

In this corner, we hope to provide useful information for our members, such as introducing the ACPF activities, past events, and re-recording the contents of the forums. For the first article in the series, I will be introducing, “Is Japanese Criminal Justice Still in the Middle Ages?”, the theme of the ACPF Forum held on Tuesday, June 4, 2019.

Is Japanese Criminal Justice Still in the Middle Ages?!



YAMASHITA Terutoshi
ACPF Vice Chairperson /
Executive Director
 (Notary / Shibuya Notary Office)

This was the title of the presentation I gave on Tuesday, June 4, 2019. At that time, Mr. Carlos Ghosn had been arrested by the Special Investigation Department of the Tokyo District Public Prosecutors Office on November 19, 2018, and after being re-arrested, he was also prosecuted on April 22, 2019 for the crime of aggravated breach of trust.

However, at the end of December 2019, he appeared in Lebanon in a surprising fugitive escape, and so now his getaway leaves a deeper impression than the case itself. This article will be serialized in four parts, but I would also like to incorporate some new circumstances that arose after I gave the presentation.

The defendant, Carlos Ghosn, put forward various arguments, and the main points were as follows.

- (1) It would not have been possible for him to receive a proper trial under the practices of criminal justice in Japan, where the conviction rate is 99.4%.
- (2) It is “hostage justice” in that he would not be released on bail if he denied the charges.
- (3) He had no legal counsel during the interview, and he was forced to confess.
- (4) He did not escape from justice but from political persecution and Nissan’s conspiracy plot.

These were his four main arguments. Yet I do not know what the basis is for the 99.4%. This was to be expected without even waiting for Carlos

Ghosn’s press conference because this is an argument often used by the Japan Federation of Bar Associations. First, let me discuss the misconception about the conviction rate in (1).

The conviction rate of 99.9% is a myth & mistake.

This refers to a “myth & mistake”. The media often reports that Japan’s criminal trial conviction rate is 99.9%. Japanese lawyers, legal scholars, and prosecutors also cite this number as the conviction rate. When this number is compared, especially to the US conviction rate of 70-80%, I find myself heaving a sigh. From my point of view, this is disinformation and so I’d like to take this opportunity to explain why.

1) What is the formula used to calculate the conviction rate?

When you hear the word “rate”, you need to look into the basis of the statistics and the formula. The formula for calculating the conviction rate of 99.9% is as follows.

$$\left\{ 1 - \left(\frac{\text{No. of people acquitted}}{\text{No. of people prosecuted}} \right) \right\} \times 100$$

The “number of people” can be replaced with “cases”. Higher convictions are not only due to a

lower numerator (number of people acquitted). The larger the denominator (number of people prosecuted), the higher the conviction rate.

Now, in Japan, the meaning of “prosecution” includes both requests for a trial and requests for a summary order (fine). A request for a summary order is a case in which the suspect or defendant confesses and pleads guilty (signs a consent form) and the prosecutor seeks a fine (1,000,000 yen or less). The necessary records are sent to the judge and the judge issues an order to impose a fine of a certain amount in yen. The defendant pays the fine and the procedure is complete. It includes offenses in flagrante such as driving without a license, driving under the influence, and drunk driving, as well as minor traffic accidents involving personal injury, assault, injury, property damage, theft and other special law violations. This number was 1.29 million in 1988, 1.01 million in 1998, 460,000 in 2008 and 220,000 in 2018.

However, the number of people subject to a request for a trial is around 90,000 a year, and a decision is rendered in only 50,000 to 60,000 cases a year. The rate will vary depending on whether the denominator used for the above formula was:

- (1) the 60,000 people in the request for a trial, or
- (2) whether the 220,000 people (previously 1.29 million people) in the request for a summary order were also added.

In (2), since the number of cases also includes cases where the defendant confessed, the acquittal rate naturally approaches zero. Furthermore, even with requests for a trial, the defendant has confessed in 80% to 90% of cases, and so it is only natural that the acquittal rate comes closer to zero and the conviction rate becomes 99.9%.

2) What about the US formula?

On the other hand, the US conviction rate is said to be approximately 70-80% although this

varies depending on whether the case is federal or state. The formula is vastly different from that used in Japan. As you know, America has jury trials. There are some trials where only judges are present, but both types of trials are when the defendant pleads not guilty. If the defendant confesses, he or she will not undergo a criminal trial like in Japan but will immediately be transferred to a procedure to decide the punishment (sentencing), so there is no need to include this in conviction rate (because the defendant is 100% guilty). Therefore, the formula used to calculate the US conviction rate is:

$$\{1 - (\text{No. of people acquitted} \div \text{No. of people denying the charges})\} \times 100$$

Since the formula used for the calculation differs right from the start, simply comparing the rates in the conclusions is like comparing apples and pears.

Then, what is the conviction rate in Japan if the number of people pleading not guilty is used as the denominator to make it comparable to the American formula? Statistics on the number pleading not guilty are not released by the prosecution but are published by the Supreme Court, and are published every year in the February issue of the Legal Times. The statistics on the right are the combined statistics for the court of first instance (district/summary). However, the number of people pleading not guilty includes some who pleaded partially not guilty, and the number of people acquitted includes some people who were partially acquitted. In all age groups, the figure does not reach 99.9%, but fluctuates between 95 and 98%. This is the reason I believe 99.9% is a



myth and a mistake. This point, as seen in the data, is shown on page 46 of “Japan, How Safe?”.

Year	No. of judgments (A)	No. of people pleading not guilty (B)	No of people acquitted (C)	Conviction rate for people pleading not guilty
1984	80,465	6,466	170	97.37%
1989	62,795	4,565	186	95.93%
1994	59,122	4,026	100	97.52%
1999	71,884	4,441	98	97.79%
2004	92,908	5,979	154	97.42%
2009	74,818	5,002	135	97.30%
2010	71,061	4,819	134	97.22%
2011	65,618	5,018	149	97.03%
2012	63,684	5,269	135	97.44%
2017	54,662	5,188	180	96.53%
2018	53,387	4,759	173	96.36%

Now in Japan there are *saiban-in* (lay judge) trials. It is used in serious cases where the statutory sentence includes life imprisonment or the death penalty. The question arises what is the conviction rate here? Preliminary figures are posted on the Supreme Court website, and the statistics from the beginning of 2009 to the end of 2019 are as follows.

No. of people for whom a decision was rendered: 12,528

No. of people pleading not guilty: 5,771

No. of people acquitted: 112

The conviction rate including cases where the defendant confessed is 99.01%, and if the denominator used is the number of people pleading not guilty, it is 98.06%. Again, it is not possible for the number to be 99.9%. The figure 99.9% is reached when the abovementioned people subject to a request for a summary order are added to the denominator, which is natural

because all of these cases where the defendant is guilty, the defendant confessed.

3) Is the number still too high?!

It is true that even a conviction rate of 95% or 98% is high, but I do not think it conveys the same impression as 99.9% does.

Let me offer another explanation. In the case of the U.S. conviction rate, if a defendant confesses to a crime and pleads guilty, the case will move to sentencing even if it is the result of a plea bargain. In a Japanese context, this would be equivalent to a case of confession in a request for a trial.

It is said that this “conviction” accounts for 90% of the total. Then, the remaining 10% of the cases where the defendant pleads not guilty are jury trials, and of this number since 70-80% make up the conviction rate, overall the conviction rate is 97-98%. Seen this way, I think the impression changes considerably.

4) Japanese prosecution standards are different

Nevertheless, the difference with the US conviction rate is evident, and I think that the reason is due to the following differences. Japanese prosecutors prosecute when they are convinced that they can prove the case “beyond a reasonable doubt” which is the standard for conviction. It is not because of the fear of an acquittal but subjecting the defendant to the criminal procedure itself imposes a considerable burden, and the thinking is that in the case of an acquittal, the defendant should be released as soon as possible.

On the other hand, in the United States for example, it appears that the prosecutor who prosecutes does not have to make a determination based on the same criteria as the judgment in the

trial, and if the evidence appears to be superior to that of the defense, there seems to be the feeling that the prosecutor should prosecute and seek the judgment of the court. In the United Kingdom, according to the statistics of 2009, the acquittal rate of cases where the defendant pleaded not guilty in the Crown Court was 62% (“Criminal Justice System of Foreign Countries”, Ministry of Justice). The conviction rate is 48%, less than half. This is because previously the system was such that the prosecutor was not originally involved in the prosecution and it was the police who initiated prosecution, and the criterion for prosecution is low, that is, if there is an element of suspicion, the case will be prosecuted and it is the court that makes the judgement. This is probably due to the thinking that “justice should be realized in the courts”. (This point is fundamental to how we view the judiciary, so I will refer to this on another occasion).

While some people criticize the conviction rate for being too high, others blame the prosecution’s flimsy work if there is an acquittal. The former way of thinking means that there should be a higher number of acquittals and this means there would be approval of acquittals as evidence that the judiciary (the court) is functioning properly, but this is not the case with the latter way of thinking. From a different perspective, it also means that a case which would be prosecuted in the United States would not be prosecuted in Japan, which is an “inconvenient truth” for the United States and those who support the American system.

In addition, in the movie “Yet I still didn’t do it”, aside from the 99.9% conviction rate, there is a scene in which the conviction rate for cases where the defendant pleaded not guilty is mentioned as being 97%, (line spoken by YAKUSHO Koji playing a lawyer) Director SUO

Masayuki’s attention to detail is apparent here. In the movie, he clearly differentiates between the 99.9% and 97%, but for some reason, after the release of this movie, it was the percentage of 99.9% which spread and was emphasized. It is sometimes said that “people conveniently use statistics to back up their own conclusions or policies”, and that may be the case here.

Going back to the defendant, Carlos Ghosn, bringing out a conviction rate of 99.4% and how he did not think he would get a fair trial, the basis for the figure is uncertain, and moreover, is not based on facts, or rather can be seen to be based on erroneous information. In particular, if you look at the conviction rate of *saiban-in* (lay judge) trials, this is not a matter of Japanese prosecutors or judges because it does not make much difference when members of the general public are involved. This means that expressing criticism based on the conviction rate is not only a criticism of the Japanese prosecutors and judges, but also a criticism of the judgment of the Japanese people.

I would be pleased if your impressions have changed just a little.

(To be continued)