

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 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?!**



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Continuing on from the previous article, the main arguments made by the defendant, Carlos Ghosn were:

- (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.

Of these points, this time I would like to discuss the “hostage justice” of (2) following on from (1).

1) The image of hostage justice

“Hostage justice” is a catchphrase used by critics of the Japanese criminal procedure. The main title, “Is Japanese Criminal Justice Still in the Middle Ages?” is similar to this. There is a phrase in the same vein that refers to the death penalty as “state-sanctioned murder”, but this does not have much of an impact. Perhaps this is because the death penalty is imposed according to legal procedures, and so it does not connect to the crime of “murder”. On the other hand, “hostage justice” is a catchy phrase that leaves a strong impression.

The points the phrase is trying to make are:

- a) There is no bail system before prosecution,

- b) If the defendant denies the charge, this will result in an extension of the detention and bail is not likely to be granted even after prosecution has been initiated,
- c) If the defendant confesses, he or she is likely to be released on bail,
- d) Detention can be interpreted in the overall procedure as being used as a means to obtain a confession.

These are the reasons why it is called *hitojichi shiho* (“hostage justice” in English). This is also easy to understand for an international audience to understand because of resonance with the expression “mob justice”.

Mob means a riot or a crowd and is an expression unfamiliar to Japanese people, but the term used here refers to incidents where a person accused of being a criminal is attacked on the streets by a large number of people, and a punishment is inflicted through unfair procedures (in other words, a lynch), and it is easy to understand “hostage justice” in parallel with this.

Putting this aside for the moment, I would like to examine two points: “lengthy detention” and a “reluctant attitude towards bail”.

2) Is the detention lengthy?

In Japan, in principle, the police make an arrest based on an arrest warrant from a judge. The exceptions are offenses in flagrante and

emergency arrests without a warrant (in which case, the arrest warrant is obtained from a judge immediately after the arrest). The subsequent detention period is:

- 48 hours by the police
- 24 hours by the prosecutor
- Detention for 10 days (if a judge has permitted detention)
- Extension of detention for a further 10 days, totaling a maximum of 23 days.

However, the maximum length was 22 days for Carlos Ghosn due to the fact that it was a prosecutor's arrest. As can be seen on the arrest procedure slide on the next page, the judge checks twice, and the judge hears the defense directly from the suspect before issuing the detention order (this is the detention for questioning).

Whether it is a minor offense or a serious offense, and whether the evidence is simple or complex, the duration is exactly the same. Since it is for one single crime, it is possible to re-arrest or detain the suspect for another crime.

American legal procedures, particularly the United States.

a) French detention period

Basically, there are three types of offenses: serious offenses, minor offenses, and police offenses. The sentence for serious offenses is 10 years' imprisonment or more, and the period of holding the suspect in custody varies depending on the gravity of the crime. In the case of ordinary crimes (minor offenses / major offenses), detention is:

- 24 hours' detention by the police
 - Can be extended once for 24 hours
 - Can be extended twice for organized crimes
 - Can be extended to 96 hours and 144 hours for terrorist crimes
- The prosecutor decides on non-prosecution or a request for a preliminary hearing
- The detention period for a preliminary hearing is four months
 - Can be extended for another four months and

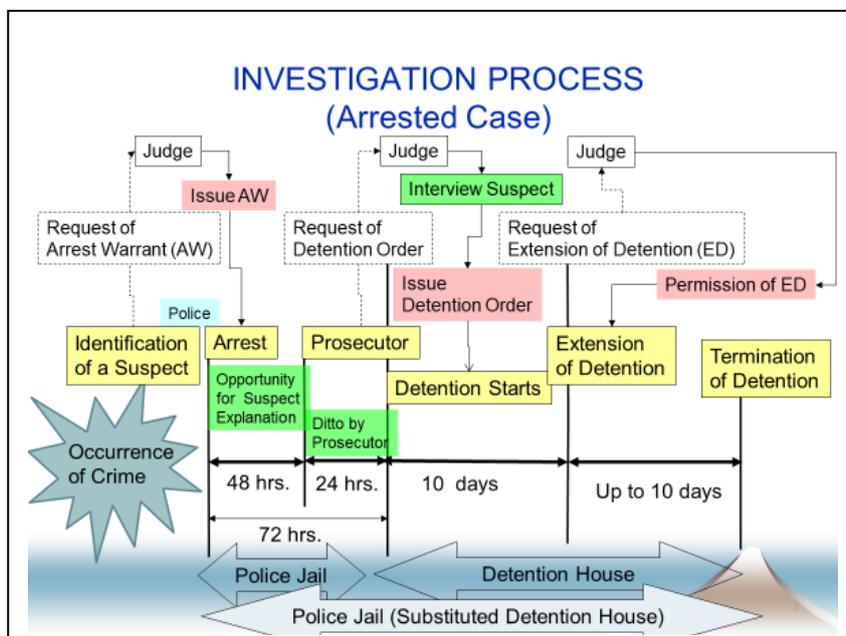
detention is possible for up to one year

Can be extended for up to two years under certain conditions such as in the case of drug crimes and terrorist crimes.

(From "Introduction to French Criminal Law" by SHIMAOKA Mana et al.)

In France, the judge in the preliminary hearing has great power. Previously the judge had the authority to detain the suspect, collect evidence using the police or others, and issue a warrant, but

this was subject to criticism from the European Court of Human Rights. As a result, although the system of a preliminary hearing by a judge has



So, what about other countries? Here, let us take a look at the French criminal justice procedures which are likely to be familiar to the defendant, Carlos-Ghosn, and the Anglo-

been maintained, there is now a “liberty and detention judge”. The authority of the judge in the preliminary hearing is similar to that of a Japanese prosecutor (the difference is in the appellation of judge or prosecutor), but the authority is greater.

Of course, bail may be granted during the detention period for the preliminary hearing, but there are those who are not released on bail. Although an attorney can be present during the interview, if the detention period is four months right from the beginning, and moreover, can be extended to one year, it is extremely long when compared to the Japanese detention period.

For some reason the Japanese press has not reported on this.

b) Detention period in the United States (Anglo-American law)

In the criminal procedure of Anglo-American law, there is actually no fixed detention period. In fact, arrests without a warrant at the discretion of the police are the norms of practice. Therefore, if the police arrest a suspect, they must bring the suspect in front of a judge within 24 or 48 hours, which is the time limit. After that, the suspect will either be detained or released on bail, but these procedures are also carried out in an open court. Put another way, I think it is easy to understand if seen from the view that the judiciary (= judge) ensures transparency and judges the correctness of the arrest on each occasion (maintenance of procedural justice). It purportedly takes about a year for a jury trial to start, but since there is no stipulation on “how long” a suspect may be held in custody, a suspect who is not released on bail has no idea of how long it is going to take.

This reminds me of MIURA Kazuyoshi of the case of the “Suspicious Bullets / LA Suspicion” who, after being tried in Japan for murder and found guilty, entered Saipan in February 2008 and

was taken into custody for the same crime under the U.S. judicial procedure. At that time, I read about the examination by the judge in the press and a detention period was not decided. It was a pre-trial procedure, and I did not think it would take that long to make a legal decision, such as *non bis in idem* or prohibition of double jeopardy. In the end, he was transferred to Los Angeles and on arriving there, committed suicide. This was in October 2008 and so he had been detained for eight months!

This begs the question is Japan’s detention period really “long”?

b) Does denial of bail contribute to hostage justice?

If the above explanation is the entrance to detention, then the exit is the bail. Two points of criticism are that there is no bail before prosecution and no bail after prosecution if the suspect denies the charges.

The former is unavoidable because legally there is no such system, but the prosecutor is able to procure release. However, the rate of an arrest with detention is about 36% of all cases, and of course there is release in cases of non-prosecution, but it is quite difficult to release a defendant unconditionally in a case which is to be prosecuted.

In the latter case, it is the judge who makes a decision on bail, and the prosecutor just states an opinion. Nonetheless, I think it is a mistake to say that it is “hostage justice” for the purpose of acquiring a confession although I am aware that the criticism of hostage justice is of the judicial procedure as a whole.

Now, those who assert the difficulty in gaining bail criticize the low bail rate. For this point, please take a look at the website of the “Japan Bail Support Association”. This organization is engaged in various support activities to promote

bail. The bail rate statistics are posted there. (Only Japanese texts are available.)

<https://www.hosyaku.gr.jp/bail/data/>

The statistics started in 1989 at 23.72%, reached the lowest figure of 11.74% in 2003, started gradually increasing and since 2016 has been about to 30%. The association was founded in 2004 and so it has only seen the bail rate rise.

When it comes to the “rate”, it is necessary to check the formula as before. The bail rate here is:

$$\frac{\text{No. of people permitted release on bail}}{\text{no. of people issued with a detention order}} \times 100$$

The denominator is everyone who is in detention, so this includes suspects who are not legally able to get bail as well as defendants who have been denied bail and those who did not ask for bail in the first place. Since the denominator becomes larger, the bail rate becomes lower.

Meanwhile, there is the “bail grant rate” instead of the bail rate.

$$\frac{\text{No. of people granted bail}}{\text{no. of people requesting bail}} \times 100$$

In other words, it is the ratio of the number of cases where bail is granted to the number of requests for bail.

The statistics published by the Supreme Court was 53.8% in 1989, the lowest was 49.3% in 1998, 58% in 2006, and has continued to rise since then. According to Jiji Press News dated December 25, 2018, the bail grant rate for 2017 was 72%. In other words, half of the defendants were granted bail if they requested bail, and more recently 70% have been released on bail. Looking at the statistics, from my view, the way the bail system is being managed does not appear to be out of the ordinary.

Of course, in a case where the defendant denies the charge, there is the danger that evidence may be destroyed so it is difficult to grant bail. However, the defendant cannot be interviewed after prosecution has been initiated, and so it is not credible to interpret bail as being used to obtain a confession.

In particular, at present, most of the interviews of suspects in detention cases are recorded or videoed, and so the process of interview can be viewed. The implementation status can be found on the Supreme Public Prosecutors’ website. (Only Japanese texts are available.)

<http://www.kensatsu.go.jp/kakuchou/supreme/rokuonrokuga.html>

In the case of the defendant, Carlos Ghosn, his interview was recorded and videoed and he was released on bail. Moreover, he still denies the charges. At the very least, I think it is misplaced for him to express a criticism using the term “hostage justice”.

(To be continued)