foreigners within the criminal justice system. The rapid increase in the number of non-Japanese speaking foreigners has been accompanied by a rise in their encounters with the justice system. However, the system has not been able to cope with such a new development, and at times lacks the ability and willingness to ensure that the foreigners' human rights are fully protected. Under the highly characteristic "Substitute Prison" (*Daiyo Kangoku*) system for detention, as illustrated by the International Bar Association (1995), for example, foreigners find themselves at the mercy of a system that is both harsh for the Japanese themselves and exacerbated by the language barrier.

2. Foreigner Crime in Japan

In recent years, there has been a dramatic increase in the number of foreigners entering Japan. It reached 3,000,000 in 1990, 4,000,000 by 1996, and exceeded 5,000,000 by 2000. According to Japan's National Police Agency, the visiting foreigners in 1999 accounted for 25% (or 5,963) of the Penal Code offenses. Based on such data, the agency]sees that "the relatively high rate of foreign visitors . . . raises concern as to an aspect of internationalization which poses a threat to public order."

In 2000, the number of convicted foreigners whose proceedings required interpreters in the district courts nationwide was 7,930. This figure represents over 10% of the total number of those convicted in the country, and more than a 25-fold increase in 16 years beginning from 318 cases in 1984.

It should be noted, however, that these figures do not mean that all are serious crimes. A number of crimes involving foreigners are "victimless" crimes. In fact, approximately 40% of the cases were violations of the Immigration Control and Refugee Control Law, particularly staying beyond the period stipulated by the visa. Such acts are considered as criminal offenses and tried in the criminal court. According to an Immigration Bureau

estimate, there are around 224,000 "over-stayers" in Japan, all of whom are currently considered officially as potential "guests" in criminal proceedings.

Most foreigners, or so-called "newcomers", involved in different criminal activities have a limited command of the Japanese language. The nationality breakdown shows a wide variety, and suggests the need for interpreters in a diversity of languages. Of the 9,396 foreigners who were convicted in either the District or summary Courts in 2001, 3,384 (36.0%) were categorized as coming from "China" (which, for statistical purposes, includes both China and Taiwan), 2,264 (24.1%) from Korea, 586 (6.2%) from the Philippines, 503 (5.4%) from Thailand, 439 (4.6%) from Iran and 380 (4.0%) from Brazil. These were followed by Peru (248), Vietnam (217), Pakistan (193), Bangladesh (148), Malaysia (125), Myanmar (115), Sri Lanka (97), USA (87), Columbia (869, Turkey (53) and India (52).

Today, 44 foreign languages are used in Japanese courtrooms, among which Chinese (including Cantonese, Shanghai, Fukien, Mandarin and Taiwanese) is the most frequently used comprising more than 39% of the total number of cases. This includes all Chinese-speaking persons from Hong Kong, Singapore, Malaysia and elsewhere. It is followed by Korean (16%), Filipino (that is, Filipino-Tagalog, 7%, but not including other local languages like Cebuano-Bisayan or Ilocano), Persian (or Farsi), Thai, Portuguese, Spanish, Vietnamese, English, Bengali and Urdu.

This situation has posed serious challenges for the justice system in Japan and for human rights protection, especially the right of a foreigner to have an interpreter or to receive translation.

3. The International Covenant on Civil and Political Rights

In 1966 the United Nations adopted the *International Covenant on Civil and Political Rights*, which reaffirmed the *Universal Declaration of Human Rights*. It took another 13 years for Japan to ratify it in 1979. Japan then became obliged to create conditions "whereby everyone may enjoy his civil and political rights" without any "discrimination solely on the ground of race, color, sex, language, religion or social origin" (Preamble and Article 4). In accordance with Article 40, Japan is now required to submit a periodic report to the United Nations Human Rights Committee, which in turn reviews the report. Let us further quote from three relevant articles:

> *Anyone* who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charges against him. (Article 9-2, my italics).
>
> All persons deprived of their liberty shall be treated with humanity and with respect for the inherent dignity of the human person (Article 10-1).
>
> As a part of the right to receive a fair trial in criminal cases, "*everyone* shall be entitled to the following minimum guarantees, in full capacity: (a) to be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him, [and] (f) to have the free assistance of an interpreter if he cannot understand or speak the language used in court" (Article 14-3a [and] 3f, my italics,).

In this regard, however, it has to be mentioned that the Japanese Constitution proclaims only the "Rights of Nationals." The human rights of non-Japanese within Japan may not exist in principle and in reality are not fully guaranteed.

4. Comments of the Human Rights Committee

On November 4, 1993, the UN Human Rights Committee issued its comments (UN 1993a, 1993b, 1994) in response to the Third Periodic Report submitted by the Government of Japan on 16 December 1991 (UN 1992). The Committee commended the Government of Japan "on its excellent report, which has been prepared in accordance with the Committee's guidelines for the presentation of State party reports and submitted on schedule," and also noted "with appreciation that the Government of Japan gave wide publicity to its report, thus enabling a great number of non-governmental organizations to become aware of the contents of the report and to make known their particular concerns." (UN 1993c)

The Committee then expressed the view that Japan's human rights situation "has improved since the consideration of the second periodic report of that State party in 1988, and that there is generally a good regard for human rights in the country." However, several specific points were noted as "Principal Subjects of Concern" as part of the Comment (ibid.). Among them was a section regarding the criminal procedures of Japan:

> The Committee is concerned that the guarantees contained in articles 9, 10 and 14 are not fully complied with;

- in [sic] that pre-trial detention takes place not only in cases where the conduct of the investigation requires it;

- the detention is not promptly and effectively brought under judicial control and is left under the control of the police;

- most of the time interrogation does not take place in the presence of the detainee's counsel, nor do rules exist to regulate the length of interrogation;

- the substitute prison system (*Daiyo Kangoku*) is not under the control of an authority separate from the police; and

- the legal representatives of the defendant do not have access to all relevant material in the police record, in order to enable them to prepare the defense.

The above comments clearly highlight the present state of Japan's criminal justice system and its problems in general. While the Human Rights Committee did not refer to the question of foreigners in Japan, all of the comments apply 'equally' to foreign suspects and defendants.

5. Implications of International Instruments for the Criminal Justice System in Japan

In this section, some pertinent aspects of Japan's criminal procedure will be discussed in the light of international instruments on human rights.

5.1. *Upon Arrest and Detention*

Article 201 of the Japanese Code of Criminal Procedure reads: "When the suspect is arrested upon a warrant of arrest, the warrant shall be shown to him." With regard to detention, it is required to issue and present a warrant of detention (Article 73-2 and 207-1). Article 236 of the Standards for Criminal Investigation (*Hanzai Sosa Kihan*) stipulates that a translation should be attached to the warrant "whenever possible" but such translation is not necessary if an arresting officer understands the language of the foreigner or an interpreter is present.

In practice, however, these warrants are written only in the Japanese language, and they are simply shown to those who do not read the language. Interpreters rarely accompany the police. Foreigners often do not know what they are suspected of or the specific reasons for arrest or detention. It often takes hours or even days for the police to

actually determine a language comprehendible to the suspect and to finally request that an interpreter be provided.

Article 9-2 of the ICCPR, which was quoted earlier, includes the right to be informed in a language one understands. In addition, *The Body of Principle for the Protection of All Persons under Any Form of Detention or Imprisonment* stipulates in Principle 10 a similar provision. Principle 14 specifically articulates language rights as follows:

> A person who does not adequately understand or speak the language used by the authorities responsible for his [or her] arrest, detention or imprisonment is *entitled to receive promptly in a language which he understands* the information referred to in:
>
> - Principle 10 [the reason for arrest and any charges],
>
> - Principle 11, paragraph 2 [any order of detention and the reasons therefore],
>
> - Principle 12, paragraph 1 [the reasons for the arrest, the identity of the law enforcement officials concerned, and so forth], and
>
> - Principle 13 [explaining rights and how to avail him (her) self of such rights at the moment of arrest and at the commencement of detention or imprisonment]
>
> And *to have the assistance, free of charge, if necessary, of an interpreter in connection with legal proceedings subsequent to his [or her] arrest* (my italics and parentheses).

The UN Centre for Human Rights (1994:11) categorically states with regard to notification that, "a written translation should be provided."

These international instruments clearly underscore that the warrant of arrest and order of detention must be accompanied at all times by a translation into a language the foreign suspect understands. In addition, at the moment of arrest and upon the commencement of detention, the foreign-suspect should be informed, in a language he/she fully understands, of the alleged crime, the relevant law and article contravened, and the full text of "criminal facts."

It may be pointed out that Japan's National Police Agency has prepared a pamphlet entitled *Information on the Criminal Procedure in Japan* (*Nihon no Keiji Tetsuzuki ni kansuru Setsumeisho*) in seventeen languages. This summary of criminal procedure, including the right to remain silent and to select defense counsel is supposed to be presented once a foreign-suspect is taken into custody and is subjected to questioning by the Japanese police authorities.

Point 4 of the English version of the document reads: "In case of being questioned, you are not required to make a statement against your will, and you are entitled to select qualified defense counsel at any time." Here it is noticeable that the word "right" is not used, but carefully rephrased instead.

There is also a pamphlet entitled *Basic Information on the Rights of Detainees*, circulated by the Osaka Bar Association in 1994, which was translated into several languages including; English, Portuguese, Chinese (Mandarin and Taiwanese), Persian, German, Korean, Vietnamese, Bengali and Filipino.

This is prepared primarily for the duty lawyers who will be visiting foreigners in custody. It summarizes the different rights of a detainee, which include the right to counsel, the right to remain silent and the right to an interpreter. The document also specifically includes a warning against making false confessions during the interrogation period due to Japan's established practice of extracting confessions under duress. Unfortunately, this document is rarely read by people who need to know their rights.

5.2. *Investigation of the Suspect*

One of the characteristics of the criminal procedure in Japan is that suspects are held in custody for a long period, up to 13 days and often extended to 23 days, before the indictment is filed. They are usually held inside a 'Substitute Prison', which is located within a police station, where intensive investigation or interrogation is conducted in order to draw confessions from the suspect.

In cases involving foreigners, the English language is most commonly used between the interrogating officers and the suspect, even if neither of them has a good command of the language. Otherwise, the Japanese language is conveniently used despite the obvious handicap for the foreign-suspect being questioned.

Japan's Code of Criminal Procedure has no provision for the right of counsel to be present during such interrogation, and when requested by the suspect's lawyer, it is refused. If a suspect or an arrested person cannot afford to hire a private lawyer, he or she will not have a defense counsel at all until the indictment is already filed. It is only after this that the court will request the local bar association for a lawyer, who will then be appointed by the court.

The exception is when the local bar association learns about a suspect who will need legal assistance and sends a "duty lawyer," called *toban bengoshi*, for a single but free

consultation to the person in custody. The expenses, including those of an accompanying interpreter, if necessary, are shouldered by the association. At present, it is said that for foreigners who require a counsel and interpreting service, one out of ten is visited by the "duty lawyer."

In the case of non-Japanese speaking suspects, the interpreting during the interrogation itself is, more often than not, done by police officers or police staff members themselves. Sometimes a Japanese-speaking foreign interpreter, not always one who can read the language, is employed from outside. The objectivity and neutrality, as well as the quality of interpreting are therefore invisible. It can be noted that, of the above-cited 7,930 court cases in Japan, only 3 were found "Not Guilty." Article 198-4 of the Japan's Code of Criminal Procedure of these provisions reads:

> The protocol [recorded statement of the suspect] shall be perused by or read to the suspect for his [or her] verification, and in case the suspect has made a motion for any addition or deletion, or alteration, his [or her] statement with regard thereto shall be entered in the protocol. (my parentheses).

Such protocols are, of course, written in Japanese but countersigned by the suspect who cannot and does not have access to them, except through the interpreter's consecutive interpreting after the oral reading by the interrogating officer or the public prosecutor.

These protocols, which are adopted as evidence in the court, are extremely important for all parties concerned. This is especially so in the light of the special characteristics of the criminal justice practice in Japan. There is no jury system in the country. A senior judge of the Osaka High Court (Ishimatsu, 1989) once said shortly before his retirement from the bench:

> This process is characterized, in my view, by the following features: the over-expansion (*hidaika*) of the investigation, completion of the investigation of material evidence prior to trial, and the turning of the trial into a ceremony (in which the trial court simply confirms, or at the most inspects, results of the investigation.)

An Urawa District Court decision in October 1990 allowed for the tape-recording of pertinent parts of an interrogation, i.e. at the beginning informing the foreign suspect of his rights, the final reading and interpreting of the protocol, and instructing the suspect to put

his/her signature and a fingerprint on the last page of the protocol. While this decision is often cited by defense lawyers and legal scholars, it is not practiced.

5.3. *Public Action*

Japan's Code of Criminal Procedure in its Article 271 stipulates that "the court shall, when the public prosecution has been instituted, serve upon the accused the transcript of indictment without delay." The full translation of the indictment in a language the defendant understands, however, does not accompany the mailed indictment written in Japanese.

It was only in June 1995 that the Supreme Court of Japan instructed district courts nationwide that a "summary" of indictment for foreign defendants should be translated into languages they understand, and that the translated material should be furnished to the defendants as soon as possible after the Japanese originally reached them ("Court Urges Translated Indictments for Foreigners," *Mainichi Daily News,* 5 June 1995).

However, this "summary" is to be filled out with only the name of the defendant and the charges brought against him/her, based on a prepared printed format, in which the "facts of the crime" are not translated. The defense counsel, through the assistance of an interpreter, still has to translate and explain the contents as deemed necessary.

5.4. *Language Rights of the Accused in the Court*

Japan's Code of Criminal Procedure, Article 175, states: "In case a person or persons not versed in the Japanese language are required to make a statement [in the court], an interpreter or interpreters shall be caused [sic.] to interpret." Note that interpreting from Japanese (statements) to a foreign language is not categorically considered necessary. Article 177 also reads: "Any letters, signs, or marks that are not in the Japanese language may be caused [sic.] to be translated." It is clear from these provisions that interpreting and translating are not considered the right of those who do not understand the language, but are rather for the sake of the judges' convenience.

A sharp contrast is seen in Article 14-3f of the ICCPR, which states that everyone shall be entitled in full equality "to have the free assistance of an interpreter."

In Japan, there is no formal mechanism to ensure the quality of interpretation or translation. There exists no procedure of officially certifying court interpreters through open examination. The High Courts maintain a List of Court Interpreters, but this listing is done by the court and no registration is required by the interpreters themselves.

An officially appointed court interpreter, who is to be appointed case by case, takes an oath at the opening of every court case by declaring that: "I swear, according to my conscience, to interpret sincerely." No more, no less. In reading this oath, the interpreter is asked to hold a prepared sheet and reads only the Japanese language before signing the document. When this author acts as an interpreter, he always has to insist, even argue, that this oath is read aloud in both the Japanese language and whatever language the defendant understands, because this procedure is intended to establish an environment of trust and confidence to all parties involved.

Currently, there is no standard procedure for checking the competence of court interpreters. The tape-recording of the hearings which require interpreting is at the discretion of the presiding judge. Hearings may or may not be recorded. Once they are recorded, however, it is required to keep the tapes together with other records. The interpreter himself/herself is not, in practice, allowed to listen to these recordings in order to conscientiously evaluate the job he/she has done even after the case is over.

Incidentally, the expenses for translating and/or interpreting in the Japanese legal system are considered part of the costs of the litigation. The cost, therefore, can be charged to the defendant, and is not free. This is a clear violation of Article 14-3f of the ICCPR as cited above.

While the international instruments discussed in this paper do not specifically require the state parties to institutionalize any act regarding court interpretation and translation, it should be noted that the United States enacted the Court Interpreters Act in 1978 (and revised it in 1988). It is my opinion that the institutionalization of a similar interpreters act should be seriously considered in Japan in order to fully guarantee the rights of non-Japanese speaking suspects/defendants and also to assure the qualification and accuracy of interpretation/ translation, as well as to provide guidelines as to the ethical conduct of the people involved.

5.5. *Sentencing*

The sentence is written in the Japanese language, and passed while being orally read and interpreted on the spot in court. In my own observation, most foreign defendants do not fully understand the essence or the details of the sentence. The judges and even defense counsels do not usually bother themselves to explain further, except when the defendant dares to complain that he/she did not understand.

Like the warrant of arrest and the indictment discussed in the preceding section, it is my strong opinion that the sentence should also be fully translated and handed over to the foreign defendant.

6. The Interpreter's World

There are approximately 3,000 "registered (or, to be precise, merely listed)" court interpreters in Japan today. These interpreters, including myself, possess neither legal nor certified linguistic qualifications, and are usually pressed into action as court interpreters or translators to fill a void created by the need for such services throughout the country. Some of us are Japanese who have acquired foreign language abilities. Others are people who have come to Japan to work, study or live and have learned Japanese.

The lack of an institutional system guaranteeing the right to have an interpreter for those who need one is no better illustrated than in the following personal experiences of mine.

In 1986, my university (which specializes in foreign studies) received a telephone call from the Osaka High Court, which was desperately looking for anyone who understood the Filipino language. A few weeks later I found myself acting as an interpreter in the courtroom, despite the fact that I had then little knowledge of Japanese criminal law or procedure. The acute lack of interpreters has also forced me to serve in police stations, detention houses, bar associations and law offices, prosecutor's offices, and district courts as well, covering practically all phases of criminal procedure (see Tsuda 1995 for more detailed discussion).

In 1992, the Osaka District Court asked me to serve as an interpreter in a murder case. But I was surprised when I saw the name on the indictment as it did not seem to belong to a Filipino. Upon inquiring, I was told that the defendant was a Malaysian of Tamil ancestry. I hastily reminded the court that I had experience in court as an interpreter in the Filipino language only. "It's okay," I was told, "You may do it in English." As this shows, the courts often request people to be interpreters while knowing little about their ability in the language that the defendant speaks, or, about their Japanese proficiency in case of a non-Japanese interpreter.

At times, team interpreting is required as a defendant is not well versed in the language assumed to be that of his/her own country. In 1994, a Filipino was charged with the murder of his Japanese employer. The defendant claimed during the first

hearing at the Kobe District Court that he "understood only 80 percent" of Tagalog, upon which the national language now called Filipino is based. His mother tongue was Cebuano. The court-appointed interpreter then had a little experience in Filipino , and neither Tagalog nor Cebuano was her mother tongue, and her Japanese was also rather limited. It became apparent that she was little experienced with interpreting Philippine and Japanese languages in court.

The judges then suspended the session to look for a more appropriate interpreter ("Murder Case Delayed by Language Barrier" *Daily Yomiuri,* 3 June 1994). I was then contacted by a Philippine Consulate official in Kobe, who was monitoring the case. It was going to be a rather delicate case wherein the defense counsel was going to argue that the killing was an act of self-defense. I decided to propose to the court that two interpreters should be appointed. After a week, the court concurred ("Murder Hearing to Resume with New Interpreters." *Daily Yomiuri*, 22 June1994).

The new team, composed of another experienced Filipino interpreter and myself, could handle the complicated and multilingual case in Cebuano, Tagalog-Filipino, English and Japanese. In the actual hearings, the statements of the defendant who made frequent code-switching among Tagalog, Cebuano and even English were interpreted by the author into Japanese with the check and support of his partner-interpreter. On the other hand, all other statements and questions by the Japanese judges, prosecutor and defense counsel in Japanese were interpreted by the partner-interpreter into the language and expressions understood by the defendant. The translation of the indictment, the prosecutor's opening and closing statements, the defense arguments and the sentences were also done accurately and promptly ("Filipino Gets 10 Years for Murder" *Daily Yomiuri* 1994). But this example, too, highlights the "make-do" nature and flexibility of court interpreting in Japan. Such points are also discussed by Matsui (1994), Nishima (1994) and Shibasaki (1997).

7. Conclusion

The purpose of this paper was to illustrate some aspects of Japan's criminal procedure, particularly those applied to non-Japanese-speaking suspects and defendants, in the light of human rights standards set internationally and accepted by way of ratification by the government (see Tsuda 1997 for more discussion).

There is no argument that the ratified covenant (ICCPR) has a binding effect within the Japanese judicial system. And yet the legal structure as well as the practices of criminal procedure in Japan does not fully abide by it.

Japan is one of the most economically advanced countries in the world today. Yet ironically it seems to have a long way to go in fully meeting international norms on human rights, particularly in terms of language rights. It is urged that all those who are concerned about human rights closely monitor and critically evaluate the structure and realities of the criminal justice system in Japan.

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