

JAPANESE LEGAL SYSTEM PART II

DAY 3 (JUNE 6, 2018)

Kyoko Ishida

DAY 3

1. A little bit more about civil procedure
2. Criminal Justice (1) Outline
3. Criminal Justice (2) Recent Reform
4. Action against the government



OUTLINE

1. Jurisdiction for international litigation
2. Foreign Party
3. International judicial cooperation
4. Enforcement of foreign judgment
5. Discussion





JURISDICTION FOR INTERNATIONAL LITIGATION



JURISDICTION FOR DOMESTIC CASE

(Lack of Jurisdiction)

Article 16 (1) The court, when it finds that the whole or part of a suit is not subject to its jurisdiction, upon petition or by its own authority, shall transfer the suit to a court with jurisdiction.

➔ Even if you file a suit to a wrong court, the court would transfer your case to the competent court. And same laws and rules are applied.




MALAYSIAN AIRLINE CASE (SUP. CT. DECISION ON OCT.16, 1981, MINSHU VOL.35, No.7, 1224)(1)

- Fact: A, an individual, was killed in the crash of an aircraft of the jokoku appellant, a corporation, in Tanjukuban, Johor Bahru, Malaysia on December 4, 1977 during its flight from Penang to Kuala Lumpur which the decedent was on board under a passenger transport agreement concluded between the decedent and the jokoku appellant on the same day in Malaysia. The three jokoku appellees, including the decedent's wife and two children, require the jokoku appellant to pay damages of 13,330,000 yen to each of them based on the decedent's claim for damages of 40,454,442 yen arising from said crash which constitutes a default under said passenger transport agreement, which claim has been inherited equally by each of the three jokoku appellees.

MALAYSIAN AIRLINE CASE (SUP. CT. DECISION ON OCT.16, 1981, MINSHU VOL.35, No.7, 1224)(2)

- Issue: Does Japanese court have jurisdiction???
- Nagoya District Court dismissed the claim for lack of jurisdiction by Japanese court. Nagoya High Court vacated that decision and remanded the case to the District Court. The defendant (Malaysia Airline) made jokoku appeal.
- What's the general principle of deciding jurisdiction???
- What kind of fact is necessary to decide this case???

MALAYSIAN AIRLINE CASE (SUP. CT. DECISION ON OCT.16, 1981, MINSHU VOL.35, No.7, 1224)(3)

- “A country's jurisdiction is exercised as an operation of its sovereignty and basically covers the same territory as the sovereignty, so that, in principle, the jurisdiction of Japan does not extend to foreign corporations with their principal places of business in foreign countries unless they elect to submit to the jurisdiction of Japan. However, with respect to cases in which the defendants are somehow legally related to our country, including those concerning land within our country's territory, it is reasonable for the defendants to be subject to the jurisdiction of Japan regardless of their nationalities and locations.”
- 

MALAYSIAN AIRLINE CASE (SUP. CT. DECISION ON OCT.16, 1981, MINSHU VOL.35, No.7, 1224)(4)

- Given that there are no laws or regulations directly providing for international jurisdiction over such cases, and there are no established applicable conventions or generally accepted rules under international laws, it is reasonable to determine the scope of such exceptions on the basis of impartiality toward the parties and proper, prompt judgment.



MALAYSIAN AIRLINE CASE (SUP. CT. DECISION ON OCT.16, 1981, MINSHU VOL.35, No.7, 1224)(5)

- As a basic principle, the provisions on jurisdiction in the CCP applied, HOWEVER, if special circumstances which denies **impartiality toward the parties and proper, prompt judgment** exist, application of the provisions in the CCP should not be permitted.



“SPECIAL CIRCUMSTANCES”

**SUP. CT. DECISION ON NOV.11, 1997,
MINSHU VOL.51, NO.10, P.4055**

- Fact: A Japanese juridical person A, which imports cars from Germany, claimed performance of monetary obligation based upon a contract, under the circumstances that the contract was concluded in Germany, and the purpose of the contract is for A to entrust various businesses in Germany to B. There was no explicit agreement in the contract on the choice of a place within Japan to be the place of performance of obligation or to choose Japanese law as governing law, while B had a basis of living and business in Germany for more than 20 years and the means of proof for B's defense were concentrated in Germany.

“SPECIAL CIRCUMSTANCES”

SUP. CT. DECISION ON NOV.11, 1997,

MINSHU VOL.51, NO.10, P.4055

- Holding: “If one of the territorial jurisdictions as provided by the Code of Civil Procedure of Japan can be found in Japan, in principle, it is appropriate to subject the defendant to the jurisdiction of the Japanese court in an action brought to a Japanese court. However, if there are special circumstances where handling of the proceedings in Japan is against the ideas of fairness of the parties, ensurance of just and speedy adjudication, the jurisdiction of the Japanese court should be denied.... the contract was concluded in Germany, the purpose of the contract is for the appellant to entrust various businesses in Germany to the appellee, while there is no explicit agreement in the contract on the choice of a place within Japan to be the place of performance of obligation or the choice of Japanese law as governing law; it was beyond expectation of the appellee that a claim for the performance of obligation under the Contract would be brought to a Japanese court.

AN AGREEMENT ON JURISDICTION IN INTERNATIONAL LITIGATION

- In Chisadane Go case (Sup. Ct. Judgment on Nov. 28, 1975, Minshu Vol.29, No.10, 1554), the Supreme Court decides that an agreement on the international court jurisdiction **does not need to be effected in a document signed by both parties**, but is sufficient if it is based upon a document prepared by one of the parties **explicitly designating a court of a specific foreign country**.



AN AGREEMENT ON JURISDICTION IN INTERNATIONAL LITIGATION (2)

- “An agreement on international court jurisdiction which excludes the jurisdiction of the Japanese court and designates a foreign court to have an exclusive jurisdiction in a specific cross-border case is, in principle, **valid, insofar as the given case does not fall within the exclusive jurisdiction of the Japanese court** and the foreign court which has been designated has jurisdiction on the case by the law of the given foreign country, and reciprocity is not required in relation to the judgments of the court of this foreign country.”



AMENDED PROVISIONS IN THE CCP IN 2011

- Art.3-2 (Jurisdiction by the domicile of defendant, etc.)
- Art.3-3 (Jurisdiction over an action relating to an obligation under a contract, etc.): “place of performance of the obligation provided for in the contract is located in Japan...”
- Art.3-4 (Jurisdiction over actions relating to consumer contract and labor relationship): domicile of consumer in J.



AMENDED PROVISIONS IN THE CCP (2)

- Art. 3-4 (Labor disputes)
- Art.3-5 (Exclusive Jurisdiction)
 1. Corporations incorporated under laws and regulations of Japan
 2. Actions relating to a registration
 3. Actions relating to the existence of IP...
- Art.3-7 (Agreement on jurisdiction): generally same as domestic rule, but proviso on consumer suits and labor suits.



AMENDED PROVISIONS IN THE CCP (3)

- Art.3-8(Jurisdiction by Appearance): similar to domestic regulation.
- Art.3-9 (Dismissal of Action on Account of Special Circumstances) : **“the court may dismiss the case when it finds special circumstances** under which a trial and judicial decision by the courts of Japan would undermine equity between the parties or disturb realization of proper and prompt trial”



JOINDER OF CLAIMS

- (General rule)

Article 136 Two or more claims, only if they shall be made through the same kind of court proceedings, may be made by filing a single action.

Art.3-6 (Jurisdiction over Joint Claim): **“Close connection” is required.**

- In general, a relationship between the claims brought together is not required.
- HOWEVER, it is understood that as to international litigation, a relationship is required (the basis of the claims should be same). WHY???



FOREIGN PARTY



PRINCIPLE OF *LEX FORI*

- *Lex fori*: the laws of a forum. While international private law decides applicable law for substantive issue, the procedure is subject to the laws of the forum.




PROVISIONS IN CCP

- Art.28 of the CCP (Principle)

The capacity to be a party, capacity to sue or be sued, and the statutory representation for a person without the capacity to sue or be sued, except as otherwise provided for in this Code, **shall be governed by the Civil Code (Act No. 89 of 1896) and other laws and regulations.** The same shall apply to the delegation of powers necessary for performing procedural acts.

- **Art.33 of the CCP (Special Provisions on Capacity to Sue or Be Sued of Foreign National)**

A foreign national, even where he/she does not have the capacity to sue or be sued under his/her national law, shall be deemed to be capable of suing or being sued if he/she shall have the capacity to sue or be sued under Japanese law.





INTERNATIONAL JUDICIAL COOPERATION



SOURCES OF LAW FOR INTERNATIONAL JUDICIAL COOPERATION

- Convention on Civil Procedure (1954)
- Convention on the service abroad of judicial and extrajudicial documents in civil or commercial matters (1965)
- Act on Special Provisions concerning Civil Procedures Incidental to Enforcement of the "Convention on Civil Procedure" and Other Convention (1970)



PROVISIONS IN THE CCP

(Service in Foreign State)

Article 108 A service to be made in a foreign state shall be made as commissioned by the presiding judge to the competent government agency of that state or the Japanese ambassador, minister or consul stationed in that state.

(Examination of Evidence in Foreign State)

Article 184 (1) The examination of evidence to be conducted in a foreign state shall be commissioned to the competent government agency of that state or the Japanese ambassador, minister or consul stationed in that state.

(2) The examination of evidence conducted in a foreign state, even where it contravenes any Acts of that state, shall be effective if it does not contravene this Code.



ENFORCEMENT OF FOREIGN JUDGMENT



EXECUTION OF A JUDGMENT IN GENERAL

- You need to file a suit to request enforcement to a execution court.

Civil Execution Act

Article 2 Civil execution shall be carried out by a court or a court execution officer upon petition.

Title of obligation (*saimu meigi*) and a certificate of execution (*sikko bun*) are required.



ARTICLE 118 OF THE CCP

(Effect of Final and Binding Judgment Rendered by Foreign Court)

Article 118 A final and binding judgment rendered by a foreign court shall be effective only where it meets all of the following requirements:

- (i) The jurisdiction of the foreign court is recognized under laws or regulations or conventions or treaties.
- (ii) The defeated defendant has received a service (excluding a service by publication or any other service similar thereto) of a summons or order necessary for the commencement of the suit, or has appeared without receiving such service.
- (iii) The content of the judgment and the court proceedings are not contrary to public policy in Japan.
- (iv) A mutual guarantee exists.



ARTICLE 24 OF THE CIVIL EXECUTION ACT


(Execution Judgment for a Judgment of a Foreign Court)

Article 24 (1) An action seeking an execution judgment for a judgment of a foreign court shall be under the jurisdiction of the district court having jurisdiction over the location of the general venue of the obligor, and when there is no such general venue, it shall be under the jurisdiction of the district court having jurisdiction over the location of the subject matter of the claim or the seizable property of the obligor.

(2) An execution judgment shall be made without investigating whether or not the judicial decision is appropriate.

(3) The action set forth in paragraph (1) shall be dismissed without prejudice when it is not proved that the judgment of a foreign court has become final and binding or when such judgment fails to satisfy the requirements listed in the items of Article 118 of the Code of Civil Procedure.

(4) An execution judgment shall declare that compulsory execution based on the judgment by a foreign court shall be permitted.



MANSEI KOGYO CASE (SUP. CT. DECISION ON JULY 11, 1997, MINSHU VOL.51, No.6, 2530)

- Parties:
- Mansei Kogyo (a branch of Japanese corp.) vs. Landowner corporation X


- Facts:

Mansei Kogyo formed a lease contract with X expecting that that the State would introduce a tax policy which was favorable for Mansei Kogyo. Then Mansei Kogyo terminated to have a factory in the State and filed a lawsuit that the contract was not effective because it was formed based on X's fraud.

California court imposed punitive damages on Mansei Kogyo.

X filed an action in Japanese court to enforce the judgment.

MANSEI KOGYO CASE (SUP. CT. DECISION ON JULY 11, 1997, MINSHU VOL.51, No.6, 2530)


- 1) In a claim for an enforcement judgment, whether the given foreign judgment fulfils the requirements of subparagraphs of Article 200 of the Code of Civil Procedure (Art.24, para.3 of the Law on Civil Enforcement) is examined. Article 200 of the Code of Civil Procedure requires that **the foreign judgment should not contradict public policy and good morals of Japan**. One may not conclude that this requirement is not fulfilled solely by the fact that the foreign judgment contains an institution which does not exist in Japan, but if the given institution is against the basic principles or basic ideas of the legal order in Japan, the judgment should be regarded as being against public order in the above-cited provision.
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MANSEI KOGYO CASE (SUP. CT. DECISION ON JULY 11, 1997, MINSHU VOL.51, No.6, 2530)

- 2) It is evident that the system of punitive damages as provided by the Civil Code of the State of California (hereinafter, 'punitive damages') **is designed to impose sanctions** on the culprit and prevent similar acts in the future by ordering the culprit who had effected malicious acts to pay additional damages on top of the damages for the actual loss, and judging from the purposes, is similar to criminal sanctions such as fines in Japan. In contrast, the system of damages based upon tort in Japan assesses the actual loss in a pecuniary manner, forces the culprit to compensate this amount, and thus enables the recovery of the disadvantage suffered by the victim and restores the status quo ante (Judgment of the Supreme Court, 1988 (O) Case No.1749, Judgment of the Grand Bench, March 24, 1993, Minshu 47-4-3039), and is not intended for sanctions on the culprit or prevention of similar acts in the future, i.e. general prevention.

MANSEI KOGYO CASE (SUP. CT. DECISION ON JULY 11, 1997, MINSHU VOL.51, No.6, 2530)

Admittedly, there may be an effect of sanctions on the culprit or prevention of similar acts in the future by imposing a duty of compensation on the culprit, but this is a reflective and secondary effect of imposing the duty of compensation on the culprit, and the system is fundamentally different from the system of punitive damages whose goals are the sanctioning of the culprit and general deterrence. In Japan, sanctioning of the culprit and general deterrence is left to criminal or administrative sanctions. Thus, **the system in which in tort cases, the victim is paid damages for the purpose of imposing sanction on the culprit and general deterrence in addition to damages for the actual loss should be regarded as against the basic principles or basic ideas of the system of compensation based upon tort in Japan.**



MANSEI KOGYO CASE (SUP. CT. DECISION ON JULY 11, 1997, MINSHU VOL.51, No.6, 2530)

Therefore, part of the foreign judgment in the present case which ordered the appellee company to pay punitive damages for the purpose of deterrence and sanction in addition to compensatory damages and the cost is against public order of Japan and therefore, has no effect.

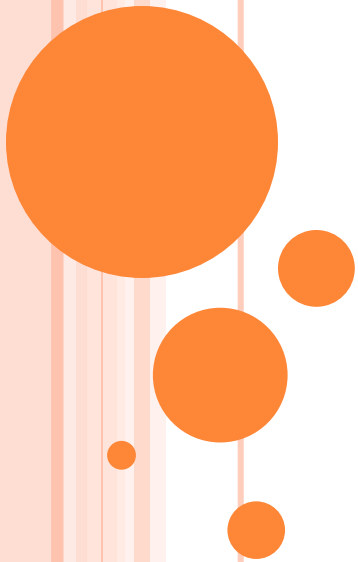


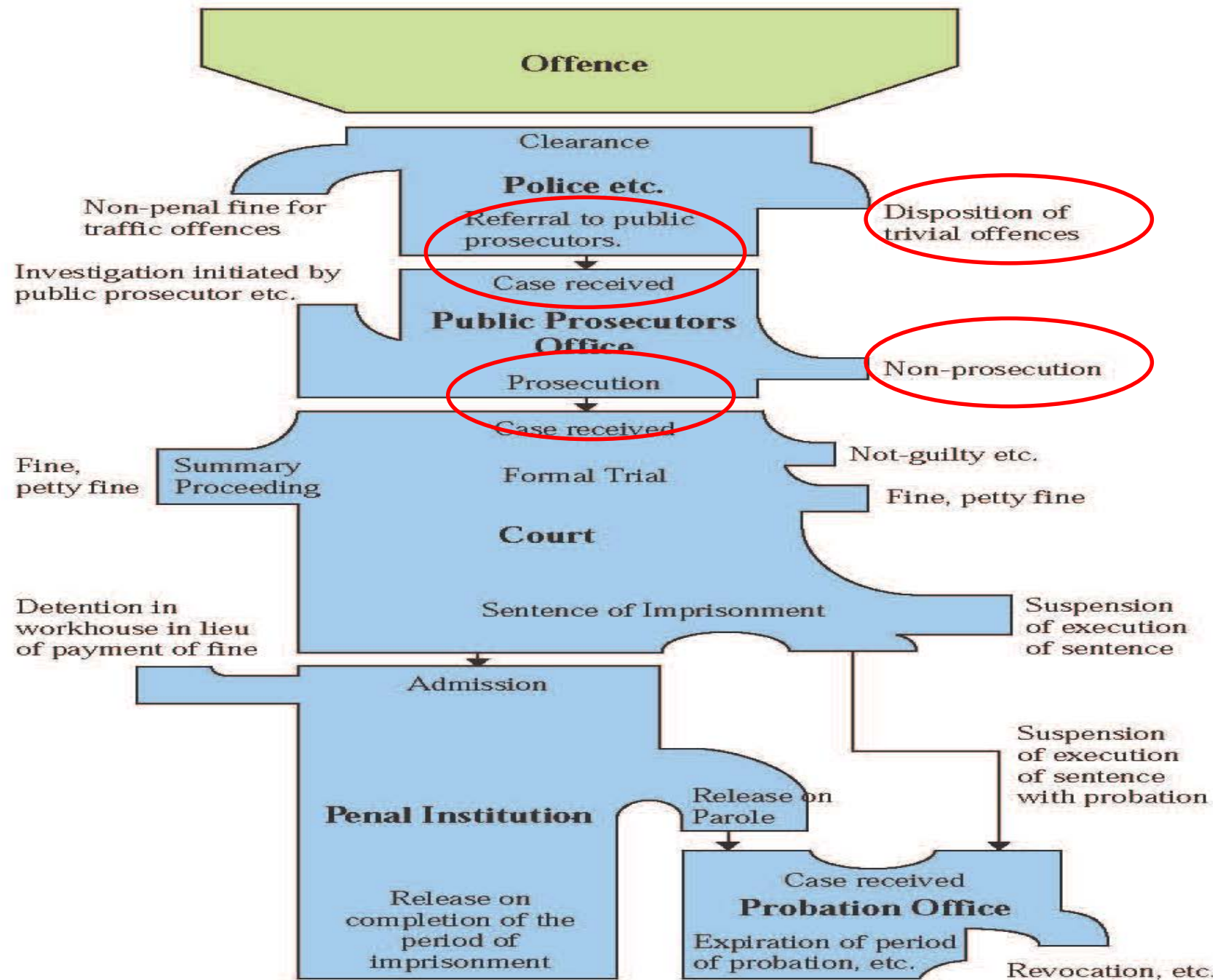
DISCUSSION

- What's the difficulty to enforce foreign judgment in Japan?
- If you are a practitioner, to what kind of point do you pay attention when doing business with a Japanese firm???



OUTLINE OF CRIMINAL PROCEEDINGS





PRINCIPLE OF NATIONAL PROSECUTION

(*KOKKA SOTSUI SYUGI*)

The national institution has the exclusive power to prosecute criminal suspects.

Code of Criminal Procedure

Article 247 Prosecution shall be instituted by a public prosecutor.

Article 248 Where prosecution is deemed unnecessary owing to the character, age, environment, gravity of the offense, circumstances or situation after the offense, **prosecution need not be instituted.**



CONSTITUTIONAL RIGHTS OF CRIMINAL SUSPECTS AND DEFENDANTS

Constitution

Article 33. No person shall be apprehended **except upon warrant** issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, the offense being committed.


Article 34. No person shall be arrested or detained without being at once informed of the charges against him or without **the immediate privilege of counsel**; nor shall he be detained without adequate cause; and upon demand of any person **such cause must be immediately shown in open court in his presence and the presence of his counsel.**

CONSTITUTIONAL RIGHTS OF CRIMINAL SUSPECTS AND DEFENDANTS (2)

Constitution

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized, or except as provided by Article 33. Each search or seizure shall be made upon separate warrant issued by a competent judicial officer.

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.



CONSTITUTIONAL RIGHTS OF CRIMINAL SUSPECTS AND DEFENDANTS (3)

Constitution

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

He shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense.

At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.



CONSTITUTIONAL RIGHTS OF CRIMINAL SUSPECTS AND DEFENDANTS (4)

Constitution

Article 38. No person shall be compelled to testify against himself.

Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

No person shall be convicted or punished in cases where the only proof against him is his own confession.



Code of Criminal Procedure

Article 30 (1) The accused or the suspect may appoint counsel at any time.

Article 39 (1) The accused or the suspect in custody may, **without any official being present**, have an interview with, or send to or receive documents or articles from counsel or prospective counsel upon the request of a person entitled to appoint counsel (with regard to a person who is not a lawyer, this shall apply only after the permission prescribed in paragraph (2) of Article 31 has been obtained).



Code of Criminal Procedure

Article 289 (1) When the case is punishable with the death penalty, life imprisonment, or imprisonment with or without work for more than three years, the trial may not be convened without the attendance of counsel.

What if the accused does not know any lawyer???

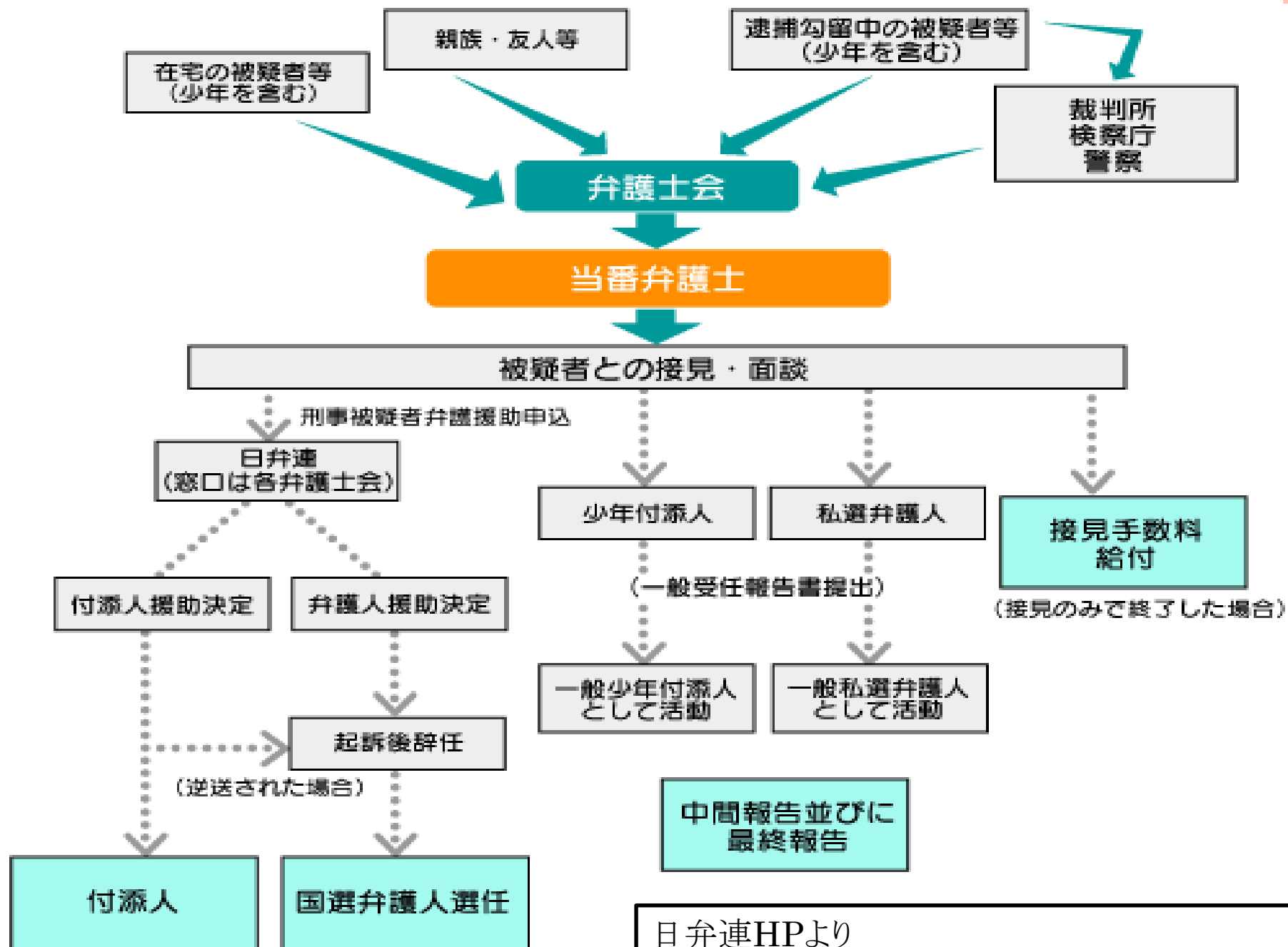


DUTY ATTORNEY SYSTEM

- First initiated by local bar association, then gradually spread into all bar associations from around 1992.
- The suspect can have a free interview of the lawyer in duty. (for the 1st meeting.)
- In 2006, 47.7% of the accused who were arrested used this system.
- In 2015, this system was used in 50,705 cases.

<http://www.nichibenren.or.jp/en/legalinfo/arrest.html>





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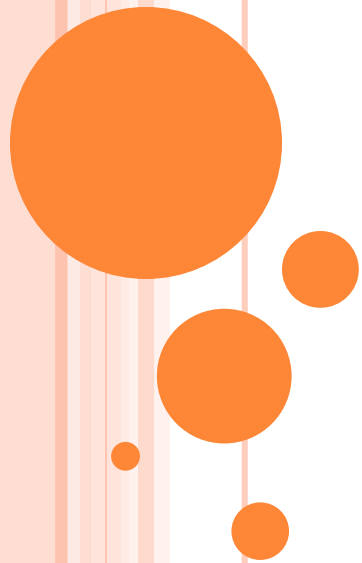
http://www.nichibenren.or.jp/ja/committee/list/keiben/keiben_a.html

WHY “INTERVIEW AT THE EARLY STAGE” IS IMPORTANT?

- How do you feel if you are suddenly arrested???
- You may be recommended by a police officer that “sign here, then you will be released soon!”
- Overturning your statement at the interrogation is VERY difficult in reality.



CRIMINAL PROCESS IN JAPAN



THREE-TIER COURT SYSTEM

○ Summary court


- A summary court generally only has jurisdiction over criminal cases where the penalty is a fine or lighter. A sentence of imprisonment with work can also be imposed for minor cases, such as theft or embezzlement, but the length of the imprisonment term that can be rendered is restricted.

○ District court

- The district court has jurisdiction as the court of first instance over criminal cases other than those liable to fines or lesser punishment. There are no summary proceedings for cases sent to a district court, for which court hearings are always held.



THREE-TIER COURT SYSTEM (2)

- Court of second instance (High Court)
 - If either party is dissatisfied with the judgment in the first instance, said party can appeal to a court of second instance with a demand to reverse the judgment by alleging errors. It is noteworthy that the public prosecutor also has the right of appeal in the same way as the accused.
 - All appeals for criminal cases are handled by the high court, with such cases being tried by a three-judge panel. An appeal can be made to the court of second instance on the following grounds:
 - (1) Non-compliance with procedural law in the trial procedure
 - (2) An error in the interpretation or application of law in the judgment
 - (3) Excessive severity or leniency of the sentence
 - (4) An error in fact finding
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THREE-TIER COURT SYSTEM (3)

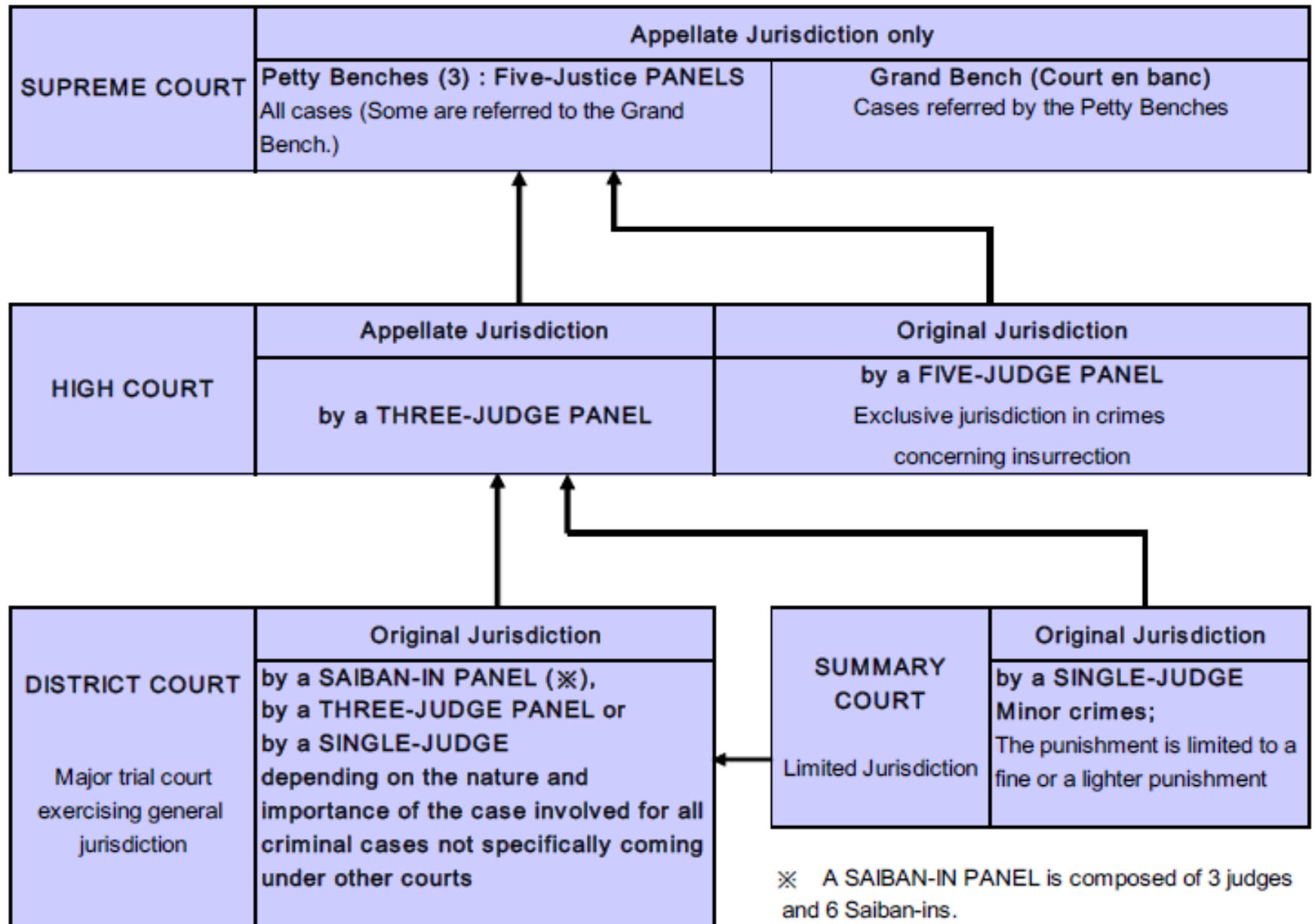
○ Final appellate instance

- Either party can make a final appeal to reverse the judgment of the court of second instance.
- The Supreme Court handles all final appeals.
- At the Supreme Court, cases are generally handled by a Petty Bench comprised of five justices, but cases involving important constitutional issues and suchlike are handled by the Grand Bench comprised of all fifteen justices.
- Final appeals can only be filed on the following grounds:
 - (1) A violation of the Constitution or an error in the interpretation of the Constitution
 - (2) An alleged conflict with precedents of the Supreme Court or high courts

However, the final appellate court may reverse the judgment in the second instance under special circumstances when it deems that not doing so would be contrary to justice.

As guardian of the Constitution, the Supreme Court is the court of last instance having the authority to determine whether all laws, orders, regulations and measures comply with the Constitution or not.

Jurisdiction and Procedure of Criminal Cases



INDICTMENT AND ACCESS TO LEGAL COUNSEL

- A period of twenty-three days is allowed for arrest and detention before an indictment, and there is no pre-indictment bail system.
- Trials focus on the examination of evidence. Procedures to arrange evidence and points of dispute may be held prior to a trial or between trials.
- Previously, Japan had assigned court-appointed attorneys for defendants only after indictment. However, from October 2006, as part of the new judicial reforms, court-appointed attorneys must be assigned for suspects of certain serious crimes in custody prior to indictment. The scope of this court-appointed attorney system has been expanded to include suspects facing servitude or imprisonment for a maximum of over three years since May 2009. The JFBA has long advocated a court-appointed attorney system for suspects and this has finally been achieved.
- NEW Reform will grant all suspects in bail an access to counsel.

PATH TO INDICTMENT

1. Offense and opening of investigation

- a. Investigative authorities : The criminal procedure starts with an investigation by the authorities.
- b. Requirement for judicial warrants

2. Arrest

- a. The right to remain silent and its notification procedure

3. Referral to public prosecutor

4. Detention of the suspect

- a. Definition and requirements for detention of the suspect
- b. Period of detention prior to institution of prosecution
- c. Document which contains a statement given before a public prosecutor
- d. Court-appointed defense counsel system
- e. Right to interview with defense counsel

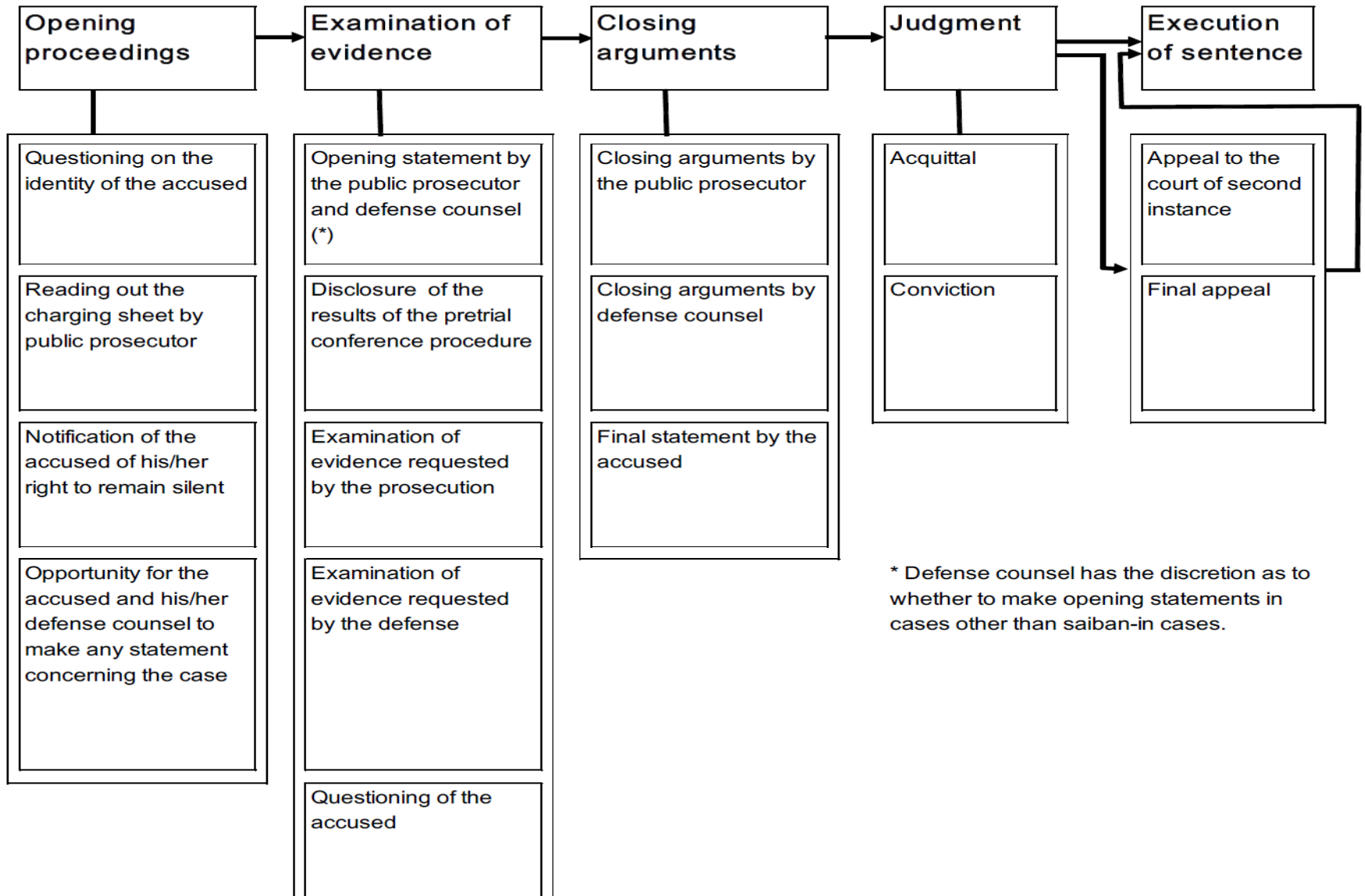


TRIAL PROCESS

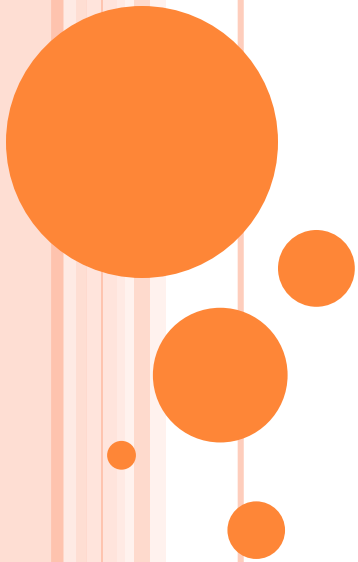
1. Opening proceedings
2. Examination of evidence
 - a. Opening statement: In criminal cases, the principle of “innocent until proven guilty” is held, so the public prosecutor must prove the charged facts beyond a reasonable doubt based on the evidence.
 - b. Statement of the pretrial arrangement proceedings results
 - c. Examination of evidence
3. Examination of witnesses
4. Questioning the accused
5. Confession
6. Demonstration of circumstances
7. Closing Arguments
8. Deliberation
9. Judgment



Criminal Case Proceedings



STATISTICAL DATA



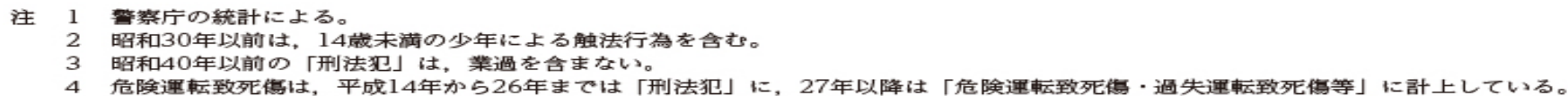
RATIO OF ARREST (2016)

In 2016, 996,120 criminal cases were found. How many of them were arrested?

1. 90%
2. 70%
3. 50%
4. 30%

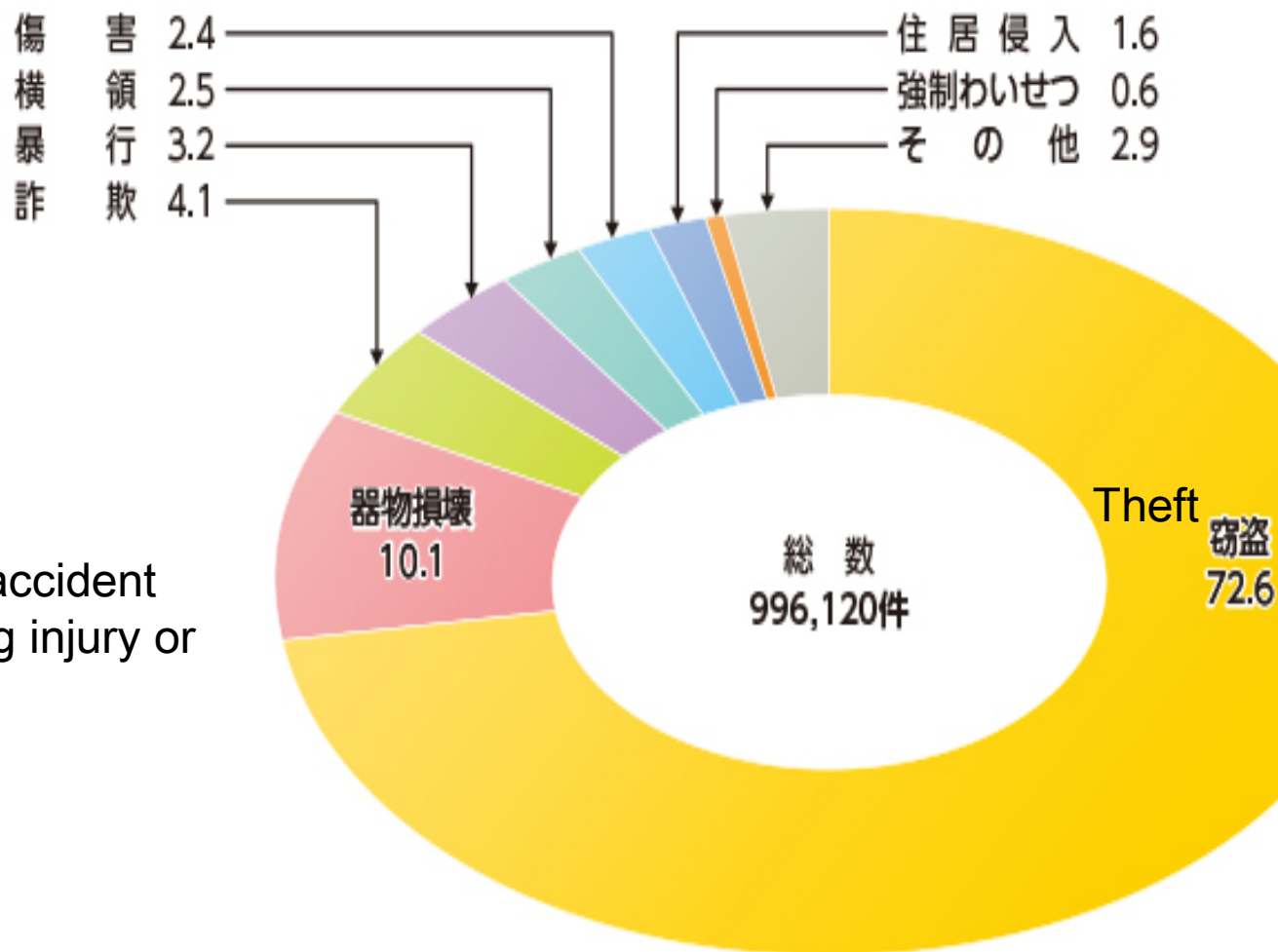
【Answer】 According to White Paper of Crimes in 2017, 337,066 cases were arrested and crime-arrest rate was 52%.





1-1-1-3 刑法犯 認知件数の罪名別構成比

(平成28年)



Traffic accident
resulting injury or
death

注 1 警察庁の統計による。

2 「横領」は、遺失物等横領を含む。

出典: 犯罪白書平成29年版 <http://hakusyo1.moj.go.jp/jp/64/nfm/images/full/h1-1-1-01.jpg>

RATIO OF INDICTMENT

In 2016, 1,124,506 criminal suspects were sent to the prosecutor's office. How many of them were actually indicted?

1. 98%
2. 68%
3. 28%
4. 8%

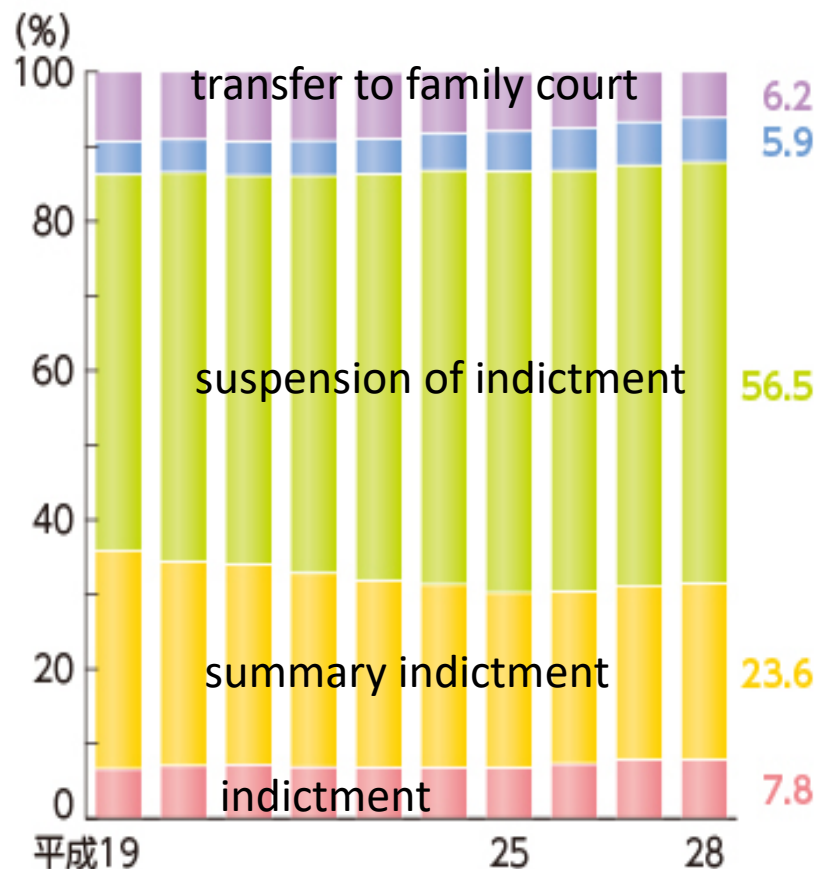
【Answer】 According to White Paper of Crimes in 2016, 87,735 suspects were indicted and the ratio of indictment was 7.8%.



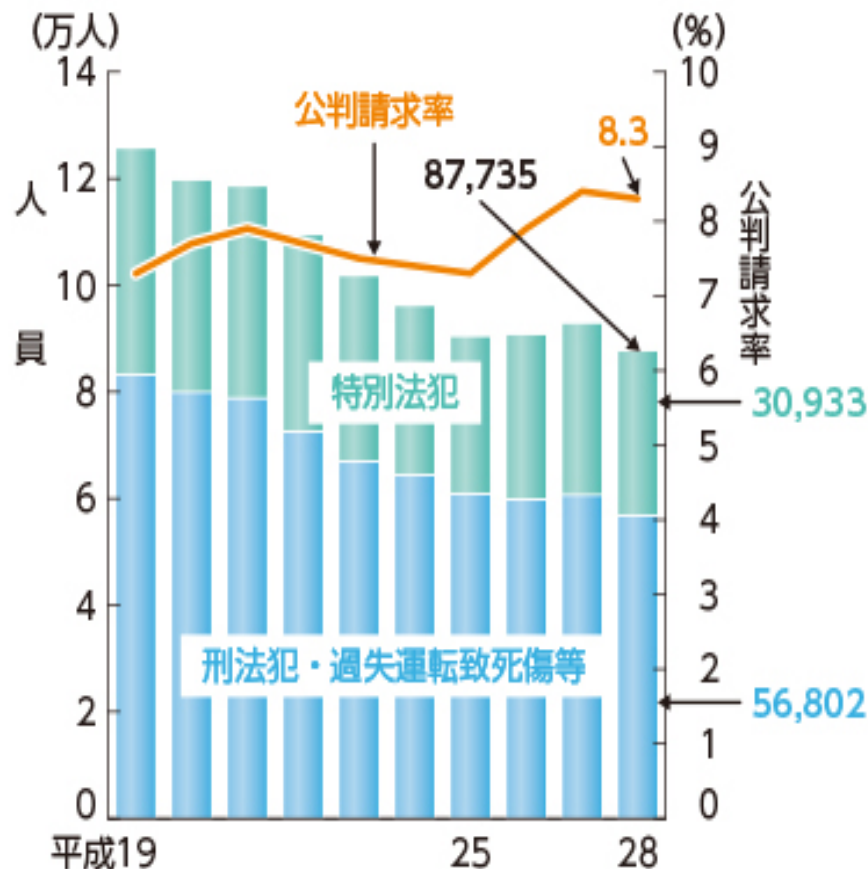
2-2-3-1 図 検察庁終局処理人員の処理区分別構成比・公判請求人員等の推移

(平成19年～28年)

① 検察庁終局処理人員の処理区分別構成比



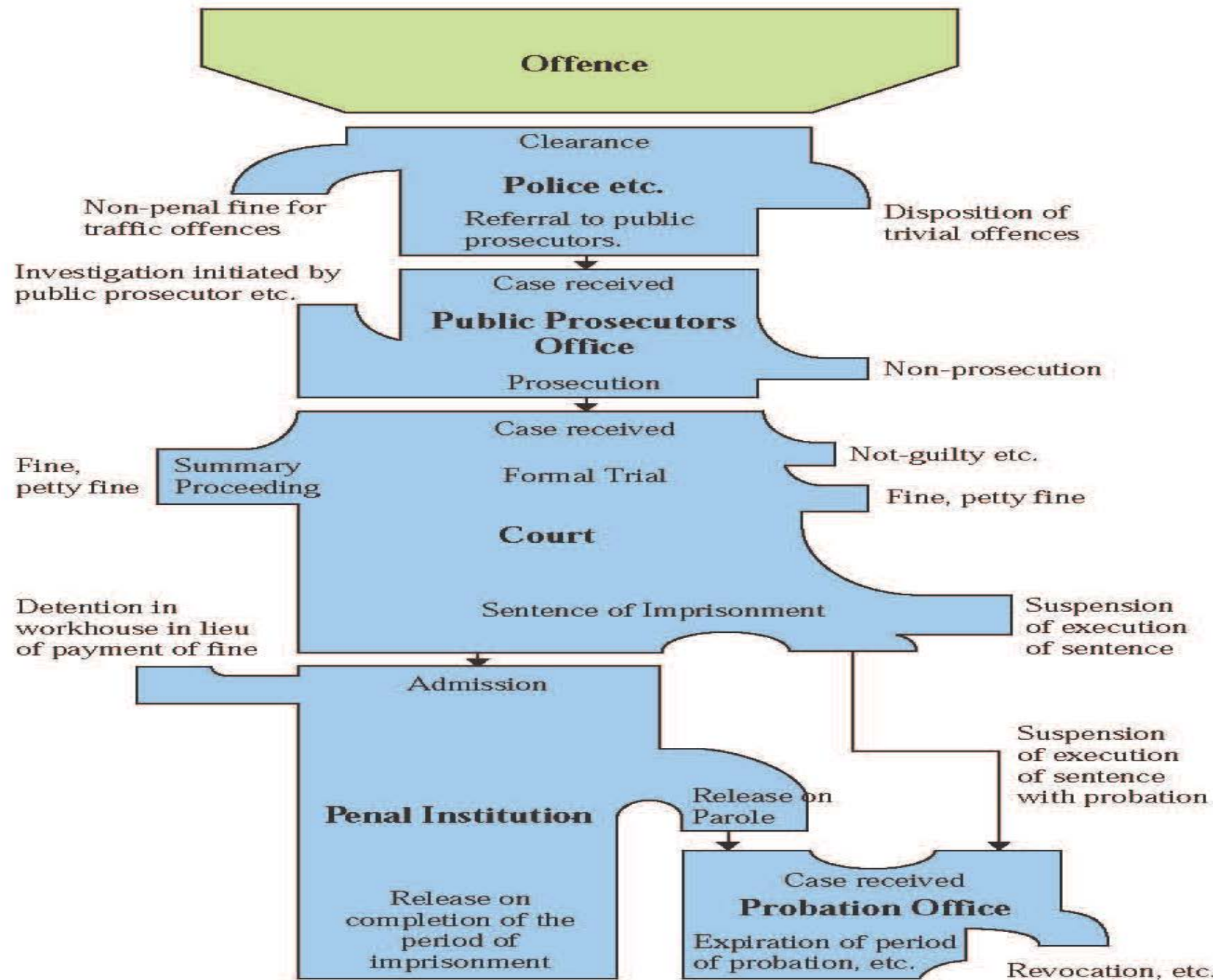
② 公判請求人員・公判請求率



注 検察統計年報による。

出典: 犯罪白書平成29年版

<http://hakusyo1.moj.go.jp/jp/64/nfm/images/full/h2-2-3-01.jpg>



CONVICTION RATE

In 2016, 320,488 criminal cases were finalized. How many of them were found not guilty?

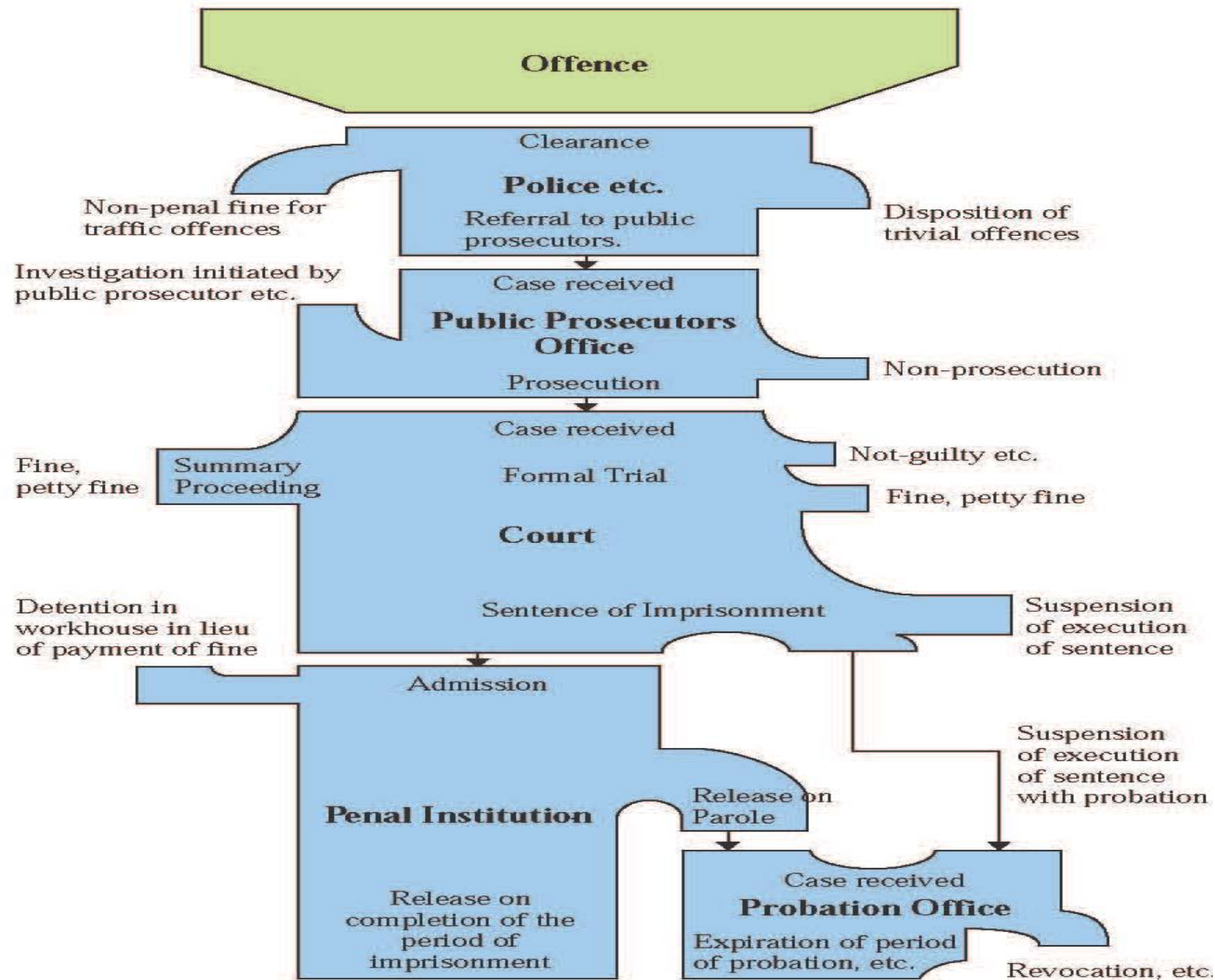
1. 0.03%

2. 0.3%


3. 3%

4. 10%

【Answer】 According to White Paper of Crimes in 2017, the courts imposed death penalty for 7 cases, life imprisonment for 15 cases, imprisonment for a definite term for 51,824 cases, and fines for 263,099 cases. The court found not guilty for 104 cases, meaning that conviction rate was 99.97%.



PROBLEM OF THE CRIMINAL JUSTICE IN JAPAN


- Shibushi Case: False charge
 - Happened in 2003.
 - The suspects in a vote-buying case in this small town in western Japan were subjected to repeated interrogations and, in several instances, months of pretrial detention. The police ordered one woman to shout her confession out a window and forced one man to stomp on the names of his loved ones.
 - In all, 13 men and women, ranging in age from their early 50s to mid-70s, were arrested and indicted. Six buckled and confessed to an elaborate scheme of buying votes with liquor, cash and catered parties. One man died during the trial — from the stress, the others said — and another tried to kill himself.
 - But all were acquitted this year in a local district court, which found that their confessions had been entirely fabricated. The presiding judge said the defendants had “made confessions in despair while going through marathon questioning.”
 - Later, the victims won in national compensation litigation.
- 



INTRODUCTION OF THE LAY JUDGE SYSTEM



OUTLINE OF THE LAY JUDGE SYSTEM

- Three judges and six *Saiban-in* (lay judge) selected at random from the pollbook for one case only
 - Decide both fact-finding and sentencing with basically the same right of vote.
 - simple majority (with some exception)
 - Limited to cases involving serious crimes (could be sentenced to death penalty, life imprisonment, etc.)
 - Murder, robbery or rape with bodily injury, arson, drug smuggling etc.
 - Both parties can appeal for fact-finding and sentencing.
 - Appellate court are held by only professional judges
- 

PROCEDURE TO SELECT *SAIBAN-IN*

() IS THE NUMBER IN 2016

Previous year
Autumn to
winter

Arrangement of
list for
candidate

Random choice
based on
pollbook
(選挙人名簿)

Questionnaire
to each
candidate

(229,200)

Around 6
weeks before
trial

Eliminate
those who
are not
qualified, or
permissible
to decline
based on
answer to
questionnaire

(171,708)

Send
summon
paper and
questionnaire
Eliminate
those who
have
difficulties to
attend

(127,811)

On first trial day

Eliminate those who
have sufficient reason
to decline
Challenge for cause
Peremptory challenge
4 persons for each
party
Finally select 6
Saiban-in and certain
number of
supplemental Saiban-
in

(6,363)



BREAKDOWN OF CASES BROUGHT TO *SAIBAN-IN* COURT IN 2016

- Total decided 1,126
 - Charges:
 - Murder 298
 - Robbery resulting injury 207
 - Arson 137
 - Sexual assault resulting death or injury 96
 - Rape resulting death or injury 70
 - Violation of drug regulations 36
 - Robbery resulting death 33 etc.



RATIO OF CONVICTION IN *SAIBAN-IN* TRIAL (2016)

- Total decided: 1,104
 - Guilty 1,090 (98.7%)
 - Death penalty 3
 - Life imprisonment 24
 - Imprisonment for definite term 1,063
 - Not Guilty 12 (1.1%)
- Appealed by either side: 400 (36.2%)



DAYS NEEDED FOR TRIAL

- Average duration for trial (from indictment to ruling) in 2016 10.0 months
- Average days that lay judge attended 9.0 days
- Average hours that lay judge deliberated 731.9 minutes (=12 hours 11.9 minutes)

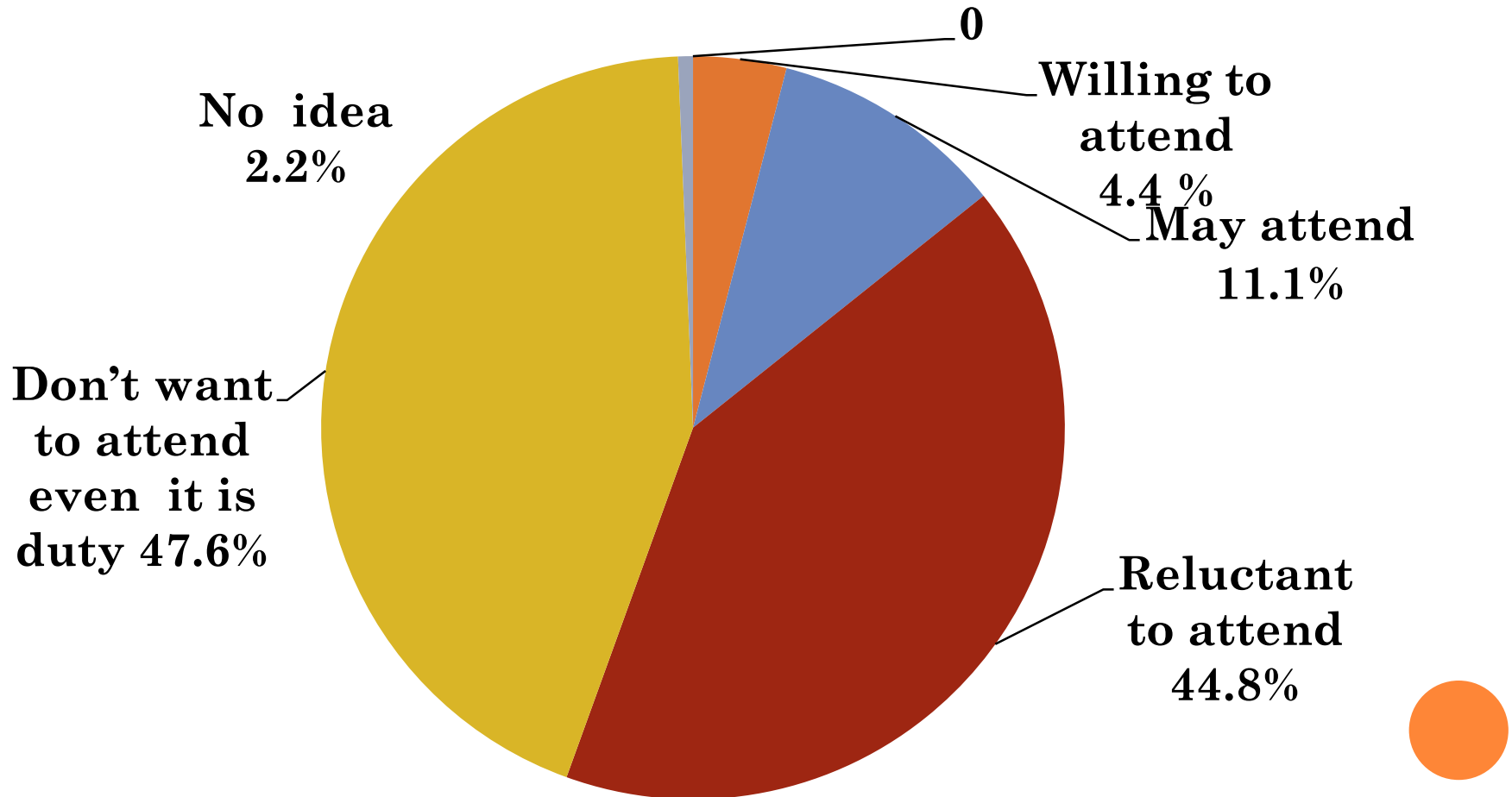


PRE-TRIAL ARRANGEMENT PROCEDURE

(公判前整理手続)

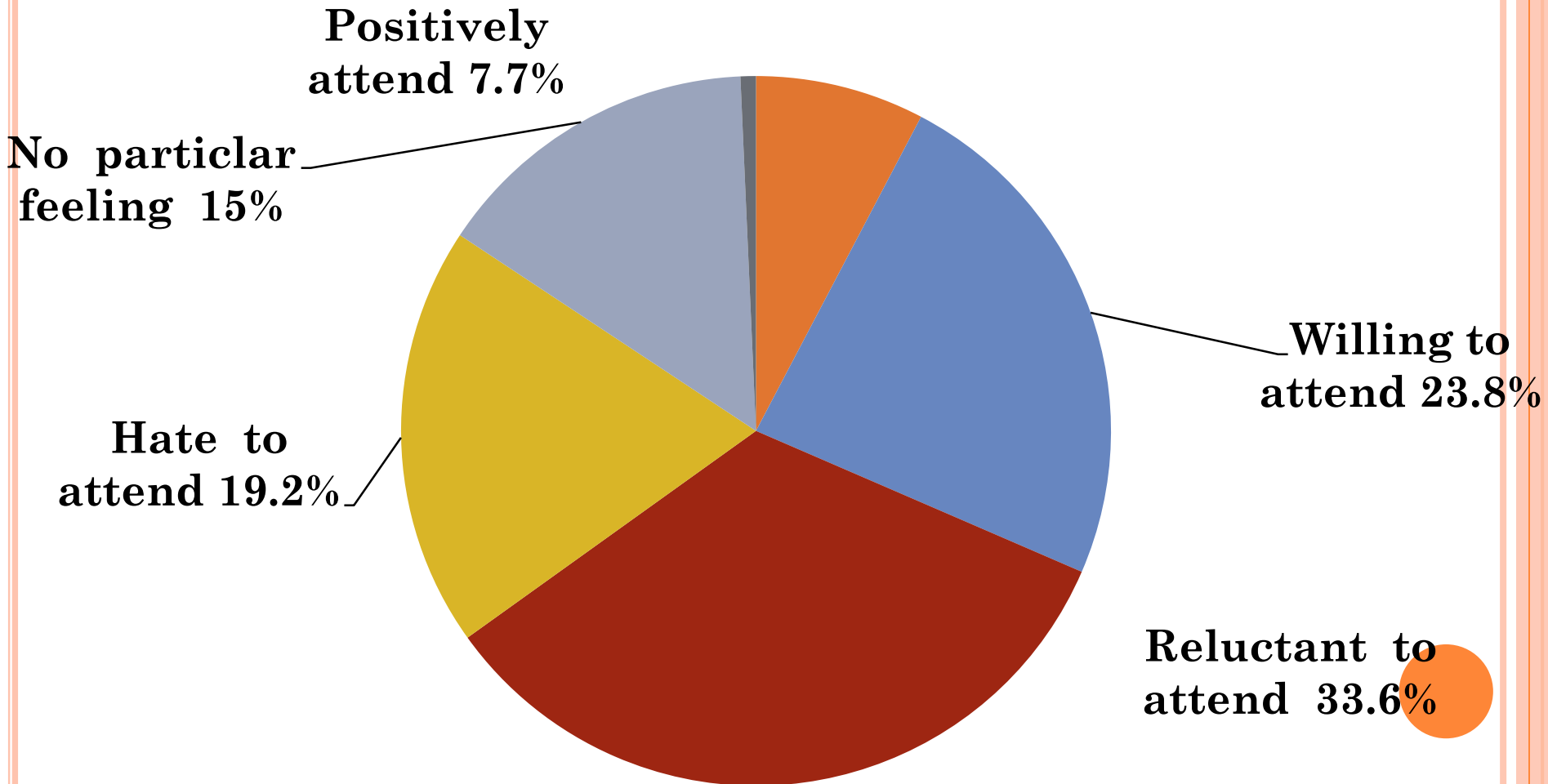
- Compulsory procedure for *Saiban-in* trial (Optional for ordinary trial)
 - In-camera (only among judges, prosecutor, defense council, and defendant)
 - Both parties submit their assertions planned to prove at trial, and list of evidences which they request to be admitted.
 - Adjust points of issues, decide evidences to be examined, and set a schedule for examination
 - Wider disclosure of evidence for defense side under proper rules
- * Pre-trial arrangement procedure was Introduced by amendment of the Code of Criminal Procedure in 2004

EVALUATION OF SAIBAN-IN SYSTEM BY ORDINARY CITIZENS (1) (SURVEY CONDUCTED BY THE SUPREME COURT BEFORE INTRODUCTION OF THE SYSTEM IN AUGUST 2008)



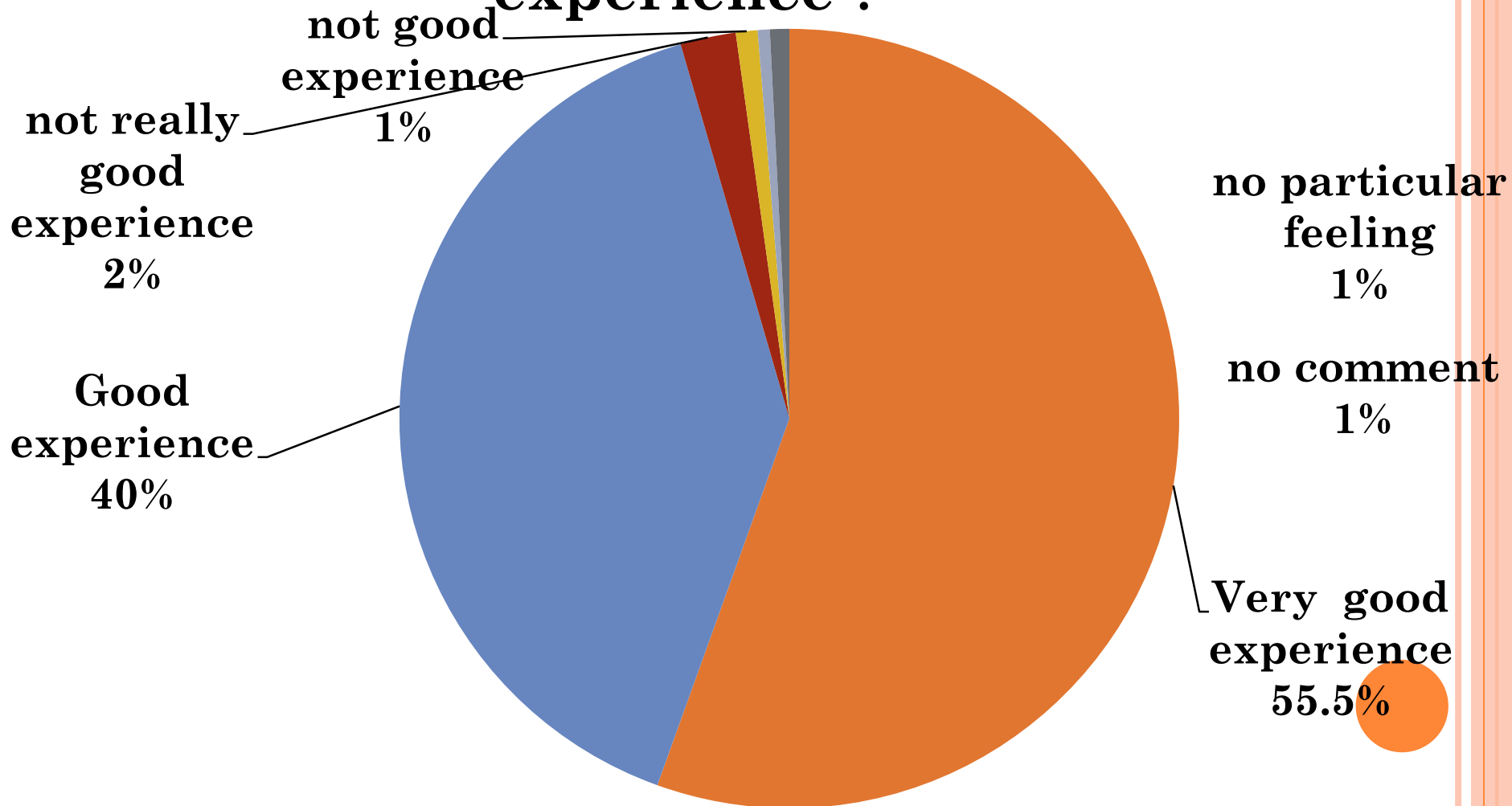
EVALUATION OF *SAIBAN-IN* SYSTEM (2)

Questionnaire to those who actually attended trial as *saiban-in*, “How did you feel before selected?” (2011.12 by Supreme Court)



EVALUATION OF SAIBAN-IN SYSTEM (3)

“How did you feel about your experience?”



JURY SYSTEM IN THE U.S

- Historical background

deeply linked to history of independence of U.S

`jury nullification` 6th Amendment of the US Constitution

- 12 jurors only decide `guilty` or `not guilty`

judge gives `jury instruction`, but does not join their verdict
verdict does not include sentencing

- Verdict gives no explanations of its reason

- Appeal is basically not allowed for fact-finding

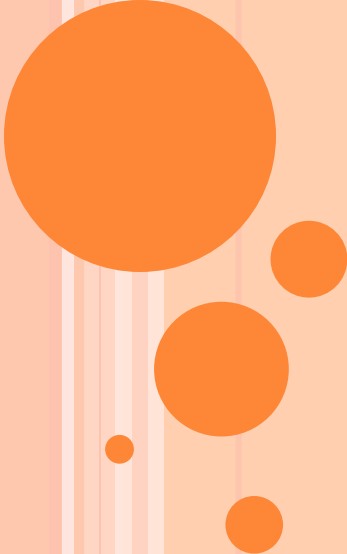
- Composition of jury member may be very crucial




ROLES OF JUDGES AND *SAIBAN-IN* IN JAPANESE *SAIBAN-IN* SYSTEM

- Judges have exclusive role on interpretation of law, and trial procedure issues.
- Judgment is basically by simple majority. Right of vote is equal, with one exception
 - `majority must includes opinions **of both judge and Saiban-in`**
 - ※ 3 judges guilty , 2 saiban-in guilty → guilty
 - ※ 5 saiban-in guilty, no judges guilty → not guilty





INTRODUCTION OF THE VICTIM PARTICIPATION SYSTEM



BACKGROUND

- Movement from the victims and families of victims.
- “WHY we are not protected from the public and allowed to say anything in the trial, whereas the murders are constitutionally protected in various ways?”
- Till only ten years ago, a crime victim has had a legal status only as the way of establishing proof in criminal procedure. So, if the public prosecutor did not consider it necessary for the proof of guilt, there was no opportunity for a victim to testify as a witness in a criminal trial, and he was not even notified of information about the case in which he became a victim.



EXAMPLE OF HIKARI CITY CASE



THE BASIC ACT ON CRIME VICTIMS (2004)

- The Basic Act, provided the basic principles of the measures for crime victims, was enacted.
- The 18th article of the Act provides that the State and Local governments shall take such necessary measures as providing information concerning the progress of criminal procedures and developing a system to expand opportunities to participate in criminal procedures, so that crime victims may get involved in criminal procedures concerning the harm in a proper way.
- The Master Plans on Crime Victims decided by the Cabinet in 2005 asked the ministry of justice to examine the system where crime victims can participate in the criminal trial directly towards newly introducing a suitable one for our country and implement the measure for it.



INTRODUCTION OF THE VICTIM PARTICIPATION SYSTEM (被害者参加制度)

- Serious criminal cases only.
- What the victims can do under the system are:
 - (1) Attendance to a trial date (Article 316-34 Code of Criminal Procedure (CCP));
 - (2) Examination of the witness (316-36);
 - (3) Ask a question to the defendant (316-37); and
 - (4) Make a statement of the opinion about the finding of facts and the application of law (316-38).(Subject to the court's permission.)



【DISCUSSION】 Discuss possible risks of victim's participation to the lay judge trial. Do you support the victim participation system? WHY?



RECENT AMENDMENT ON CODE OF CRIMINAL PROCEDURE

- The Act Concerning Criminal Judicial Reform passed on May 24, 2016. The Act becomes effective within 3 years (2019).
- The Act includes mainly:
 - Recording interrogation (for Saiban'in saiban, detention cases, and cases Prosecutor investigates)
 - Introduction of plea-bargaining **for the other parson's criminal conduct**
 - Reforming rules on Wiretapping
 - Expanding the scope of lawyers' assistance
 - Reforming evidence disclosure system
 - Introducing measures to protect victims and witness



CHARACTERISTICS OF JAPANESE CRIMINAL PROCESS

- *Seimitsu shiho*
- Crime control model \Leftrightarrow Due process model
- Community control
 - ➔ Diversion model
- Adversarial model???
- ➔ Discussion on drafting Professional Responsibility Rules “duty to ‘respect truth’”
 - Positive duty or Passive duty ???
- Forgiving (*Kandai-na*) punishment ➔ 60 % suspended.





HOW MASS POLLUTION CASES ARE TREATED IN JAPAN?



WHY NOT SO MANY CASES ARE PUBLISHED???

- Relatively small number of lawyers.
- For WHOM the cases are published???
- The scope that the judiciary can be effective is still small???
- How then have Japanese people handled a problem involving so many people?



MINAMATA CASE

- <https://www.youtube.com/watch?v=iTQ5zf050-w>
- Officially found in May 1956, sale of Minamata fish banned by 1957.
- In 1959, Kumamoto University researchers identified that organic mercury from Chisso was the cause of the disease.
- Government mediation in 1960: ¥300,000 for deaths, ¥20,000 for funeral expenses, with totally unfair terms.
- In 1968, the government finally agreed that organic mercury was the causative agent.



MINAMATA CASE (2)

- First litigation against Chisso brought in 1969 => Judgment in March 1973, ordering Chisso to pay 937.3 million Yen.
- Second litigation against Chisso in 1973 brought by uncertified victims.
- (Delays in recognition of Minamata patient in 1970s.) => Minamata Matase-chin (waiting fee) litigation. Kumamoto Dist.Ct (1983), Fukuoka High Ct. (1985) found the government respnsible. Sup.Ct (1991) remanded the case to Fukuoka High Ct. Plaintiff LOST in 1996.
- Third litigation against the government 1980 => Won in the first instance but the government appealed. In 1990, the court recommended settlement. But the national government did not settle the case.



MINAMATA CASE (3)

- In 1994, MURAYAMA Cabinet established. Political settlement → Passed the law paying money to 11,000 victims WITHOUT certifying them as “Minamata patients.” This is called the first political settlement.



MINAMATA CASE (4)

- In 2004, the Supreme Court decision on Minamata litigation brought by the victims in Kansai area who refused to accept political settlement EXPANDED the standard for certification of Minamata patients. The judgment says:
 - (1) By the end of Dec.1959, the government should have exercised its authority to regulate pollution of Chisso.
 - (2) Non-performance of such authority by the government became illegal in January 1960.
 - (3) Kumamoto prefecture was also responsible.
 - (4) The government and Kumamoto prefecture is responsible to pay the damages of 71.5 million Yen as damages of the 37 patients.

MINAMATA CASE (3)

- Minamata Victim Relief Act (2009): Certify those people who do not satisfy the national standard of Minamata Patient as “Minamata Victim” and provide about 2 million Yen. → The second political settlement.
- However, the Act requires the applicant to live specific area in Kumamoto or Kagoshima for more than one year in the past.
- In February and April 2012, two different High Court decisions about the certification standard of Minamata Victim.
- Finally, the unified decision by the Supreme Court in 2013, recognizing the plaintiff as a patient.
- But still there are 2,142 requesting recognition as a patient and about 1,400 people litigating to claim compensation.

FRAMEWORK OF COMPENSATION.



All led by the Ministry of WLH. Several litigations are still pending.

REQUIREMENTS TO PROMOTE CHECKING-POWER OF THE JUDICIARY AGAINST THE EXECUTIVE

- Process must be transparent.
- Evidence must be preserved.
- Standing must be expanded.
- Remedy must be effective.
- Number of lawyers who can handle administrative litigation must be increased.

➔ Relatively new, or even now seriously problematic...



REFORM OF ADMINISTRATIVE LITIGATION ACT (2004)

- Expanded standing (Art.9), modeled after *Monju* Case of 1992.
- New remedy (Art.3(6)): Imposing “Obligation” to do some performance. (Gimu-zuke sosho)
- New remedy (Art.3 (7)): Injunction



TOMO NO URA CASE (2009, Hiroshima District Court)

→ The court allowed the plaintiff's claim of injunction





(IF WE HAVE TIME)... THE DIFFERENT SURNAME CASE WAS ALSO ADMINISTRATIVE LITIGATION...

- 1997: Legislative Council of the MOJ proposal
- NO legislation since then...
- FAILURE to ACT???

