

**A PRESUMPTION OF GUILT RATHER THAN A PRESUMPTION OF INNOCENCE?  
FORENSIC-LINGUISTIC ANALYSIS OF A JAPANESE CRIMINAL CASE OF  
COMPLICITY IN THE SAIBAN-IN TRIAL**

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## I. INTRODUCTION

Article 60 of the Japanese Penal Code stipulates that when two or more persons jointly commit a criminal act, they shall be dealt with as principals.<sup>3</sup> These accomplices are each brought to trial to mete out punishment according to their respective involvement in the particular criminal act in question.

It is not unusual for the same prosecutors to be in charge of all the public trials of accomplices involved in the case. On the other hand, it is also common for totally different defense counsel to take on the case of each accomplice. It is interesting to note that the same panel of professional judges typically hears the cases of multiple defendants in a series of trials on complicity, though different lay judges are assigned to each public trial. While defense counsel and lay judges are newly assigned to each defendant, the same prosecutors and the same judges may be responsible for all the trials of defendants in a case on complicity.

In this paper we take up a criminal case of complicity in which two men and two women were indicted for a crime of bodily injury resulting in death. Three of the defendants admitted to all of the criminal charges, whereas one defendant denied the charges. The same prosecutors sought conviction of all four of the defendants while two panels of professional judges were responsible for each examining one pair of defendants respectively. Lay judges and counsel for the defense, however, were appointed for each trial. Both of the authors were present at the eight-day trial of the defendant who pleaded not guilty; the second author Higuchi acted as chief counsel for the same defendant. We analyze one witness's direct examination testimony from the perspective of the prosecution and investigate the influence of witness preparation by the prosecutor with the use of forensic linguistic analysis. We also examine the judge's way of witness questioning and analyze university students' perceptions of the same judge's performance in the various trials of the same complicity case. We

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<sup>3</sup> Keihō [Pen. C.], art. 60.

concluded that a defendant in a complicity case who pleads not guilty is more likely to be presumed guilty by both the prosecutors and the judges who had previously ruled on other defendants of the same complicity case.

## II. JAPANESE LAY JUDGE SYSTEM

The Japanese lay judge system is a hybrid of the common law jury and Roman law lay judge systems. Like the Common law jury system, Japanese lay judges decide only a single case. However, unlike the jury system of common law countries, Japanese lay judges deliberate and decide the case together with professional judges. The deliberation body is composed of three professional and six lay judges. Not all cases are tried under this hybrid system. Only criminal cases of serious offences are subjected to this new system. Defendants indicted on serious offences have no option of being tried by the traditional bench trial system.

There are a number of distinctive features of the lay judge system. First, the entire system establishes a highly collaborative atmosphere between the professional and lay judges. Lay judges **not** only render a verdict after having engaged in deliberative discussions with professional judges; they also work together to sentence a guilty defendant. It is neither prohibited nor uncommon for lay judges to discuss the case with professional judges prior to the conclusion of trial. Furthermore, the presiding judge frequently declares fifteen-minute adjournments to facilitate and ensure that lay judges have an adequate understanding of what is being presented in the trial.

Second, Japanese prosecutors are not required to disclose all of the evidence that they have collected. A pre-trial conference procedure was introduced in order to facilitate the criminal process for the *Saiban-in* trial, where the defense counsel can request the prosecutors to disclose all of the evidence relevant to the defendant and his case. In the present case, however, the discovery procedure worked against the defendant, which will be explained in the subsequent section.

Third, the Code of Lay Judge Court prohibits both parties from presenting new evidence during a trial that has not been previously presented at a pre-trial conference. As a result, the defense tries to request as many pieces of evidence as possible for examination. On the other hand, the defense's disclosure request for particular types of evidence also likely reveals the defender's trial strategy in advance, so that prosecutors can easily anticipate and prepare countermeasures before the trial. As it will be shown in the following section, prosecutors'

understanding of the defense strategy prior to the trial had an adverse effect on the equitable disposition of the current case at hand.

### **III. THE OVERVIEW OF THE CASE**

The following is an overview of the criminal case being examined. A male F was found dead in a car that was submerged in an irrigation reservoir in Gunma Prefecture, Japan in July 2009.<sup>4</sup> Five acquaintances of the victim (A, B, C, D and E) were arrested on charges of causing bodily harm resulting in death and disposing of a dead body. Three of them (A, B and C), who admitted to carrying out the crime, were given sentences of eight, nine and ten years, respectively. The other two defendants (D and E), however, denied any involvement in the crime. Defendant D had his indictment suspended, but Defendant E was charged as a joint principal in the conspiracy. Although Defendant E pleaded not guilty to the crime, she was sentenced to nine years of imprisonment by the district court in November 2010. She appealed to the Tokyo High Court, which dismissed it in March 2011. The defendant then appealed to the Japanese Supreme Court but withdrew the appeal in October of 2011.

#### ***A. BEFORE THE TRIAL***

The main issue in this case was whether or not Defendant E conspired with the three other defendants (A, B, and C who were previously convicted of murder) to assault the victim. At the pre-trial conference, the defense lawyer made a statement that questioned the credibility of the three witnesses' statements against the defendant. This provided the prosecutors with an opportunity to anticipate the defendant's main trial strategy, thus prompting a series of visits to all three witnesses who were serving their prison sentences whereby each was interviewed ten times before the trial's commencement. During the subsequent trial, all three witnesses A, B and C proceeded to give incriminating statements against Defendant E; yet, the content of their statements was different from that of the previous testimonies they gave in their own trials six months earlier. We will thus discuss possible witness preparation by the prosecutors in the following.

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<sup>4</sup> Maebashi Chihō Saibansho [Maebashi Dist. Ct.] Nov. 19, 2010, Hei 21 (wa) no. 540.

## ***B. WITNESS PREPARATION FOR THE PROSECUTION***

We focused on one of three witnesses (Witness B) and examined his testimony using linguistic analysis. This witness previously had an intimate relationship with Defendant E. During an interview with the witness, the prosecutor disclosed to him that Defendant E tried to intoxicate him with a stimulant drug in the kitchen with the intent to arouse him to attack Victim F. Prior to his testimony in court, then, it was clear that this witness had probable motive for testifying against the defendant. At the trial, Witness B clearly showed his anger at the defendant when he came into the courtroom to take the witness stand. But before analyzing the content of his testimony and examining the signs and traces of possible witness preparation by the prosecutor, we briefly review the method of forensic linguistics and how this investigative technique can be useful in the analysis of witness testimony.

## **VI. FORENSIC LINGUISTICS**

Forensic Linguistics is a relatively new field, and a term was first coined by Jan Svartvik when he wrote *The Evans Statement* in 1968.<sup>5</sup> The book examined a murder case that took place in November 1949, in which Timothy Evans was arrested for the murder of his wife and infant daughter. His trial began in January 1950. But because the prosecution was able to obtain his written confession during the initial investigation, Evans ended up receiving a death sentence and was put to death in March of the same year. Three years after Evans's execution, John Christine was arrested for the murder of four women including his wife. During his trial, Christine confessed that he murdered Evans's wife, which brought significant controversies and debates over Evans's wrongful conviction and eventual execution. Svartvik made a corpus analysis of the original written statement of Evans' confession and found two distinctly contrasted grammatical styles: (1) an educated style, possibly coached by an investigating officer, and (2) a casual writing style reflected by the defendant himself. He concluded that the authenticity of Evans' written confession was very questionable, suggesting that the content of the statement contained the sign of significant external influence, rather than his own.

In the following section, we likewise introduce several techniques of forensic linguistic analysis in the context of professional language features such as peculiar word usage,

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<sup>5</sup> See Jan Svartvik, *The Evans Statement: A Case for Forensic Linguistics* (1968).

preciseness, repetition, and some other features of written language. These features were then later used in the analysis of a judge-witness interaction in our complicity case.

### ***A. USAGE OF WORDS***

Another pioneering analysis in forensic linguistics comes from the Bentley case involving the attempted burglary and murder of a police officer in 1953, for which nineteen-year-old Derek Bentley was convicted and later executed. Although the actual murder was carried out by sixteen-year-old Chris Craig, he was not given the death penalty because of his age at the time of arrest. It was stated that Bentley's IQ was far below the average of his peers and he was also functionary illiterate. Recognizing that this case involved complicity in a burglary attempt, forensic linguist Malcolm Coulthard analyzed Bentley's confession statement and argued that Bentley personally did not make a confession as noted in the statement to the police. Rather, using a corpus analysis of the term 'then' in the confession statement, he found that large parts of Bentley's writings reflected, and were composed of, words and language used by investigating officers assigned to the case.<sup>6</sup>

### ***B. FREQUENCY OF "THEN"***

Coulthard discovered that one salient aspect of Bentley's written confession was a frequent use of the word "then." Coulthard thought it atypical for the word to occur ten times in Bentley's 582 word confession statement.<sup>7</sup> Coulthard collected two corpora of data: (1) first of three witnesses from different cases consisting of 930 words and (2) the other of three police officers involved in different cases consisting of 2,270 words. Coulthard contrasted the first witness's corpora against the police officer's corpora and discovered that there was only one occurrence of the word in the witness's corpora; on the other hand, it occurred as many as 29 times in the police officer's corpora. Coulthard further discovered that the word of "then" is seldom used in normal narrative or spoken language of ordinary people. For example, in the Corpus Spoken English, which is a subset of the COBUILD Birmingham Collection of English text (BCET), the word "then" occurred only 3,164 times in the entire

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<sup>6</sup> Malcolm Coulthard, *Powerful Evidence for the Defence: an Exercise in Forensic Discourse Analysis, in Language and the Law* 424-27 (John Gibbons ed. 1994).

<sup>7</sup> Malcolm Coulthard, *Corpora in the Analysis of Forensic Linguistics*, 1 *FORENSIC LINGUISTICS* 27 (1994).

volume of 1.5 million words.<sup>8</sup>

### *C. POST-POSITIONING OF “THEN”*

Another salient feature of Bentley’s statement is identified with respect to the post-positioning of the same word “then.” Post-positioning refers to the situation in which the word is placed after the subject, as shown in the following two examples from Bentley’s statements:<sup>9</sup>

Chris then jumped over and I followed.

Chris then climbed up the drainpipe to the roof and I followed.

On the other hand, the positioning of ‘then’ in front of the subject, i.e., “Then, Chris jumped over and I followed,” would be a more common usage than ‘Chris then jumped over and I followed,’ in an ordinary speech.

Although Bentley post-positioned “then” seven times out of the 582 words, none of the three witnesses used any post-positioning in their own testimonies that consisted of 930 words. On the other hand, there were nine occurrences of post-positioning of the word in the 2,270 word corpora of the three police officers. In contrasting this with the nine occurrences in the BCET data which contains 165,000 words, Coulthard concluded that this idiosyncratic syntax placement reflected the policeman’s unique register, suggesting that the confession was not Bentley’s but that of the investigating officer.

### *D. ACCURACY*

Another prominent forensic linguist Gwyneth Fox has also demonstrated unique characteristics of written statements by examining the grammatical structure of police speak through a comparison of the respective corpora of ordinary individuals and police officers.<sup>10</sup>

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<sup>8</sup> *Id.* at 32.

<sup>9</sup> *Id.*

<sup>10</sup> Gwyneth Fox, *A Comparison of ‘Policeseak’ and ‘Normalspeak’: A Preliminary Study*, in *TECHNIQUES OF DESCRIPTION: SPOKEN AND WRITTEN DISCOURSE: A Festschrift for Malcolm Coulthard* 183 (John M. Sinclair & Gwyneth Fox eds., 1993).

We would like to introduce some features relating to the conceptualization and utilization of time by police officers and ordinary people in the following.

### **1. TIME**

Police officers usually offer precise information of time such as “at 5:12 p.m.” or “at approximately 3:45 p.m.” This is because police officers are trained to be incredibly meticulous to time, unlike ordinary persons in their daily activities.

### **2. ADVERBIALS OF TIME**

Adverbials of time such as “*later*”, “*later on*”, “*later the same day*”, “*at this time*”, and “*after this*” occur more frequently in a police officer’s register than in a COBUILD corpus of ordinary people’s text.<sup>11</sup> More interestingly, these adverbials of time are more likely to be placed at the beginning of a sentence in a police officer’s register.

### **3. ADVERBIAL CLAUSES OF TIME**

Adverbial clauses of time are frequently used and often precede the main clause, as shown in the following example.

When he had finished raping her he then threw her out of the van.

Investigating officers can effectively specify the sequence of events by using time-related expressions at the correct positions. The distinct use of adverbial clauses of time was more saliently observed in law enforcement officers’ statements than in ordinary people’s speeches.

### ***E. REPETITION***

Coulthard further examined the credibility of confession statements in a criminal case, in which a suspect named Power supposedly retold the same events, by using the same words in his confession statement, as shown below.<sup>12</sup> It is quite unusual for a suspect or defendant to recount the same events (and doing so with the exact same words) because memory of the

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<sup>11</sup> *Id.* at 188.

<sup>12</sup> Coulthard, *supra* note 6, at 420.

events is normally not stored or recorded in the context of verbal formats. Each act of retelling also requires a decoding of the memory of the event which is then transcribed and translated into a verbal format, thereby creating a slightly different narrative each time. Retelling the same events with the exact same words would be nearly impossible, unless a constant presence of external personnel such as investigative police officers or those trained in note-taking leads them to form a collaborative relationship with a suspect in extracting and recording the statement. The following example shows the pattern of possible collaboration of investigative officers and the suspect.

and then he told Richard to give me one as well (the original statement)  
and then told Richard to give me one as well (the retold statement)

The choice of words, the structure of the statement, and post-positioning of “then” are all identical in both recounted narratives. Coulthard thus suggested that these statements lacked credibility in their authenticity.

#### *F. WRITTEN LANGUAGE*

The following example also comes from Coulthard’s analysis of a written statement taken from a criminal suspect, in which the statement was later presented in court by the police as a verbatim record of a dictated speech.<sup>13</sup> The suspect denied making the statement because it clearly showed his admission of guilt:

I wish to make a further statement, explaining my complete involvement in the hijacking of the Ford Escort van from John Smith on Tuesday 28 March 1981 on behalf of the A.B.C. which was later used in the murder of three person (sic) in Avon that night.

Using lexical density (i.e., lexical terms per clause), Coulthard demonstrated that the above example could not have come from the suspect’s verbatim record. Lexical density of ordinary spoken language is between 1.5 and 2, while that of ordinary written language is between 3 and 6. More formal language has a higher lexical density. The lexical density of

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<sup>13</sup> *Id.* at 35.

the above statement is 8.3, which is much higher than that of ordinary written language, and even higher than that of ordinary spoken language.

Investigating officers often use their professional language in recording a statement from a suspect or defendant, and the unique feature of lexical density can be used to examine and assess the credibility and authenticity of recorded statements. Critical analysis of the recorded statement and the question of authenticity become crucial because the content of the statement serves to provide crime-specific information for the purpose of issuing an indictment against the suspect.

As shown in the above example, ordinary people's statements normally do not contain high lexical density or use specialized investigative languages. The analysis of these formalized statements becomes useful to trace potential sources of a specialized language used by the police and their investigative officers.

In the next section, we will dive into the first complicity case in Japan proper and examine the occurrence of prosecutor's language in the testimony of a prosecution witness. We will demonstrate the analysis of Witness B's statement in terms of both professional language features and written language features.

## **V. FORENSIC LINGUISTIC ANALYSIS OF WITNESS B'S STATEMENT**

### ***A. PROFESSIONAL LANGUAGE FEATURES***

Japanese police officers and prosecutors also import similar features of their professional language into the official records of suspects' statements. They include the use of demonstrative pronouns (*sono* (its, the)), prepositions (*ni taishite* (towards) and *tame* (for)), and the past progressive form, all of which aid in giving statements greater precision. First, we wish to show how these syntactic features are reflected in a suspect's statement recorded by an investigating officer. We also cite examples from a commonly used handbook used by investigating officers (*Shin Sōsa Shorui Zenshū* [A New Complete Work of Investigating Documents: Interrogation])<sup>14</sup> to facilitate our discussion and analysis. This handbook is a standard textbook that teaches investigative officers about the techniques of suspect

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<sup>14</sup> Hisashi Kajiki et al., *Shin Sōsa Shorui Zenshū* [A New Complete Work of Investigating Documents: Interrogation] (2006).

interrogation and the recording of verbal testimonies. We will then show that many traces of professional language used by the investigating officer appeared in Witness B's testimony.

## ***B. INTERROGATION HANDBOOK EXAMPLES***

### **1. SONO (THE)**

Constituents of a sentence are frequently omitted in the Japanese language, and such omissions are much more salient in spoken language, especially when the speaker believes that the hearer knows or can understand the context of a situation, as shown in the following examples.

Anata wa ashita eiga ni ikimasu ka? ~~Anata wa ashita eiga ni ikimasu ka?~~  
(Are you going to the movie tomorrow? ~~Are you going to the movie tomorrow?~~)

The sentences below are taken from the handbook.<sup>15</sup> The words “my” of “my internet” and “her” are omitted because these demonstrative pronouns are easily recoverable from the context. On the contrary, the article “the” from “URL” or “picture” is not deleted because it clarifies ‘the URL’ and ‘the picture’ in question. This is how the handbook educates investigating officers not to omit the demonstrative pronouns relating to the key notions.

As I would make Mayu's picture open to (my) internet homepage and send (her) the URL and cancel-key by mail, I was telling Mayu to delete the picture by herself...

、、、真由の画像をインターネットのホームページに公表し、後でその(sono)  
URLと解除キーをメールで送るから、自分でその(sono)画像を削除しろと  
真由に伝えていた(-te ita)ので...<sup>16</sup>

### **2. NI TAISHITE (TOWARDS)**

‘*Ni taishite* (towards)’ is a preposition that is commonly used in formal written Japanese.

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<sup>15</sup> *Id.* at 68.

<sup>16</sup> *Id.*

‘*Ni taishite*’ is also used in investigative officers’ handbook. One could simply say ‘*Mayu ni* (to Mayu)’ instead of ‘*Mayu ni taishite* (towards Mayu)’.

I kept sending mails towards Mayu.

真由に対して(*ni taishite*)メールを送り続けていました(*-te imashita*).<sup>17</sup>

### 3. *TAME* (FOR, FOR THE SAKE OF)

‘*Tame* (for the sake of)’ is a preposition that is mainly used in written language. In the handbook, ‘*tame*’ is frequently used as in the example sentence given below. Such usage is redundant and the sentence would be more natural without ‘*tame* - (for the sake of -)’.

in reward for the sake of providing such a service for us

そのような働きをしてもらうための謝礼として...<sup>18</sup>

### 4. *-TE IMASHITA* (WAS DOING): PAST PROGRESSIVE FORM

The past progressive form frequently appears in a suspect’s recorded statement. This is because investigative officers or prosecutors are required to describe the crime scene vividly enough so that the judges can use the descriptions to recreate an accurate depiction of the crime and thus make factually correct decisions on the case. Other examples of ‘*-te imashita* (was doing)’ come from the example sentence above for ‘*ni taishite*’: ‘*okuri tsuzukete imashita*’ (kept sending). Its shortened form ‘*-te ita,*’ and ‘*tsutaete ita* (was telling)’ is also found in the example sentence for ‘*sono.*’

I was telling lies.

嘘をついていました(*-te imashita*).<sup>19</sup>

### C. WITNESS B’S TESTIMONY

This section examines the different features of professional language and its usage that

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<sup>17</sup> *Id.* at 67.

<sup>18</sup> *Id.* at 262.

<sup>19</sup> *Id.* at 101.

have appeared in Witness B's testimony. Witness B was originally convicted in the complicity case involving the same crime and was called to testify as a prosecution witness against Defendant E in her trial.

In Testimony (1) below, the prosecution witness's statement contains many of the same linguistic and syntactic features used by professional investigative officers, including the demonstrative noun '*sono* (its)' and the pronoun "E", -- that is, the defendant's true name. The witness also used '*ni taishite* (towards)' and '*yobi*' (call or call out) (we will return to the usage of '*yobi*' in a later section to examine the issue of Repetition). If the witness had used ordinary spoken language, his testimony would cohere more with Example (2), in which both noun phrases (recoverable from the context) and formal expressions like "*ni taishite*" (towards) would be eliminated.

- (1) E got angry in regard to (the fact that) that son (her son) was beaten, called the other party's parent and (his) son, and called out to E's house to do the same to them.

Eが、その(sono)息子が殴られたことに対して(ni taishite)腹を立て、同じような目に遭わせようと相手の親と子を呼び(yobi)、Eの(E no)家に呼び出しました(yobidashimashita)。

- (2) E got angry in regard to (the fact that) that son (her son) was beaten, called the other party's parent and (his) son, and called out to E's house to do the same to them.

Eが、息子が殴られたことに腹を立て、同じような目に遭わせようと相手の親と子を家に呼び出しました。

Similarly, in the next testimony (3), the usage of '*tame*', most commonly found in police written records, is also found in B's statement. In ordinary speech, "*tame*" in sentence (3) can be replaced with common subordinate conjunctions like '*node*' (as) because it is more natural to use the latter. Likewise, "*tame*" is also used in sentence (4) which meant "for the sake of." We note that the past progressive form of '*te-ita*' is also used in sentence (3).

- (3) As Z's car was parked in the parking lot of Seki drug store, we came to change the place to Hokuryo High School.

セキ薬局にZの車が止まっていた(-te ita) ため(tame)、北陵高校に変更となりました。

(4) It is for the purpose of putting the blame on C.

Cのせいにするため(tame)です。

Now look at the past progressive form ‘*kuwaesasete-imashita*’ (was causing or inflicting) in the sentence (5). This usage of the past progressive form by the witness describes the crime scene where Defendant E ordered A to physically assault F. These examples reflect formal linguistic phrases used by Japanese investigative officers.

(5) E who got angry by it was using A to inflict violence on F.

それに腹を立てたEがAを使ってFに暴行を加えさせていました(-te imashita)。

#### ***D. PROSECUTOR’S EXAMPLES***

Many instances of professional language from the interrogation handbook were found in the testimony given by Prosecution Witness B. Similar instances (*sono, ni taishite, tame, te-ita*) can also be found in both the prosecutor’s opening and closing statements.

##### **1. SONO (THE, ITS, HER)**

Examples (6) and (7) were taken from the prosecutor’s opening and closing statements, respectively. The word “*Sono*” is used in both instances in order to make a specific reference to the defendant’s daughter and the victim’s body.

(6) the defendant’s daughter G, her boyfriend H

被告人の娘のG、その(sono)交際相手のH

(7) I have nothing to do with the disposition of the corpus.

その(sono)死体を捨てたことに何ら関与していない。

## 2. NI TAISHITE (TOWARDS)

Testimony (8) is taken from the prosecutor's opening statement and (9) comes from the closing statement. 'Ni taishite' is also found in (10).

(8) The defendant who heard about this was enraged against (towards) Mr. F.

これを聞いた被告人もFさんに対して(ni taishite)激怒しました。

(9) A and B inflicted serious violence on (towards) Mr. F.

AやBがFさんに対して(ni taishite)激しい暴行を加えた。

## 3. TAME (FOR, OR FOR THE PURPOSE OF)

Sentence (10) is taken from the prosecutor's opening statement, and (11) comes from the closing statement. The usage of "tame" in (10) is more natural than that of (11) because the inclusion of "tame no" (for the purpose of) in (11) is more or less redundant. Nonetheless, both words reflect the use of professional language preferred by investigative officers.

(10) recruit accomplices in order to assault Mr. F

Fさんに激しい暴行を加えるために(tame ni)、共犯者を集め・・・

(11) The defendant called accomplices to her house and gave them weapons for the purpose of assaulting Mr. F ...

被告人は共犯者らを自宅に呼び出してFさんに暴行を加えるための

(tame no)凶器を渡し・・・

## 4. TE IMASHITA (WAS DOING): PAST PROGRESSIVE FORM

The past progressive form is also found in both (12) in the prosecutor's opening

statement and (13) in the final statement. Both examples refer to a description of on-going events.

(12) A was watching the condition of Mr. F.

Aは、・・・ Fさんの様子を見ていました(*te imashita*)。

(13) was talking with ~.

~と話していました(*te imashita*)。

It is clear that these four features are usually found in the professional language of the prosecutors and/or investigative officers. Now we demonstrate that they are in fact not a register of the witness himself but that of the prosecutors or investigating officers. We show this by first tallying the number of occurrences of these features in five pieces of discourse: (1) a witness's letter to the defendant's daughter's boyfriend; (2) the testimony of the prosecution witness in court; (3) eleven samples of the suspect's statement taken from the handbook; (4) the prosecutor's opening statement, and (5) the prosecutor's closing statement.

None of these features (*sono*, *ni taishite*, *tame*, and *te-imashita*) were found in the witness's personal letter. On the other hand, these linguistic features are found in the suspect's testimony in court, as well as his written statement submitted by the prosecutors. The high frequency of these features in the suspect's testimony and written statement suggests possible witness preparation or prosecution coaching prior to his testimony in court. The witness's use of particular language patterns also parallels the language use of the prosecutor in his testimony.

	<i>sono</i>	<i>ni taishite</i>	<i>tame</i>	<i>te imashita</i>
Personal letter (3,323 letters)	0	0	0	0
Testimony (4,730 letters)	4	10	13	40
Suspect's written statement (42,917 letters)	76	11	43	73
Opening statement (10,839 letters)	8	3	8	16
Closing Statement (12,117 letters)	16	15	20	3

## *E. WRITTEN LANGUAGE FEATURES*

Written language is more complex than spoken language.<sup>20</sup> Academic writing, which usually focuses on a specific theme contributing to the main line of argument without digressions, includes linguistic characteristics of noun-based phrases, subordinate clauses or embeddings, complement clauses, sequences of prepositional phrases, participles, passive verbs, lexical density, lexical complexity, nominalization, and attributive adjectives.<sup>21</sup> Among them, we discuss noun-based phrases below.

### 1. LOCATION OF MODIFIERS

One example that was found in the examination of written language is a modification of a noun phrase: a relative clause (noun + post modifier). A relative clause is used to provide additional information without the inclusion of another sentence. Nonetheless, unlike English, Japanese does not require the use of relative pronouns.

For example, the relative clause in witness testimony (14) directly modifies the noun phrase. The clause, (*Sore ni hara*), comes before noun phrase (E) and is predominantly used in written language. In order to fully understand the true meaning of this sentence, nonetheless, one may require the process of reading back the whole sentence. Thus the use of the relative clause in a normal conversation is extremely rare. In examining Witness B's testimony, the use of this relative clause in his speech is very unusual and may imply the possibility of witness preparation conducted by a prosecutor during the ten pre-trial interviews in prison. In a normal spoken expression, it is more common and natural to express this with the use of a compound sentence as shown in (15).

(14) who got angry with it was using A to inflict serious violence on F.

それに腹を立てた E (*sore ni hara wo tateta* E) が A を使って F に暴行  
を加えさせていました。

(15) E got angry with it, and he was using A to inflict serious violence on F.

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<sup>20</sup> MICHAEL ALEXANDER KIRKWOOD HALLIDAY, *SPOKEN AND WRITTEN LANGUAGE* (1989).

<sup>21</sup> GILLET, A. HAMMOND & M. MARTALA-LOCKETT, *INSIDE TRACK TO SUCCESSFUL ACADEMIC WRITING* (2009).

Eはそれに腹を立てて、Aを使ってFに暴行を加えさせていました。

#### *F. REPETITION*

Coulthard suggested that it is rare for individuals to remember verbatim in its exact form or words in terms of what they themselves said, as well as what other people stated with respect to some past event. It is also a misconception that what people remember is the gist of what was in fact said and expressed.<sup>22</sup> This means that slightly different accounts are usually given at each retelling.

The witness recounted in court on 10 November 2010 about what had occurred from the Third to the Fourth of July in 2009. The witness, however, retold the same event using exactly same words and phrases, as shown in testimonies (16) to (18). Also, please note that Testimony (1) had two usages of ‘yobi’ (call). Not only did Witness B use the word “yobi,” but he also used the phrase “*boukou wo kuwaeru*” (cause violence) very frequently, as shown in (5) and (14). The same phrase “*boukou wo kuwaeru*” was also frequently used by the prosecutor when he read the opening and closing statements, as shown in (9), (10), and (11). This indicates that the witness retold the same event using the same words used by the prosecutor who also interviewed the witness in prison on repeated occasions prior to the trial.

(16) It was because I was called out by E.

Eから呼ばれた(yobareta)からです。

(17) I was called out by telephone from E.

Eから電話があつて呼ばれました(yobaremashita)。

(18) I was called out by Ms. E.

Eさんに呼ばれました(yobaremashita)。

#### *G. THE CHARACTERISTICS OF WITNESS B'S TESTIMONY*

Prosecution witness B gave his response to a direct question, using the prosecutors' or

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<sup>22</sup> Coulthard, *supra* note 6, at 414-15.

investigating officers' register, including the frequent use of *sono, ni taishite, tame, te-imashita*, as well as written language features and repetitive expressions, all of which are not normally found in ordinary people's verbal expressions. The witness's personal letter also had shown no indication of these characteristics or linguistic traits. Hence, it is possible that the prosecutor's repeated contacts and detailed interviews with the witness influenced the way he responded to the question about the case.

The Japanese criminal justice system does not have a comparable process of discovery procedure like the one in the U.S., and the prosecutors are not required to disclose the list of all of the evidence that they have collected. As a result, the defense lawyers must compile a specific list of documents or evidence needed to prepare for their defense strategies. During the course of a pre-trial conference, the defense lawyer makes a request for the disclosure of specific information, including material or forensic evidence, depositions, statements made during interrogation, or any other documents pertaining to the case. The defense's specific request for materials or evidence often gives prosecutors a fairly good understanding of the defense's likely strategy. The prosecution is then in a privileged position to formulate its own counter-defense plan prior to trial.

In the present complicity case, since the defense raised the question of the credibility of accomplices' statements on Defendant E and requested relevant documents or evidence, the prosecutors then may have decided to conduct comprehensive interviews of the former accomplices in order to prepare them for their upcoming testimony in court. Indeed, the prosecution conducted a total of ten interviews with all of the accomplices in a prison facility prior to the trial. If this was in fact the case, then the prosecutors' trial strategy raises serious ethical questions regarding excessive witness preparation and possible witness coaching.

## **VI. IMPARTIAL TRIAL**

Article 37 of the Japanese Constitution stipulates that in all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal; the defendant has a legal right to a fair trial in Japan.<sup>23</sup> Article 21 of the Criminal Procedure Code also stipulates that a public prosecutor or the accused may challenge a judge from the execution of his/her

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<sup>23</sup> NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION], art. 37.

duties, if there is a possibility that he/she may render a partial judgment.<sup>24</sup>

We need to examine whether the defendant can obtain a fair and impartial trial when his or her case is presided over by a judge who has previously ruled on other accomplices involved in the same complicity case. The Japanese Supreme Court stated in a previous decision that judges cannot be challenged simply because they have convicted other defendants on the same complicity case.<sup>25</sup> In that case, two defendants, X and Y, were indicted on a charge of buying votes. Each of them appealed their original conviction to a higher court. The Japanese Supreme Court examined the circumstances, in which two judges who were assigned to the case of Defendant Y also presided on the judicial panel of Defendant X's trial, which had already convicted the latter individual. Defendant Y's counsel requested the exclusion of the two judges from the judicial panel, based on Article 20 (7) of the Criminal Procedure Code, which disqualifies a judge from the execution of his/her duty if he/she participated in the original judgment of the case.<sup>26</sup> The counsel claimed that these two trials relied on identical evidence to indict and try both defendants. The Supreme Court, however, ruled that these two cases were in fact non-identical, maintaining that the judges should not be disqualified unless their partiality could be substantiated with concrete evidence.<sup>27</sup>

Little research has been conducted to examine the extent to which a judge's prior involvement in a previous trial affects his or her decision regarding another defendant who is involved in the same case. Some research has focused on how inadmissible information such as prior criminal-record information might affect the judge's subsequent decision. Landsman & Rakos suggested that jurors and professional judges might be similarly influenced by potentially biased information in civil litigation.<sup>28</sup> And this is despite the fact that American judges are assumed to possess a special capacity to disregard their subjective reactions to inadmissible information.<sup>29</sup> Wistrich, Guthrie & Rachlinski found in their experiments with real judges that while they were generally unable to disregard prior sexual history of an alleged rape victim or prior criminal convictions of a plaintiff, they were in fact able to ignore

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<sup>24</sup> KEIJI SOSHŌHŌ [KEISOHŌ] [C. CRIM. PRO.], art. 21, para. 1 [hereinafter Soshoho].

<sup>25</sup> Saikō Saibansho [Sup. Ct.], June 14, 1961, Mei 36 (shi) no. 21, 15 SAIKŌ SAIBANSHO KEIJI HANREISHŪ [SAIBANSHŪ KEIJI] 6, 974.

<sup>26</sup> Soshoho, *supra* note 24, art. 20, para. 7.

<sup>27</sup> Saikō Saibansho, *supra* note 26.

<sup>28</sup> Stephan Landsman & Richard F. Rakos, *A Preliminary Inquiry into the Effect of Potentially Biasing Information on Judges and Jurors in Civil Litigation*, 12 BEHAV. SCI. & L. 113 (1994).

<sup>29</sup> *Id.*

inadmissible information obtained in violation of proper legal procedures.<sup>30</sup> Blanck et al. also pointed out that jurors might be similarly influenced by judges' views through subtle verbal and non-verbal cues.<sup>31</sup> From these studies, it becomes apparent that judges are not truly equipped with a special ability to disregard their subjective reactions to inadmissible information. Furthermore, their verbal and non-verbal behavior also tends to influence the nature and quality of jury deliberations and final verdicts.

Before we examine a judge's verbal behavior in the case of Defendant E, we wish to note the high conviction rate in Japan and its ramifications. Ramseyer and Rasmusen have pointed out that the conviction rate of criminal trials is particularly high in Japan.<sup>32</sup> In 1994, Japanese prosecutors were able to secure a conviction in 99.9% of all criminal cases tried at a Japanese district court level.<sup>33</sup> Compare this figure with the U.S. in 1995, where professional judges convicted 85% of all criminal cases at the federal level, and 87% or 88% of the criminal cases at the state level.<sup>34</sup> The 2010 *Hanzai Hakusho* (White Paper on Crime) found that the number of persons found not guilty in 2010 was only 80 out of a total of 61,816 defendants, accounting for 0.0013% of all criminal cases.<sup>35</sup> Even with the introduction of the new lay judge system in 2009, the near-perfect conviction rate has not changed at all.<sup>36</sup>

Japan's extremely high conviction rate is not necessarily a reflection of competency and skill on the part of Japanese prosecutors to win nearly all of their cases. Rather, the Japanese prosecutors have been known to bring forth only the strongest cases to trial and have been reluctant to put weak cases or dubious suspects on trial, citing lack of sufficient budget or shortage of personnel or resources for the trial. As a result, Japanese judges have been asked to rule on the most obviously guilty defendants. Furthermore, many judges may not have a sufficient time to diligently process each and every criminal case. The average number of criminal cases handled by a Japanese district court judge in 2004 was 105; 771 judges examined the total of 81,251 criminal cases in the three month period, suggesting that on

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<sup>30</sup> Andrew Wistrich et al., *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. PA. L. REV. 1251, 1306-08 (2005).

<sup>31</sup> Peter David Blanck et al., *The Appearance of Justice: Judges' Verbal and Nonverbal Behavior in Criminal Jury Trials*, 38 STAN. L. REV. 89 (1985).

<sup>32</sup> J. Mark Ramseyer & Eric Rasmusen, *Why is the Japanese Conviction Rate So High?*, 30 J. LEGAL STUD. 53, 54-55 (2001).

<sup>33</sup> *Id.* at 55.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 14.

<sup>36</sup> Hanzai Hakusho 2010 [White Paper on Crime 2010] (2011), <http://hakusyoy1.moj.go.jp/jp/nendofnm.html>.

average, a single judge only has time to spend six days per case.<sup>37</sup> In other words, Japanese judges are overwhelmed and overburdened with the responsibility to make decisions and routinely convict defendants on cases pre-selected by prosecutors. This type of judicial practice hinders the full enjoyment of the presumption of innocence on the part of the defendants.

We now take up an examination of a judge's questions to a defense witness (formally Witness D) in this complicity case. The panel of the judges stated in the judgment of Defendant B (currently Witness B) that Defendant B caused bodily harm resulting in death in conspiracy with (Defendant) A, (Defendant) C and (Defendant) E. The following section examines the verbal exchange between the judge and the witness to see whether or not 'there is the fear that he/she [a judge] may make a prejudicial decision.'<sup>38</sup>

## VII. LINGUISTIC ANALYSIS OF JUDGE'S COMMENTS

In the current complicity case in discussion, Witness D's indictment was suspended. In the following excerpt from (1) to (20), the judge accused Witness D of his impudent behavior for staying late at night at Defendant E's place. The judge first mentioned "normal people's sensibility" and asked Witness D to respond why he did not behave in such a way in (5). In (7) and (9), the judge placed emphasis on "late at night" and implicitly criticized D for staying at E's place at such a late hour. In (11), the judge hinted that there was a romantic relationship between Witness D and Defendant E. But because Witness D denied such relations (in (12)), the judge thus showed his own disapproval of D staying at E's residence, stating to him in (15) that "you are quite impudent." Witness D accepted the judge's critical characterization of his misbehavior in (16). The judge, during the conversation, continuously highlighted Witness D's ostensible moral failings, claiming that "ordinary people [given the time and circumstance] would leave her place" in (17). Likewise, in (19), the judge accused Witness D of his deviance with respect to his decision to stay with Witness E. It is clear that in (5), (7), (11), (13), (15), (17) and (19), the judge did not hide the explicit showing of his negative attitudes toward D. These critical reactions and negative responses might suggest that the judge has already deemed Witness D as an accomplice simply because of his overnight stay

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<sup>37</sup> Saikō Saibansho [Sub. Ct.], *Saiban no Jinsokuka ni kakawaru Kensho ni kansuru Houkokusho* [Report on Speedy Trials] (2005).

<sup>38</sup> Soshoho, *supra* note 24, art. 21, para. 1.

at Witness E's residence.

(1) J: After that, C and the other two went out, didn't they?

J : では、Cたち3人が出掛けるということになりましたよね。

(2) D: Yes.

D : はい。

(3) J: Before that, they were talking about wanting to borrow your car, weren't they?

J : その前に、あなたの車、貸してくれって話があったわけですね。

(4) D: Yes.

D : はい。

(5) J: I think that using common sense, it was time for you to say good-bye because you came to see her for nothing. Why did you lend your car key to others and decided to stay at her place?

J : 普通の感覚であれば、特に用事もなく来てるのであれば、もうそろそろいまごいをする機会かなという感じもしますけれども、なぜ車のキー貸して、あなたは居残ったんですか。

(6) D: I was staying there without thinking at all.

D : 何も考えずに、普通に残ってましたね。

(7) J: But, it was 10 o'clock [at night].

J だって、時間は10時ですよ。

(8) D: Yes.

D : はい。

(9) J: Late at night.

J : 遅い時間帯。

(10) D: Yes.

D : はい。

(11) J: The relationship between you and her was so intimate that you could stay late, though

you met her only once before, right?

J : 1回会っただけで来て、そんなにずっといられるような間柄だったんですか。

(12) D: No, it was not like that.

D : いや、そうでもないですけど。

(13) J: C already knew that you know [her], correct?

J : あなたが知ってるのは、Cとかは知ってるわけですね。

(14) D: Yes, he did.

D : 知ってます。

(15) J: That was your second time meeting her, wasn't it?. I think you are quite audacious.

J : 被告人とは2回目でしょ。厚かまし過ぎるんじゃないのかなという感じがしますけど。

(16) D: Kind of.

D : そうですね。

(17) J: When they were going out, why didn't you say that you could drive them somewhere along the way? I think ordinary people would leave her place and return home. But, you stayed there until around 10 o'clock [in the evening]. Those who you know well were not staying there, were they?

J : どうして一緒に出掛けるときに、おれが途中まで送って行くわっていうことで、普通の感覚だったら、家出て帰るといふふうになるんじゃないかと思いますけど、10時ぐらいの時間帯で居残ったんですかね。あなたの知ってる人というのは、余り親しい人って残ってないわけでしょ。

(18) D: Because I wanted to talk with her. G (E's daughter) and H (G's boyfriend) were there, too.

D : ええ。まだしゃべりたいなっていうのあったから、GもHもいました。

(19) J: Do you realize that your way of thinking is different from that of ordinary people? Do you understand your way of thinking is quite different from the rest of the world?

J : 世間の感覚とずれてるという意識はありますか。世間の感覚とずれてるなと

いふのは分かりますか。

(20) D: I know I'm different.

D : ずれてます。

In the next excerpt from (21) to (57), the judge asked Witness D a variety of coercive questions. The judge tried to confirm some fragments of the assault scene in (21) and (23). Based on this confirmation, the judge then tried to extract an admission in (25) from the witness that he was in fact aware that Accomplices A, B and C were violently assaulting the victim. It was obvious in (26), however, that Witness D did not give the answer that the judge wanted. The judge then paraphrased the expression such as “carrying an ice pick” and “beating the victim” in (25), and used a more technical term “doing (or imposing) violence” in (27). With Witness D’s confirmation of the paraphrase in (28), the judge once again appealed to the moral standard of “an ordinary person” when confronted with violence in order to rebuke the witness’s own inability to think with common sense in (29). Because the judge could not obtain a response he wanted from the witness in (30), he followed up with a question of “why was that?” in (31). The witness, however, simply repeated the judge’s question in (32). The judge then once again criticized the defendant’s inconsiderate behavior in (33) and was able to obtain a compromised response in (34), with a re-visitation of the common standard of behavior of persons in (35), followed up accusatory questions in (37), (39) and (41).

When the witness expressed his feeling of not wanting any further association with the victim in (42) and (44), the judge labeled him as “a rather cold-hearted person” in (43) for his failure to take the victim to a hospital as an ordinary person usually would in (45), criticizing his having “indifference” to the victim in (47) to (53), and further calling on the defendant to justify his failure to help the victim in (55). A series of accusatory questions continued until one of the defense counsel requested that the judge stop his series of coercive and intrusive questions against the defendant in (56). The judge, however, took offense at the attorney’s complaint and continued his previous pattern of critical questioning.

(21) J: When you went there, it was C who was excited. She was telling a story about when she beat the victim in retaliation for being beaten by him, wasn't she?

J : 行ってみると、Cの方が興奮して、被害者に殴られたから、殴り返したって

というようなことを言っていたわけですね。

(22) D: Yes.

D : そうですね。

(23) J: When you went to the park, H got out of the car, and came to tell you how they were beating him, didn't he?

J : 公園に行ったときにも、車から降りたH君、どう、殴っているという話をあなたにしてきたんですか。

(24) D: Yes.

D : そうですね。

(25) J: They were carrying an ice pick or a weapon that is pointed at the end. C was saying how she was beating him [the victim] herself, or that H was the one beating him. After hearing these stories, didn't you want to know what was truly happening?

J : アイスピック、あるいは先のとがったものを持っていったり、あるいはC自身が殴り返したと言ってみたり、あるいはH君が殴ってるっていうようなを言ったという、このような話をずっと聞いてみて、一体何が起こってるんだろうなとか思いませんでしたか。

(26) D: I thought they were just making him apologize. Because I didn't know what they were using the ice pick for.

D : 謝らせるのかなって。アイスピックも何も使うか分かんなかったですから。

(27) J: They brought it and used it to beat him. That means that they were doing violence to him with it.

J : 持って行って、殴ってるというのは、暴行を加えてるということですよ。

(28) D: Yes, that's right.

D : ええ、そうですね。

(29) J: Ordinary people would think that they were using it as a lethal weapon. Didn't you think that way also?

J : 凶器に使っていると、普通考えると思いますけど、そういう思いには至らなか

ったですか。

(30) D: Not really.

D : そうですね。

(31) J: Why was that?

J : どうしてでしょうかね。

(32) D: Not sure.

D : どうしてなんですかね。

(33) J: Then, they moved to a rice field. After that, the defendant said that they would return home. Did she really say on the way back home that they should take the victim to a hospital?

J : それで、田んぼの方に場所を変えて、その後で、被告人が帰るよと言って家に向かう中で、被害者を病院に連れていった方がいいよということは言っていたんですか。

(34) D: Yes, I'm absolutely sure that she said so.

D : はい、間違いなく言っていましたね。

(35) J: Ordinary people would think that they [the other defendants] have seriously injured him from witnessing this chain of events .

J : かなりのけがをさせてるんじゃないかと、この一連の流れを聞けば普通思いますけど。

(36) D: Yes.

D : そうですね。

(37) J: Didn't you say anything when the defendant said this?

J : あなたも、被告人がそう言ったときに、何か言わなかったですか。

(38) D: I said something like: yeah.

D : うんみたいな、そんな感じ。

(39) J: But, you didn't think you should check the condition of his injury?

J : あるいは、どんなけがの状態だろうと確認しようと思わなかった。

(40) D: I didn't think so.

D : 思わなかったですね。

(41) J: Why was that?

J : どうしてですか。

(42) D: If our eyes met, F (the victim) might have told me something. I don't want to get involved at all.

D : 顔が会ったら、Fさんに、後で何か言われるから、自分は一切。

(43) J: But, the relationship between you and the victim was a cordial one. You and he were going out often together, right? From your reaction at the scene, however, you looked like a rather cold-hearted person. If you were told that, how would you feel?

J : あなたと被害者の関係だって、遊びに行ったりする関係だったわけでしょ。

かなり冷酷な感じにも見受けられますけど、そう言われたら、どうですか。

(44) D: But, he became crazy while I was still on good terms with him. So, I was thinking I should dissociate myself a little from him. After all Mr. F is Mr. F.

D : でも、途中でおかしくなったから、やっぱりあの人は、Fさんっていうのは。ちょっと距離を置こうかなとは思ってましたね。

(45) J: Even if you managed to distance yourself from him, you still heard them beating him with an ice pick, or they continued to beat him, the defendant herself said they had better take him to the hospital. If your relationship with him was not that estranged, I think it would be normal to take a different course of action in such a case. What do you think of this?

J : 距離を置いたとしたって、アイスピック持って行って殴ったとか、殴っているよという話聞いて、被告人自身も病院連れていった方がいいんじゃないかという話を聞いていて、あなたとそんなに疎遠な関係じゃないというのであれば、もうちょっと違う対応をするのが普通じゃないかと思いますけど、どうなんでしょうね。

(46) D: Nothing special.

D : 普通に。

(47) J: Are you able to be indifferent?

J : 無関心でいられるんですか。

(48) D: I'm not that indifferent.

D : 無関心じゃないですけど。

(49) J: But, you didn't do anything for him, did you?

J : だって、何もやってないじゃないですか。

(50) D: Who didn't?

D : だれですか。

(51) J: You didn't.

J : あなたが。

(52) D: Yes.

D : はい。

(53) J: That is called indifference, isn't it?

J : そういうの、無関心って言うでしょ。

(54) D: Yes, that is indifference.

D : 無関心ですね。

(55) J: Why was that?

J : それはどうしてか。

(56) L (Defense Attorney): (To the judge who is asking questions) Your Honor, whose trial is it? What is the relevance of your interrogation and this trial? (To the Chief Judge) Your Honor, is this a proper way to preside over the trial? I do not understand what the judge wants to hear.

弁護人：裁判官、だれの法廷かというところなんですけど、何の関係のある尋問なのか、裁判長、訴訟指揮としてよろしいでしょうか。何がお聞きになりたいのか、趣旨が分からないんですが。

(57) J: I am asking [the defendant] about how he dealt with the matter. Please keep quiet!

J : どういうふうな対応したのかということを知っています。ちょっと黙っててください。

The judge, in the above exchanges with Witness D, posed a series of similarly worded questions in order to obtain what he wanted to hear from the witness. Since the same panel of the judges previously participated in the trial of other defendants in the same complicity case, it could be that this particular judge may have already formed an opinion implicating in his mind all five of the individuals (A, B, C, D and E). The judge then may have tried to confirm his preconception through the witness's responses to his coercive style of questioning. The exchange between the judge and the witness casts some serious doubts on whether or not he indeed presided over this trial with an open and impartial mind. Rather, the series of the judge's critical questions and negative remarks to both the witness and his defense lawyer seems to suggest the powerful presence of his bias and prejudice toward the defendant because of his failure to disregard information obtained from previous trials in the same complicity case.

## **VIII. SURVEY OF OPINIONS ABOUT JUDGE REAPPOINTMENT**

To further examine perceptions of the appropriateness of using the same panel of judges for the trials of individuals involved in the same complicity case, we conducted an opinion survey and analyzed the subsequent responses. We asked a total of 407 university students at the School of Regional Policy of Takasaki City University of Economics, in Gunma, Japan and distributed the questionnaire on two separate occasions on April 12 and 18, in 2011. The questionnaire consisted of simple legal explanations (i.e. a brief explanation of the legal concept of presumed innocence and co-principals of complicity), an overview of this specific complicity case, and two closed-ended and open-ended questions, including the following.

(A) The professional judges who examined Defendant E had already given a 10-year prison sentence to Defendant B in the same complicity case.

Do you think that the reappointment of the same professional judges from a previous



**Figure 1. Perceptions of Whether Professional Judges Should be Reappointed in Complicity Cases**

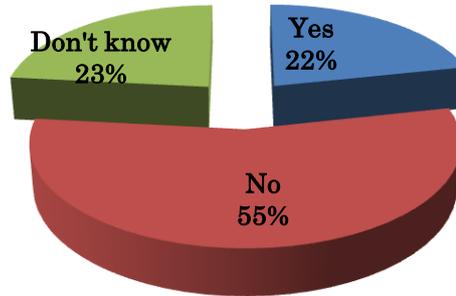


Figure 2 indicates that among those who answered “yes” to the question, the number one reason is that “Judges are only bound by the Japanese Constitution and the law,” suggesting that judges are capable of the strict application of legal principles without prejudice toward defendants (39% or 48 individuals). The second reason was that “judges are not to make a judgment on this case because they previously ruled [on Defendant B’s case]” at 34% (42 subjects). The third reason is that “the victim is the same person in these trials” (23% or 29 subjects). Some open-ended answers indicate that some respondents felt that these cases are related to each other but the same judges do not necessarily give the same sentence. In short, the main reason for supporting judge reappointment is mainly because respondents believed that judges are more likely to act professionally and make decisions on the basis of legal principles without undue prejudice toward the defendant.

**Figure 2. Reasons for Favoring Reappointment of Judges in Complicity Cases**

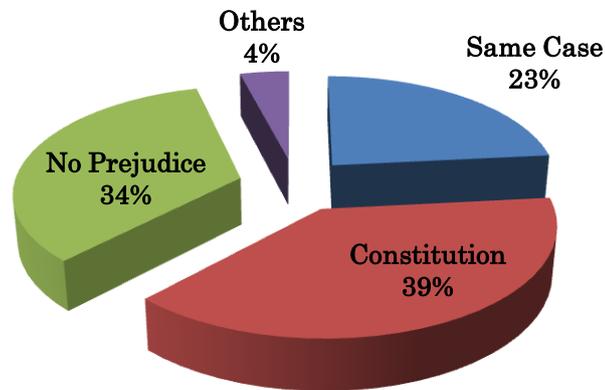
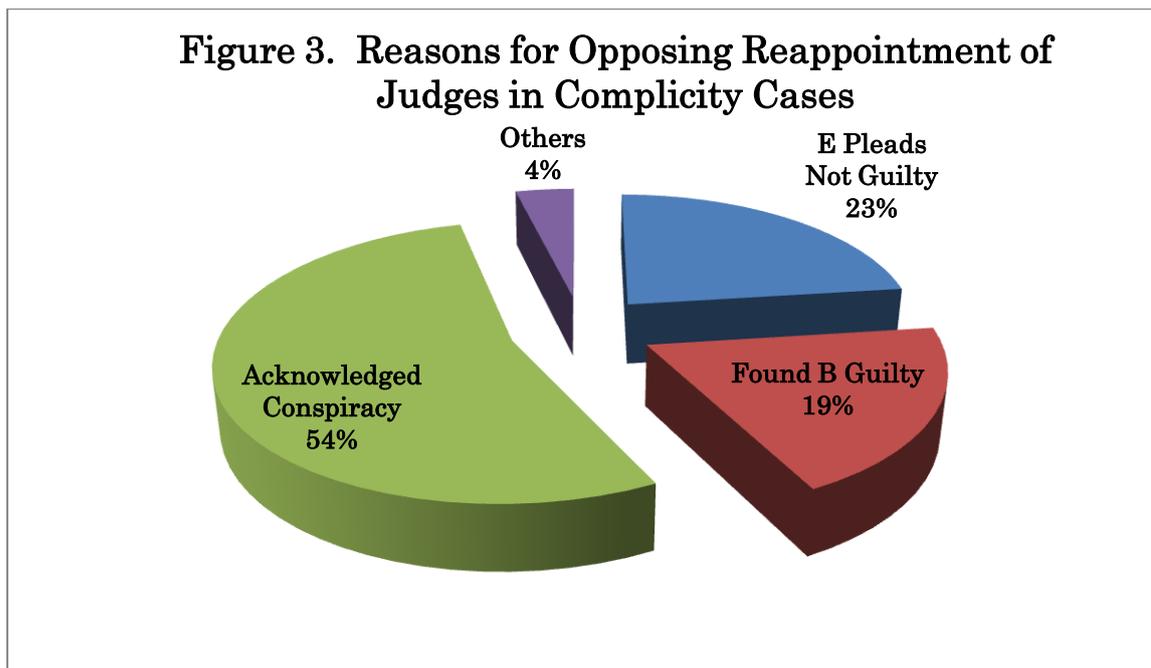


Figure 3 shows the percentage breakdown of respondents' reasons for believing that the reappointment of the same jurists violates the legal principle of presumed innocence. A majority of them indicated that judges' previous admission that Defendant E was one of the associates who were found guilty in other trials violates the legal principle of presumed innocence (54% or 140 subjects). "Defendant E pleaded not guilty" accounts for 23% (60 subjects), followed by "the judges already declared Defendant B guilty" (20% or 51 subjects). Some participant responses to the open-ended question included the following:

- a. I cannot think that the same judges are able to prepare themselves psychologically when they try a new defendant involved in the same crime.
- b. I believe that the recognition of E as an associate in the trial of B, prior to E's trial, violates the principle of presumed innocence.
- c. It is very strange that the judges mentioned E's complicity issue in the trial of B.
- d. At the time of B's trial, E was yet to be found guilty or not guilty.
- e. The judges already assumed, without examining evidence, that E was guilty.
- f. The judges already determined that E was an accomplice prior to E's trial.
- g. It is possible that E would be examined based on the judgment given to B.

Figure 3 shows the breakdown of reasons why participants opposed the reappointment of judges. The figure indicates that individuals who answered "no" to the reappointment of

the same judges had more specific opinions than those who supported the reassignment. It could be that respondents who opposed the reappointment are bothered by the fact that the judges who recognized E as an accomplice in another trial were also assigned to E's trial. Many respondents are skeptical that the same judges can start afresh with a clean slate in the trial of another alleged accomplice in the same complicity case.



## IX. CONCLUSION

It may be unreasonable to expect that a judge has the innate capacity to disregard prejudicial information obtained from other trials or suppress their subjective views on individual accomplices in the same complicity case. It is thus important to establish a legal procedure, in which the same judges will be disallowed to participate in the ruling of accomplices in the same complicity case.

Since May 2009, lay judge trials began and judicial panels consisting of both lay and professional judges were asked to make decisions in criminal trials. If professional judges are not barred from reappointment, lay judges will then need to be educated about the potential biases introduced by judges who have served in multiple trials of a complicity case. Lay judge trials are held in the head courtroom of each district court, as well as ten branch courthouses in Japan. Most district courts have one or two panels of judges in their criminal

division assigned for the lay adjudication trial, and a complicity case that has more than three alleged accomplices is tried by the same panel of professional judges. When criminal suspects or defendants admit guilt to a criminal charge, there is little issue at stake. However, when some co-defendants in the same complicity case insist on their innocence, a new panel of judges should ideally be assigned to each separate trial in order to examine the case with a clean slate. Given that most district courts have four or five branch courts, it is possible to reappoint a new panel of judges in a complicity case to each trial that takes place, in order that the principle of presumed innocence of defendants may be guaranteed in a Japanese criminal trial.

Unlike professional judges, however, it is difficult to expect to see changes in the assignment of prosecutors for each new defendant. In light of this, the important lesson may be that lay judges be informed of these procedural features as well as the process by which the custody of criminal defendants is handled and managed. The lay judges also need to be informed that public prosecutors have easy access to the accused as well as prisoners, but defense attorneys do not. Since most criminal suspects and defendants are detained before their trial, the accused are placed under the authority of the detention officers. Through this arrangement, investigating officers are allowed to make contact with the accused and can, if they so wish, form personal relationships with the accused who often serve as prosecution witnesses in other trials for the same case. Lay judges should be warned about the possibility of close collaborative relationships between the prosecutors and prosecution witnesses before their testimony so that they can be educated to pay closer attention to the unnatural usage of words or expressions in their testimonies.

The Japanese criminal procedure is firmly established on the legal principle that the accused are presumed innocent until proven guilty in a court of law. If this legal principle is to be taken seriously, judges should not be allowed to participate in multiple trials of different defendants from the same complicity case, while lay judges should be informed of the prosecutor's pre-trial access to suspects, defendants and/or prisoners and be made aware of the danger of excessive witness preparation or improper witness coaching by the prosecutors.

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