

**Grand Design of Criminal Justice Reform for Preventing Miscarriages of  
Justice (*Enzai*)  
2022 Edition**

**November 16, 2022**

**Japan Federation of Bar Associations(JFBA)**

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## 1 Purpose and Perspective of the Grand Design

It is a serious violation of human rights for a State to suspect innocent persons and deprive them of their life or liberty for crimes they did not commit. It goes without saying that wrongful execution is an irreversible violation of human rights. Wrongful conviction and imprisonment also lead to the destruction of that person's life. Even with a judgement that includes a suspended sentence, being labelled a criminal will bear heavily on an innocent person. Even if the person is not convicted in a trial, pretrial detention for false accusations will have a grave impact on the life of the innocent person. Preventing such miscarriages of justice<sup>1</sup> is the most important challenge for criminal justice.

However, it can hardly be said that preventing miscarriages of justice has been sufficiently sought after in Japanese criminal justice. "Everyone charged with a criminal offence shall have the right to be presumed innocent until proved guilty according to law" is an internationally established principle (International Covenant on Civil and Political Rights (ICCPR) Article 14.2). Nevertheless, as indicated in forced statements during interrogation and long-term custody of citizens who deny the charge, we cannot conclude that the right to be presumed innocent has been sufficiently respected in actual practice under the Japanese criminal justice system.

The following is a list of only the major miscarriage of justice cases revealed in recent years in Japan.

Table 1. Major miscarriage of justice cases revealed in recent years

Year	Case (Judgement)
2007	Shibushi case (Acquitted, Feb. 23, 2007, Kagoshima District Court)
	Himi case (Acquitted in the retrial, Oct. 10, 2007, Toyama District Court Takaoka Branch)
2010	Ashikaga case (Acquitted in the retrial, Mar. 26, 2010, Utsunomiya District Court)
	Postal Fraud case (Ex-senior official at the Ministry of Health, Labor and Welfare was acquitted, Sept. 10, 2010, at the Osaka District Court)
	Kitakyushu nail care case (Acquitted, Sept. 16, 2010, Fukuoka High Court)
2011	Fukawa case (Acquitted in a retrial, May 24, 2011, Mito District Court Tsuchiura Branch)

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<sup>1</sup> The word *enzai* (miscarriage of justice) has several meanings, but in this Grand Design it will be used to refer to the state suspecting an innocent person of committing a criminal offence and depriving him/her of his/her life or liberty.

2012	PC Remote Control Virus case
	Tokyo Electric Power Company's female employee murder case (Acquitted in a retrial, Nov. 7, 2012, Tokyo High Court)
2014	Izumitsu convenience store theft case (Acquitted, Jul. 8, 2014, Osaka District Court Kishiwada Branch)
2015	Osaka rape false testimony retrial case (Acquitted in a retrial, Oct. 16, 2015, Osaka District Court)
2016	Higashi-Sumiyoshi case (Acquitted in a retrial, Aug. 10, 2016, Osaka District Court)
2019	Matsubase case (Acquitted in a retrial, March 28, 2019, Kumamoto District Court)
2020	Koto case (Acquitted in a retrial, March 31, 2020, Otsu District Court)
2021	Ohkawara Kakohki case (Prosecution dismissed, Aug. 2, 2021, Tokyo District Court)
	Pressance case (Acquitted, Oct. 28, 2021, Osaka District Court)

These miscarriages of justice cases shed light on the practices that criminal investigation agencies use to coerce innocent people into making false statements- statements that the courts use to detain them for an extended period. Such cases were revealed to be miscarriages of justice due to circumstances such as the appearance of the true perpetrator or the discovery of conclusive evidence. We cannot underestimate the number of miscarriages of justice cases that have yet to be revealed. Japanese criminal justice system needs fundamental reform to achieve its most important goal which is the prevention of miscarriages of justice.

The purpose of the Grand Design is to provide an overall concept for criminal justice reform that seeks to prevent miscarriages of justice out of the many challenges related to criminal justice. The JFBA has collected and published a variety of opinions regarding the prevention of miscarriages of justice. The Grand Design will look at problems at each stage of the process that citizens would experience when they are suspected of a crime that they did not commit under the current Japanese criminal justice system and provide an overview of the JFBA's opinion for each stage. The opinions included in the Grand Design are a summary of the JFBA's opinion papers. The full text of the opinion papers is available on the JFBA's website.

With regard to criminal justice, the JFBA has been engaged in a variety of important issues, including the prevention of miscarriages of justice, rights of the child, human rights in criminal proceedings, toughening and broadening the range of penalties and human rights,

human rights of death row inmates, criminal detainees, the convicted and the victims<sup>2</sup>. The JFBA seeks to reform the overall penalties system including abolishing the death penalty system and has declared that it will put its best efforts into realizing this.<sup>3</sup> Due process of criminal proceedings must be protected in all cases no matter what the circumstances may be. Even in situations where a penalty is imposed on a person who has committed a crime, restrictions on human rights must be kept to a minimum. This is a matter of course.

The Penal Code and the Code of Criminal Procedure have been repeatedly revised with the changing times. New problems appear one after another at the forefront of criminal justice. The system reform has been discussed within the JFBA continuously. Criminal justice reform for the prevention of miscarriages of justice requires constant efforts. The JFBA will continue to grasp problems in the criminal justice system and collect and publish opinions for improvement. This Grand Design will be revised accordingly.

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<sup>2</sup> Declaration on Action for Human Rights 2019 (Oct. 2019)

<sup>3</sup> Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty (Oct. 2016), Basic Propositions on Abolition of the Death Penalty and on Introducing Alternative Punishment and Instituting a Judicial Proceeding System for Commutation (Oct. 2019)

## **2 Current conditions and problems of criminal justice and the JFBA's opinion**

### **2-1 Interrogation by criminal investigation agencies**

#### **2-1-1 Current conditions and problems of interrogation by criminal investigation agencies**

When citizens who have not committed a crime are suspected of committing a criminal offence by criminal investigation agencies, they are asked to come to a police station or public prosecutor's office or are even arrested for interrogation.

#### **Interrogation for long hours, many times, and/or for an extended period**

Interrogation usually takes place behind closed doors in what is called an interrogation room within the police station or the public prosecutor's office. A distinctive feature of the Japanese criminal justice system is that interrogation is conducted over an extremely long period of time. According to current laws, there are no strict limitations regarding the duration or number of interrogations. Interrogation lasting many hours may be conducted multiple times over an extended period. Such interrogation places extensive mental, physical, and financial strain on citizens who have been suspected of committing a criminal offence.

#### **Coerced false confessions and statements**

During interrogations, the Japanese criminal investigation agency does not conduct interviews from a neutral standpoint but pursues the suspects' admission with regard to the suspected criminal offence. This often leads to the coercion of false statements. Some of the miscarriage of justice cases revealed in recent years have made it clear that the criminal investigation agencies have coerced the suspects into making false confessions and statements during interrogations, especially in the Shibushi case, Himi case, Ashikaga case, Postal Fraud case, Kitakyushu Nail Care case, Fukawa case, PC Remote Control Virus case, and Higashi-Sumiyoshi case. Some criminal investigation agencies occasionally assert that the function of interrogation is to encourage the suspect to show signs of self-reflection and remorse. Such an antiquated mindset shows how the criminal investigation agency underestimates the risk of causing miscarriages of justice. Even if a citizen who has not committed a

crime (an innocent person) makes a truthful statement, the investigator, assuming that the person must have committed the crime, accuses the person of lying and of showing no sign of regret or remorse, and attempts to obtain admissions of guilt from that person.

### **Interrogation of suspects who are not under arrest or detention**

The Code of Criminal Procedure clearly provides that when a suspect, who is not under arrest or detention, is requested to appear at a police station or a public prosecutor's office, the suspect may refuse to do so. Furthermore, even after appearing, the suspect may leave at any time (Article 198(1)). However, it cannot be said that measures to secure the freedom to appear or leave are in place. The practices indicate that any refusal to comply with the requests from the criminal investigation agency may lead to arrest, which makes it difficult for the suspects to refuse attendance or leave. The fear of possibly being taken into custody if a statement is not in accordance with the view of the criminal investigation agency motivates a suspect to make false statements. In the Shibushi case, Ashikaga case, PC Remote Control Virus case, the Postal Fraud case, Higashi-Sumiyoshi case, Matsubase case, and Koto case, the suspects had been coerced to give false confessions and statements while being interrogated before they were arrested.

### **Interrogation in custody**

During interrogations, the pressure on the suspects to admit to the charge increases markedly when they are arrested, detained, deprived of liberty, denied access to the outside world, and have their lives monitored. The fear of not knowing how long one is going to stay in custody if a statement is not in accordance with the views of the criminal investigation agency has become a motive for giving false statements. The Constitution guarantees the suspect's right to remain silent (Article 38(1)). Based on this, the prevailing theory is that a suspect who is under arrest or detention has no obligation to be interrogated. However, criminal investigation agencies conduct the interrogation based on the view that a suspect who has been arrested or detained has an obligation to be interrogated, and even where the suspects exercise the right to remain silent, the investigators continue the interrogations and give significant pressure on them to admit the charge. Courts have also accepted such interrogation practices.

### **Disadvantages to citizens who deny any charge of committing a criminal offence**

Citizens who have not committed a crime naturally deny the charge against them precisely because they have not committed any crime. However, this is used against them in judges' decisions on detention and bail. For citizens who have not committed a crime, a lack of knowledge of how long they are going to be held in custody if they continue their denial is a source of enormous emotional distress. This effectively turns into massive pressure to make them admit the charge against them alleged by the criminal investigation agencies. The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Japan ratified in 1999, prohibits "torture" which is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, ... when such pain or suffering is inflicted by ... a public official or other person acting in an official capacity" (Article 1.1). In the Postal Fraud case, it has become clear that the "accomplices" signed the written statements which contained false statements following the prosecution's scenario because they could no longer endure the fear and distress from not knowing how long they were going to be held in custody.

### **Written statements**

Investigators make written statements during interrogations, but questions by the investigator and statements by the suspect are never transcribed accurately. Investigators make written statements by selecting the matters or expressions to be recorded, changing the nuance of the suspect's statements, and at times they record what the suspect had not stated at all. The written statements made in such a manner are still used as evidence to establish guilt in criminal trials as long as they have the suspects' signatures.

### **Miscarriages of justice created from interrogations of those other than the suspect**

Interrogations, in which written statements are made, are conducted not only on the suspect, but also on eyewitnesses, victims, other unsworn witnesses, as well as suspects considered to be "accomplices". Statements are prone to interferences and mistakes of perception, recollection, expression, and description, and are thus



evidence that are liable to change. Even if a citizen who has not committed a crime is able to continuously deny the charge, miscarriages of justice occur because of the others' statements which follow the scenario prepared by the criminal investigation agency. In the Postal Fraud case, it has come to light that while the ex-senior official continued to deny any charge of committing a criminal offence, many others that were involved were made to sign and seal on the written statements containing false statements that followed the prosecutor's scenario. Similarly, in the Pressance case, the public prosecutor made more effort than necessary to have those concerned feel responsible, which caused strong motivation in them to make untrue statements to escape such responsibility, resulting in making them change their statements.

### **Audio and video recording of the interrogation**

With the amendment of the Code of Criminal Procedure in 2016, an audio and video recording system of the interrogation process was established. However, the cases subject to this system are limited to cases tried by *saiban-in* (lay judges) ("cases punishable by the death penalty, or life imprisonment with or without work" and "cases punishable by imprisonment with or without work with a limited term of one year or more involving crimes causing death to a person through an intentional criminal act") and those in which public prosecutors conduct their own investigations ("cases other than those sent or referred by a judicial police officer") during the interrogation of the detained (Code of Criminal Procedure Article 301-2 (4)). Such cases comprise less than three percent of all criminal trials thus leaving mandatory audio and video recording inapplicable to most cases. In addition, the method of filming adopted by criminal investigation agencies, which is to film the suspect directly from the front, has been pointed out as resulting in images of the suspect facing the camera in most cases risk inducing a bias on the court to find that the suspects made confessions voluntarily.

### **Interrogation without the defense counsel's presence**

The right to have the assistance of counsel is guaranteed in the Constitution (Articles 34 and 37(3)). A citizen who has not committed a crime but is suspected of doing so requires the assistance of defense counsel most during interrogation. However, in practice, even if the suspect or counsel requests the defense counsel's presence, it is customary for the criminal investigation agency to interrogate without it, thus

preventing assistance by defense counsel in interrogations.

### **Interrogation of juveniles and persons with intellectual disabilities**

At times suspects can be juveniles who are immature, have low language abilities, and lack the power to defend themselves. They may also be persons with intellectual disabilities who have a high tendency to be induced and to pander. Interrogation in its current form carries the risks of false statements and triggering miscarriages of justice. Such risks become even greater when it is conducted on these juveniles or persons with intellectual disabilities.

### **Observations of the United Nations Committee against Torture<sup>4</sup>**

In the “concluding observations on the second periodic report of Japan” adopted on May 29, 2013, the United Nations Committee against Torture stated that they were “seriously concerned” regarding the following: “The State party’s justice system relies heavily on confessions in practice, which are often obtained while in the *Daiyo Kangoku* (substitute prison) without a lawyer present. The Committee has received reports about ill-treatment while interrogated, such as beatings, intimidation, sleep deprivation, and lengthy interrogations without breaks”; “It is not mandatory to have defense counsel present during all interrogations”; “The lack of means for verifying the proper conduct of interrogations of detainees, while in police custody”; “In particular the absence of strict time limits for the duration of consecutive interrogations”. The committee recommended as follows: “Establishing rules concerning the length of interrogations, with appropriate sanctions for non-compliance”; “Improving criminal investigation methods to end practices whereby confession is relied on as the primary and central element of proof in a criminal prosecution”; “Implementing safeguards such as electronic recordings of the entire interrogation process and ensuring that recordings are made available for use in trials”.

### **Observations of the United Nations Human Rights Committee Recommendations<sup>5</sup>**

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<sup>4</sup> “Recommendations by the United Nations Committee against Torture to the Japanese Government—Towards Eradication of Inhuman Treatment of People Deprived of Their Liberty—” (Sept. 2013)

<sup>5</sup> “Improvements recommended by the Human Rights Committee—Based on consideration of Japan’s sixth periodic report” (Aug. 2015)

The United Nations Human Rights Committee also stated the following in its “Concluding observations on the sixth periodic report of Japan” adopted on July 23, 2014: “[The] Committee expresses concern at the absence of strict regulations regarding the conduct of interrogations”, “regrets the limited scope of mandatory video recording of interrogations”, and recommended that the following be guaranteed: “That all suspects are guaranteed the right to counsel from the moment of apprehension and that defense counsel is present during interrogations”; “Legislative measures setting strict time limits for the duration and methods of interrogation, which should be entirely video-recorded”; “A complaint review mechanism that is independent of the prefectural public safety commissions and has the authority to promptly, impartially and effectively investigate allegations of torture and ill-treatment during interrogation”. The Committee also stated in its “Concluding observations on the seventh periodic report of Japan” adopted on October 28, 2022 that it is “concerned at reports [...] that there continues to be, in practice, a lack of strict regulations regarding the conduct of interrogations and limited scope of mandatory video recording of interrogations” and demanded to “ensure that interrogations are entirely video recorded, including prior to a formal arrest, and that due consideration is given to applying audiovisual recording of interrogations in all criminal cases” and “make available a complaints review mechanism, independent of the prefectural public safety commissions, with the authority to promptly, impartially and effectively investigate allegations of torture and ill-treatment during interrogation”.

## **2-1-2 The JFBA’s opinion concerning interrogation by the criminal investigation agency**

### **Clarification that the suspects have no obligation to be interrogated**

The Code of Criminal Procedure should clarify that suspects who have been arrested/detained have no obligation to be interrogated. Despite the Constitution guaranteeing the right to remain silent, criminal investigation agencies are coercing the suspects to make false confessions which turn out to be false by not respecting the suspect’s right to refuse interrogation and conducting long hours of inquisitorial interrogation. To prevent miscarriages of justice based on coerced false confessions, it is necessary to clarify that suspects have no obligation to be

interrogated.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.1))*

**Clearly setting down the right to have defense counsel present in the interrogation**

The Code of Criminal Procedure should clearly state that upon request from the suspect or counsel, the investigator must make counsel present in the interrogation. By conducting interrogations while preventing counsel's presence, investigation agencies unjustly limit the right to counsel. Conducting interrogations while creating a situation which makes it difficult for the suspects to freely execute one's right to remain silent effectively violates this right. To prevent miscarriages of justice based on coerced false confessions, it is necessary to establish the right to have counsel present in the interrogation.

*(Opinion Calling for the Establishment by Law of the Right to Have Counsel Present in Interrogations, Declaration Calling for the Establishment of the Right to Have the Assistance of Counsel: Counsel's Presence at Interrogation Changes the Criminal Justice System, Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure)*

**Expansion of scope of mandatory audio and video recording of interrogations**

The audio and video recording system of interrogations should be expanded to include interrogation of suspects who are not under arrest or under detention as well as unsworn witnesses, so that audio and video recording of the entire interrogation process of all cases will become obligatory. The main reasons for miscarriages of justice in Japanese criminal justice are improper interrogation and the written statements prepared in such interrogations. To prevent miscarriages of justice, it is necessary to stop investigation agencies from conducting improper interrogations to protect suspect rights, and to prevent production of oral evidence based on false statements, along with enabling objective validation of interrogation circumstance and the creation of statement process. To this end, audio and video recording of the entire interrogation process should be obligatory. This need is not limited, and is not only for cases when suspects are arrested and detained.

*(Opinion concerning the Establishment of the New Criminal Justice System (No.1), Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure)*

To fairly determine if the statements are made voluntarily, video should not be shot from inappropriate angles which may introduce bias. The current method of filming suspects from the front should be amended.

*(Opinion concerning filming direction during video recording of interrogation)*

### **Regulating interrogation time**

Duration of consecutive interrogations, hours of interrogation per day, and the time of day at which interrogation takes place, should be regulated. Interrogations for long hours, or late at night, exhaust suspects physically and psychologically, making it difficult for them to give accurate and appropriate statements. These conditions also jeopardize a suspects' free will to decide whether or not he/she would like to continue the interrogation. Investigations, which include the process of exhausting suspects via long hours of interrogation to obtain confessions or written statements in line with scenarios of criminal investigation agencies, have a high risk of causing miscarriages of justice, and thus need to be regulated.

*(Opinion concerning the Establishment of the New Criminal Justice System (No.1))*

### **Interrogation of suspects with intellectual disabilities**

When criminal investigation agencies interrogate suspects with intellectual disabilities, they shall bring, in principle, a neutral and independent observer who has a sufficient understanding of the nature, degree, and characteristics of the disability.

Prior to interrogation of suspects with intellectual disabilities, an expert shall conduct a full assessment of the suspects' disability so that the interrogator and observer fully understand the characteristics of the disability as well as statements made by said suspects and take such characteristics into consideration when conducting the interrogation.

In order to secure eligible people throughout Japan who can take on the role of

observer—those who are both in a neutral position, and have sufficient understanding of characteristics of disabilities— a network of community-based volunteer observers should be developed, with personnel and material assistance to enable sufficient training and the development of qualified observers.

*(Opinion Concerning Legislating for the Observer’s Presence at Interrogations of Intellectually-Challenged Suspects)*

## 2-2 Arrest

### 2-2-1 Current situations regarding arrest

Citizens suspected of committing a crime may be arrested by criminal investigation agencies. In 2021, the police or the public prosecutor's office arrested a total of 92,633 persons (excluding cases of negligent driving resulting in death or injury and violations of the Road Traffic Act).<sup>6</sup> Once arrested, suspects are taken into custody and kept in a police detention facility or detention house for a maximum of 72 hours. Until their release, they are deprived of liberty, cut off from the outside world with no access to telephones or the internet, and are placed in a situation where their lives are strictly controlled.

#### **The reality of judicial reviews of arrest warrants**

Arrests are made based on warrants that judges issue upon request from criminal investigation agencies, except in cases of flagrant offenders. Warrants are issued when there is sufficient probable cause to suspect an offence has been committed by a suspect, and there is a necessity for arrest (Code of Criminal Procedure, Article 199). However, citizens suspected of committing a crime are not allowed to rebut or refute allegations. Suspects can neither file an appeal against the arrest, nor can they review documents used to establish cause and necessity for arrest. In 2021, judges issued 79,534 arrest warrants (98.6%), while only 57 dismissals of arrest warrants were issued (0.1%) (the number of request withdrawals for arrest warrants by criminal

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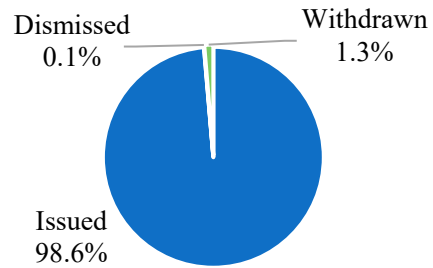
<sup>6</sup> Annual Report of Statistics on Prosecution 2021, “39 Statistics regarding arrested suspects and measures taken after arrest for processed cases within the jurisdictions of the Supreme Public Prosecutors Office, High Public Prosecutors Office, and District Public Prosecutors Office—excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act—”

investigation agencies was 1,047 persons (1.3%))<sup>7</sup>.

Fig. 2-1 Arrest warrants issued/dissmissed/withdrawn (number of persons) (2021, all courts)

	No. of persons	Proportion
Issued	79,534	98.6%
Dismissed	57	0.1%
Withdrawn	1,047	1.3%

Fig. 2-2 Arrest warrants issued/dissmissed/withdrawn (proportion) (2021, all courts)



**Stages of arrest where a suspect cannot request court-appointed defense counsel**

Although the Constitution guarantees suspects the right to counsel (Articles 34 and 37 (3)), under the current Code of Criminal Procedure, a suspect cannot request a court-appointed defense counsel until they are detained. Citizens who are unable to retain defense counsel on their own, due to poverty or other reasons, have no choice but to confront the criminal investigation agency and face interrogation without receiving any advice from defense counsel while deprived of liberty, access to the outside world, and liberty to live without being strictly monitored. To supplement this defect, each bar association operates a duty attorney (*toban bengoshi*) system, and new provisions were stipulated in the 2016 amendment of the Code of Criminal Procedure which requires the criminal investigation agency to explain about matters concerning the appointment of defense counsel. However, there has not been established a practice in place where the criminal investigation agency gives an appropriate explanation of the duty attorney system to the arrested suspect.

**Observations of the United Nations Committee against Torture<sup>8</sup>**

<sup>7</sup> Annual Report of Judicial Statistics 2021 criminal cases table 15 “Statistics regarding classification of outcomes of warrant cases and types of warrants—all courts and all high courts, district courts and summary courts”

<sup>8</sup> “Recommendations by the United Nations Committee against Torture to the Japanese

The United Nations Committee against Torture stated in its “concluding observations on the second periodic report of Japan” adopted on May 29, 2013, that “the Committee deeply regrets that under this system, suspects can be detained in police cells for a period up to 23 days, with limited access to a lawyer especially during the first 72 hours of arrest and without the possibility of bail.”

## 2-2-2 The JFBA’s opinion concerning arrest

### **Guaranteeing the opportunity to receive advice from a lawyer before interrogation**

Once arrested, there should be a guaranteed opportunity for suspects to obtain advice from defense counsel before he/she undergoes interrogation. Upon the suspects’ request, police and prosecutors must allow suspects to have an interview with a defense counsel before commencing interrogation.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3))*

### **Expanding the system of court-appointed defense counsel for suspects**

All arrested suspects should have the right to request court-appointed defense counsel. The Constitution stipulates that, “No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel.” It is difficult for suspects under arrest to appropriately exercise their right of defense without receiving any advice from counsel. To prevent miscarriages of justice it is necessary to expand the system of court-appointed defense counsel so that arrested suspects may also exercise the right to request court-appointed defense counsel.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3),  
Opinion on the Three-Year Review under Supplementary Provision 9 of the  
Code of Criminal Procedure)*

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Government—Towards Eradication of Inhuman Treatment of People Deprived of Their Liberty—”  
(Sept. 2013)



**Explanation of matters concerning the appointment of defense counsel**

With respect to the explanation of matters concerning the appointment of defense counsel to the suspect provided for under Article 76, Paragraph 2, Article 77, Paragraph 2, Article 203, Paragraph 3, Article 204, Paragraph 2 and Article 207, Paragraph 3, those provisions should obligate to explain with information of the point of contact that the suspect may request for appointment of defense counsel, designating an attorney, legal professional corporation or a bar association and, moreover, that the suspect may request a bar association for appointment of defense counsel regardless of the suspect’s personal financial resources.

It should be stipulated in Article 209, Paragraph 2 of the Code of Criminal Procedure as follows: “In the cases given in the preceding paragraph, the term ‘court’ in Article 78 are deemed to be ‘public prosecutor or judicial police officer who handles the case’.”

*(Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure)*

**Inspecting and copying written requests for arrest warrant**

Criminal investigation agencies should be obligated to include a list of attachments in the written request for an arrest warrant, and submit a certified copy of the written request and its attachments. Judges should store the certified copy of such documents so that the suspect for whom the arrest warrant was executed, or his/her counsel, should be able to inspect and copy the certified copy of the written request.

*(Opinion Concerning Overall Augmentation of Records on Procedures in which Courts are Involved during Police Investigations)*

**Establishing an appeal system**

In order to minimize the possibility of situations when citizens who have not committed a crime are taken into custody, filing an appeal (quasi-appeal) against an arrest should be made possible.

*(Opinion concerning detention/bail system reform)*

**2-3 Detained suspects**

## 2-3-1 **Current conditions and problems regarding detention of suspects**

Citizens suspected of committing a crime may be detained based on a detention warrant issued by a judge upon request from a public prosecutor. Once detained, under the principles of the Code of Criminal Procedure, suspects have no choice but to face interrogation for ten days while being deprived of liberty, access to the outside world, and the liberty to live without being strictly monitored.

### **The reality of judicial reviews for detention warrants**

Detention warrants are issued when sufficient probable cause exists to suspect that an offence has been committed by a suspect, “the accused has no fixed residence”, “there is probable cause to suspect that the accused may conceal or destroy evidence”, or “the accused has fled or there is probable cause to suspect that the accused may flee” (Code of Criminal Procedure, Article 207(1), 60(1)). When judges make decisions regarding detention, they hold a hearing to inform suspects of the charge against them and to hear their statements (hearing prior to detention) (the Code of Criminal Procedure Article 207(1), Article 61). However, such proceedings are held without counsel’s presence. Suspects do not have the right to review the material that forms the grounds for the detention. In 2021, the number of arrested suspects for whom judges issued detention warrants upon requests from the public prosecutors was 83,815 persons (95.9%), while judges dismissed detention requests for only 3,565 persons (4.1%) (excluding cases of negligent driving causing death or injury and those of violations of the Road Traffic Act)<sup>9</sup>.

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<sup>9</sup> Annual Report of Statistics on Prosecution 2021 “39 Statistics regarding suspects arrested and measures taken after arrest for processed cases within the jurisdictions of the Supreme Public Prosecutors Office, High Public Prosecutors Office, and District Public Prosecutors Office—excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act—”

Fig. 3-1 Detention permitted/dismissed

(No. of persons)

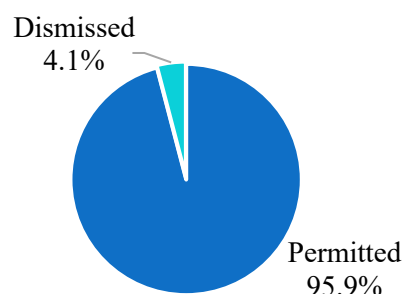
(2021, all Public Prosecutor's Offices)

	No. of persons	Proportion
Permitted	83,815	95.9%
Dismissed	3,565	4.1%

Fig. 3-2 Detention permitted/dismissed

(Proportion)

(2021, all Public Prosecutor's Offices)



### **Extension of detention period – principle/exception reversed –**

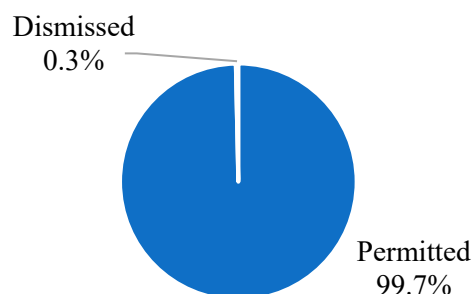
The Code of Criminal Procedure provides that the detention period for suspects be ten days in principle, but when “unavoidable circumstances” exist, the detention period can be extended upon request from a public prosecutor. In 2021, of the total number of suspects detained (83,841), the extension of the detention period was requested for 56,894 persons (67.9%) (excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act). Upon receiving such requests, judges granted the extension of the detention period for 56,703 persons (99.7%), while dismissing the request for only 191 persons (0.3%)<sup>10</sup>, thus reversing the principle and exception of this Code in practice.

<sup>10</sup> Annual Report of Statistics on Prosecution 2021 “40 Statistics regarding the number of suspects according to measures taken after detention, according to detention period and permission/dismissal of extension of detention period for processed cases within the jurisdictions of the Supreme Public Prosecutors Office, High Public Prosecutors Office, and District Public Prosecutors Office—excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act—”

Fig. 4-1 Extension of detention permitted/dismissed (no. of persons)  
(2021, all Public Prosecutor's Offices)

	No. of persons	Proportion
Permitted	56,703	99.7%
Dismissed	191	0.3%

Fig. 4-2 Extension of detention permitted/dismissed (proportion)  
(2021, all Public Prosecutor's Offices)



### **Detention of juveniles**

The Juvenile Act states that public prosecutors cannot request to detain juveniles unless there are unavoidable circumstances (Article 43(3)), and that in principle, protective detention should be provided in lieu of detention. In practice, however, detention is permitted in a majority of cases, causing a situation that is contrary to the provisions of the Juvenile Act.

### **Disadvantages to citizens who deny charges**

Detention, which keeps suspects in custody for ten days or more, deprives suspects of liberty and access to the outside world. Having one's life strictly monitored, imposes a mental, physical and economic burden on citizens suspected of committing a crime. Furthermore, if citizens who have not committed a crime deny any allegation of committing a criminal offence because they have not done so, they are treated disadvantageously when judges decide on detention or extension of the detention period, due to fears of flight or concealment of evidence. Such practice functions as a means to force suspects to accept the criminal investigation agency's assumption that a crime has been committed in return for freedom, thus violating human rights—particularly of citizens who have not committed a crime.

### **Filing of appeals and limitations on bail**

Appeals (quasi-appeal) may be filed against a judicial decision for detention, but the Code of Criminal Procedure has a provision that provides that “an appeal against

detention may not be filed on the grounds that there is no suspicion that a crime has been committed” (Article 420(3)). Proviso to Article 207(1) of the Code of Criminal Procedure provides that bail is not allowed until charged.

### **The reality of disclosure of grounds for detention**

The Constitution guarantees the right of a detained citizen to request the disclosure of the reasons for detention in open court (Article 34). However, even when reasons for detention are requested to be disclosed, it is an established practice for judges to state, as a mere formality, that it meets the requirements for detention, without disclosing any substantial reason.

### **Limitations to interviews in *Daiyo Kangoku* (substitute prison) and detention house**

Under the Code of Criminal Procedure, a detained suspect shall be taken into a detention house or other penal institution (Article 64). However, most detained suspects are taken into a police detention facility (*Daiyo Kangoku*, or substitute prison), where they have their lives monitored by the police and have no choice but to be interrogated. Hardly any other country allows police to detain citizens for such a lengthy period. On the other hand, detention houses limit interviews during the evening, and holiday periods, creating situations in which suspects are unable to have sufficient interview time with defense counsel.

### **Violation of the right to confidential communication and interview**

Article 39 (1) of the Code of Criminal Procedure protects the right to confidential communication and interview between suspect and counsel. However, in practice, public prosecutors and police officials question suspects on the contents of interviews with counsel, and this behavior shows no sign of decline. Moreover, photography and audio recording inside interview rooms are generally restricted—preventing counsel from preserving evidence regarding their client’s injuries or mental state.

### **Prohibition of visitations with those other than counsel**

A court may prohibit detained suspects from having visitations with persons other than counsel and may prohibit passing and receiving documents or articles with persons other than counsel (prohibition of visitations). The prohibition of visitations

isolates detained citizens, and also places a heavy mental burden. In 2020, there were 36,008 orders prohibiting visitations, with the rate of such orders (the proportion of the number of prohibitions of visitations to the number of persons for whom requests for detention were permitted) being 41.0%.<sup>11</sup>

### **Limitations on the number of defense counsel**

Following amendments to the Code of Criminal Procedure in 2016, all detained suspects have been given the right to request court-appointed defense counsel after June 2018. However, unless the judge deems it particularly necessary to add another counsel in a “case punishable by the death penalty or life imprisonment with or without work”, the number of court-appointed defense counsel is limited to one (Code of Criminal Procedure, Article 37(5)). The number of private defense counsel cannot exceed three, except for situations where the court has permitted this due to special circumstances (Rules of Criminal Procedure, Article 27(1)). Such restrictions on the number of defense counsels make it difficult for the suspect to have sufficient interviews with counsel and receive advice in complex cases.

### **Observations of the United Nations Committee against Torture<sup>12</sup>**

The United Nations Committee against Torture stated in its “Concluding observations on the second periodic report of Japan” adopted on May 29, 2013, that “the Committee deeply regrets that under this system, suspects can be detained in police cells for a period up to 23 days, with limited access to a lawyer especially during the first 72 hours of arrest and without the possibility of bail.” “The lack of effective judicial control over pretrial detention in police cells and the lack of an independent and effective inspection and appeal mechanism are also a matter of serious concern.” “The Committee regrets the position of the State party that the abolition or reform of the pretrial detention system is unnecessary.”

### **Observations of the United Nations Human Rights Committee<sup>13</sup>**

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<sup>11</sup> “White Paper on Attorneys 2021 edition,” page 89

<sup>12</sup> “Recommendations by the United Nations Committee against Torture to the Japanese Government—Towards Eradication of Inhuman Treatment of People Deprived of Their Liberty—” (Sept. 2013)

<sup>13</sup> “Improvements recommended by the Human Rights Committee—Based on consideration of Japan’s sixth periodic report” (Aug. 2015)

The United Nations Human Rights Committee stated in its “Concluding observations on the sixth periodic report of Japan” that “the Committee regrets that the State party continues to justify the use of the *Daiyo Kangoku* by citing the lack of available resources and the efficiency of the system for criminal investigations. The Committee remains concerned that the absence of an entitlement to bail or a right to State-appointed counsel prior to the indictment reinforces the risk of extracting forced confessions in *Daiyo Kangoku*,” and recommended that “alternatives to detention, such as bail, are duly considered during pre-indictment detention.” Similarly, in its “Concluding observations on the seventh periodic report of Japan” adopted on October 28, 2022, it stated that “the Committee remains concerned at the lack of entitlement to bail and of respect for the right to State-appointed counsel from the outset of deprivation of liberty, and that the State party has expressed that a pre-indictment bail system is unnecessary” and expressed concern “that individuals are held in pretrial detention for periods exceeding those prescribed in domestic law, with a high acceptance rate of requests for extension and re-extension of detention”. Further, it stated that “the Committee remains concerned at the conditions of detention, especially the use of prolonged solitary confinement and the lack of access to adequate medical services for detainees, the denial of procedural guarantees such as access to counsel and contact with family, and the denial of the right to vote.” Then, it demanded to “ensure that prescribed periods of pretrial detention are respected to prevent excessive periods of detention”, “ensure that non-custodial alternatives to detention such as bail, are duly considered during pre-indictment detention”, and “review the total length of permissible solitary confinement for remand detainees, even if it is used as a measure of last resort, and regularly evaluate the effects of solitary confinement, with a view to further reducing it and developing alternative measures where necessary”.

### 2-3-2 The JFBA’s opinion concerning the detention of suspects

#### **Stipulation of the principles regarding detention**

In the Japanese criminal justice system, citizens who have not committed a crime are held in custody for a lengthy period, on the grounds that they deny the charge, significant mental, physical and economic disadvantages occur. Criminal investigation agencies misuse custody to coerce a person into admitting charges,

and prevent the exercise of the right of defense, thus causing a miscarriage of justice.

To prevent miscarriages of justice through the abusive use of detention, the Code of Criminal Procedure should clearly state that in principle, suspects and the accused shall not be held in custody (principle of non-restraint).

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.1))*

It should be clearly stipulated that in judicial decisions regarding detention, the suspect's or the accused's denial of charges, refusal of interrogation or a statement, or non-agreement to evidence for examination requested by the public prosecutor, must not be considered unfavorably to the accused (prohibition of adverse treatment of denial and silence), and that the degree of disadvantage to defense or social life generated by the gravity of the offence and the non-release of the suspect or the accused must be taken into consideration (principle of proportionality).

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3))*

### **Restriction order on the place of residence, etc. in lieu of detention**

As an alternative to detention, a method similar to the following system of restriction orders on the place of residence, etc. should be established, and detention should be allowed only when this order is unable to achieve its purpose.

In the event that there is probable cause to suspect that the suspect or accused has committed a crime, and there is probable cause to suspect that they may conceal or destroy evidence, or there is probable cause to suspect that they may flee or have fled, the court (judge) may issue the accused or suspect an order for a fixed period of time not exceeding two months; this restricts the place of residence, prohibits contact with the victim or any other person who is deemed to have knowledge essential to the trial or the relatives of such persons, prohibits entry to certain places, and any other order to prevent concealment of evidence or flight (restriction order on the place of residence, etc.).

The court (judge) should be able to detain the accused or suspect only in the following circumstances: There is probable cause to suspect the accused; suspect has committed a crime, and has breached the restriction order on the place of



residence, etc.,; or has received said order but has not complied and there is probable cause to suspect that they may conceal or destroy evidence or flee.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3))*

#### **Counsel's presence during questioning prior to detention**

To exercise prudence in making a decision on detention, which is a significant limitation on human rights, defense counsel should be able to attend questioning prior to detention and state his/her opinion.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3))*

#### **Abolition of restrictions on the number of defense counsel**

To prevent miscarriages of justice based on coerced false confessions, it is necessary to have sufficient interviews with counsel and receive advice so that suspects can exercise their right of defense. To this end, unreasonable restrictions on the number of defense counsels must be abolished.

Article 27 of the Rules of Criminal Procedure, which restricts the number of defense counsel for the suspect, should be deleted.

Furthermore, Article 37(5) should be amended to allow the appointment of as many court-appointed defense counsels as required without putting limitations on the case.

*(Opinion concerning the multiple appointment system of court-  
appointed defense counsels)*

#### **Establishing the right to confidential communication and interview**

It should be made clear that interrogating suspects about interviews with their counsel by the public prosecutor or police officer shall constitute a violation of the right to confidential communication and interview, interference with defense activities, and thus shall not be permitted.

*(Opinion concerning the establishment of the right to confidential communication*

*and interview)*

Restrictions and inspections of photography and audio recording made inside interview rooms by counsel must be abolished, and notices restricting such acts should be removed immediately.

*(Opinion concerning photography (including video recording) and audio recording in the interview room)*

#### **Abolition of *Daiyo Kangoku* (substitute prisons)**

Detained suspects should be taken into detention houses that are not police facilities so that the *Daiyo Kangoku* system (substitute prisons) can be abolished. Like the interrogation room, the *Daiyo Kangoku* system (Substitute prison system) involves detention in a police detention facility and is a breeding ground for coerced confessions.

*(Declaration on Action for Human Rights 2019)*

#### **Inspecting and copying written requests for detention**

The public prosecutor should be obligated to include a list of attachments in their written request for detention, as well as a submitted certified copy of the written request and its attachments. The judge should store the certified copy, and the suspect for whom the detention warrant has been executed, or their counsel should be able to inspect and copy the certified copy of the written request.

*(Opinion Concerning Overall Augmentation of Records on Procedures in which Courts are Involved during Police Investigations)*

#### **Reinforcing the filing of appeals against detention**

When a citizen who has not committed a crime is detained, miscarriages of justice should be prevented by guaranteeing the right to file an appeal on the grounds that there is no suspicion that the citizen has committed the crime. Article 429(2) of the Code of Criminal Procedure should be abolished, and in its place, an article should clearly state that a quasi-appeal can be lodged against a determination of detention made by a judge on the grounds that there was no suspicion that the citizen had committed the crime (there is no probable cause to suspect that the citizen has committed a crime).

*(Opinion concerning the Establishment of the New Criminal Justice System)*

**Bail before indictment**

To prevent innocent persons who have not committed a crime from being deprived of their liberty and coerced into confessions by means of holding them in custody, suspects should be taken into custody only when it is truly necessary to prevent concealment of evidence, or flight. If this can be achieved through payment of a bail bond, detaining citizens in custody should be avoided. The proviso to Article 207(1) of the Code of Criminal Procedure should be abolished, and bail should be allowed before indictment.

*(Opinion concerning the Establishment of the New Criminal Justice System*

*(No.3))*

**2-4 Prosecution**

Citizens suspected of committing a crime may be prosecuted and may face a criminal trial if a public prosecutor deems it necessary to do so. In 2021, the total number of persons cleared by the Public Prosecutor's Office was 625,072, out of which the number of persons charged by the public prosecutor was 141,263 (22.6%), while 392,961 persons (62.9%) were not prosecuted (excluding cases involving alleged violations of the Road Traffic Act)<sup>14</sup>.

**Non-prosecution comprised substantially of suspended prosecutions**

Non-prosecution includes a case that “does not constitute a crime” (alleged facts of the crime do not fulfill the requirements of a crime, or it is clear from the evidence that there are reasons preventing the establishment of a crime), a case in which there is “no suspicion” (it is clear from the alleged facts of the crime that the suspect is not the perpetrator, or it is clear that there is no evidence to establish whether or not a crime has occurred), or a case in which there is “insufficient suspicion” (based on the alleged facts of the crime there is insufficient evidence to establish the crime), as well as cases of “suspended prosecution” (in circumstances where the alleged facts of the crime are clear,

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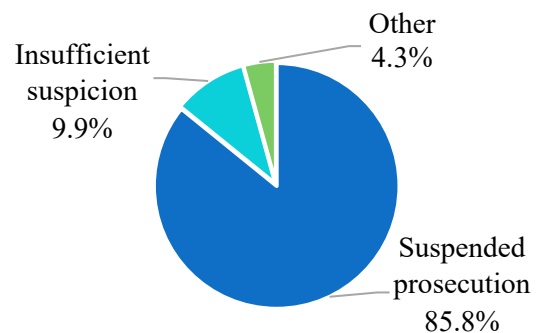
<sup>14</sup> Annual Report of Statistics on Prosecution 2022 “6 Number of accepted alleged cases, number of persons cleared and pending according to the Public Prosecutor's Offices—excluding cases involving alleged violations of the Road Traffic Act—”

and the personality, age and circumstances of the suspect, the gravity and circumstances of the offence, and the situation after the crime do not necessitate prosecution). In 2021, suspended prosecution comprised 337,316 persons (85.8%) of non-prosecutions by public prosecutors, and insufficient suspicion comprised 38,816 persons (9.9%). Citizens who have been suspected of committing a crime by a criminal investigation agency, have been arrested and have been detained, but then are not prosecuted can receive criminal compensation only when the disposition falls under “does not constitute a crime” or “no suspicion,” as well as “when there are sufficient grounds to believe that the person did not commit the crime” (Regulations for Suspect’s Compensation, Article 4). There are no processes in place to dispute non-prosecution when citizens who have not committed a crime are found to come under “suspended prosecution” or “insufficient suspicion”,

Fig. 5-1 Number of persons by type of non-prosecution  
(2021, all Public Prosecutor's Offices)

	No. of persons	Proportion
Suspended prosecution	337,316	85.8%
Insufficient suspicion	38,816	9.9%
Other	16,829	4.3%

Fig. 5-2 Proportion by type of non-prosecution  
(2021, all Public Prosecutor's Offices)



**Statements by accomplices who are not prosecuted**

In accomplice cases, there is a danger of the alleged accomplice giving false statements in line with the criminal investigation agency’s prepared scenario in order to pass on or mitigate one’s own liability. In criminal trials of conspiracy cases, “accomplices” who have avoided prosecution often give witness testimony as requested by the public prosecutor. Alternatively, their records of statements may be requested as evidence by the public prosecutor, in which case their statements may form the basis for a conviction. By offering non-prosecution in exchange for making an inculpatory statement, there is a great risk that alleged accomplices—citizens who have not committed a crime—will be implicated in the miscarriage of justice. In the Postal Fraud case, it has been revealed

that multiple “accomplices” who avoided prosecution signed and sealed false statements that followed the scenario created by the public prosecutor.

“The system for the collection of evidence with cooperation by a suspect under the agreement on the prosecution” (cooperative agreement system) was established in 2016 with the amendment of the Code of Criminal Procedure. This institutionalized the suspect/defendant’s giving statements with regard to the criminal conduct of another suspect/defendant in return for non-prosecution and so forth. Without considerable caution in judging the credibility of such statements, there is a great risk of causing miscarriages of justice. However, the scope of mandatory audio and video recordings for interrogation is limited, and the process of the “accomplice” making the statements is not necessarily recorded objectively.

## **2-5 Detention of the accused and bail**

### **2-5-1 Current conditions and problems regarding the detention of the accused and bail**

When a person is suspected of committing a crime, is detained as a suspect, and then is indicted, detention is automatically continued without a fresh review.

#### **Revocation of detention not functioning**

The Code of Criminal Procedure provides that when the grounds or the necessity for detention no longer exist, the detention must be revoked (Article 87). Being prosecuted means that the public prosecutor has collected enough evidence to bring the charge, and the investigation is temporarily concluded. Thus, the grounds and need for detention would have substantially changed. However, in practice, the court rarely revokes detention. In 2021, the number of the accused to whom a detention warrant was issued before final judgement was 42,597 persons, while the number of accused who had their detention revoked in accordance with Article 87 of the Code of Criminal Procedure by request and ex officio only amounted to 149 persons (0.3%). The Code of Criminal Procedure also states that when there is unjustly lengthy confinement due to detention, the court must either revoke detention or allow bail (Article 91), but in 2021 the number of persons for which the court revoked detention

based on this article was one<sup>15</sup>.

Fig 6. Number of accused for whom detention warrant was issued/detention was revoked  
(2021, all courts)

		No. of persons	Proportion
Accused for whom detention warrant was issued before final judgement		42,597	—
Accused for whom detention was revoked before final judgement	Code of Criminal Procedure Article 87		
	Request	97	0.2%
	Ex officio	52	0.1%
	Code of Criminal Procedure Article 91	1	0.0%

### **Limitations on the period of detention have no substance**

The Code of Criminal Procedure states that the period of detention is in principle two months, and can be extended on a monthly basis “when it is especially necessary to continue the detention.” Unless there are reasons not to limit the number of detention extensions, the maximum duration of detention is three months (Article 60(2)). However, in practice, it is extremely rare for the accused to be released as a result of non-extension of detention. Thus, limitations on the period of detention have no substance.

As a result of such detention practice, unless bail is permitted (bail bond is paid and the accused is granted bail) it is commonplace for the accused to face judgement in a criminal trial while being held in custody.

### **Prohibition of visitations with those other than counsel**

Furthermore, in cases where the accused has denied the charges, it is not uncommon that the prohibition of visitations continues after prosecution.

### **Operation of bail where the principle and exception have been reversed**

According to Article 89 of the Code of Criminal Procedure, “the request for bail must be granted, except in the following circumstances,” stating that the principle under

<sup>15</sup> Annual Report of Judicial Statistics 2021 criminal cases table 16 “Number of persons by process related to detention/bail and before/after final judgement All courts and Supreme Court, all high courts, district courts and summary courts”

the law is to grant bail. However, due to the court's operation of broadly construing "probable cause to suspect that the accused may conceal or destroy evidence" (item (iv)), the principle and exception under the law have been reversed in practice.

**Disadvantages to citizens who deny any charges of committing a criminal offence**

In practice, the fact that the accused is denying any charge of committing a criminal offence is used to establish that there is a "probable cause to suspect that the accused may conceal or destroy evidence." This is used as grounds to dismiss requests for bail. As a result, this has created a situation where if an innocent citizen who has not committed a crime denies any charge of committing a criminal offence precisely because he/she has not committed it, such denial is used as grounds for long-term custody. In the Postal Fraud case, out of the four persons charged, the three who had signed and sealed false statements in line with the public prosecutor's scenario were quickly granted bail after being indicted. Meanwhile, the ex-senior official, who continued to deny any charges of committing a criminal offence because she had not committed any crime, took more than four months after the charge until the bail was finally granted. During this time, the public prosecutor continued to object to bail, alleging that there was probable cause to suspect that the accused may conceal or destroy evidence. The court accepted the public prosecutor's opinion and dismissed the requests for bail multiple times. In the Ohkawara Kakohki case, the public prosecutor submitted an opposition against bail, on the grounds that the accused persons were keeping silent, stating that there was a high risk that the accused would try to conceal or destroy evidence by coordinating their story with accomplices and employees of the accused company and the request for bail was dismissed. One of the accused stated in an appealing expression that he had fallen ill during the detention and had a blood transfusion in the detention house and that he was suffering from progressive stomach cancer and needed an operation, but the court did not grant him bail, and he was eventually admitted to a hospital as a stay of execution of detention but died after that. Requests for bail by the other accused persons also continued to be dismissed on the grounds that they might coordinate their story, and it was about 10 months after the indictment that bail was granted to them. Similarly, in the Pressance case, requests for bail by the accused who claimed not guilty continued to be dismissed and it took 248 days until bail was granted.

In 2020, the rate of bailouts in the first instance at district courts was 32.1% in cases

where the defendant admits his/her guilt, while it was 27.6% in cases where defendants denied the charge. This means that bailouts are exceptional in both situations. In terms of the bailout rates by period, the rate of bailouts granted prior to the first trial date was 25.9% for the defendants who admitted the charge, while it was 12.3% for the defendants who contested the charge. In terms of bailouts by the length of detention, the rate of bailouts granted within 15 days of the indictment was 17.8% in confession cases, while it was 7.1% in denial cases. When it comes to the rates of bailouts granted within one month of indictment, it was 23.3% in confession cases while that was 9.4% in denial cases. Thus, around 90% of the defendants who plead not guilty have not been released on bail for more than one month after the indictment and face the first trial date without bail<sup>16</sup>.

### **Coercion of false statements by means of lengthy custody**

Such implementation of bail particularly violates the human rights of persons who have not committed a crime, hampers the preparation of the trial, and prevents a fair trial. Not only that, the prospect of lengthy custody due to the defendant's denial of the criminal investigation agency's charge is used as a means of coercing false statements. In the 2016 amendments to the Code of Criminal Procedure, the Judicial Affairs Committees of both houses of the Diet adopted the additional resolution calling for extra consideration so that "dissemination efforts should be made to ensure that practice is in line with the purpose of the Code, which means that, in judgements regarding bail, the following factors should not be overvalued for unfairly disadvantageous treatment: 1) the accused does not make a statement admitting the charged facts, 2) the accused remains silent, or 3) the accused does not agree as per Article 326 of the Code of Criminal Procedure regarding evidence for examination requested by the public prosecutor."

## **2-5-2 The JFBA's opinion regarding the detention of the accused and bail**

### **Prohibiting adverse treatment of denial and silence**

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<sup>16</sup> Judicial statistics provided by the Supreme Court to the JFBA, "The period of bailouts for those who have been released on bail out of the persons (finalized) in ordinary first instances (district courts) 2020" "Length of detention for those who have been released on bail out of the persons (finalized) in ordinary first instances (district courts) 2020"



In judicial decisions regarding bail, in light of the accused's right of defense, the Code of Criminal Procedure should clearly provide that the accused's denying charge, rejecting to have interrogations or make statements, or not consenting to evidence that the public prosecutor requests to introduce at trial, must not be considered unfavorably against the accused.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3),  
Opinion Calling for the Elimination of Hostage Justice)*

**Alternative measures that are less restrictive than physical detention**

Assuming that "hostage justice" will be eliminated and that a bail practice will be in place where the accused are released in principle, the electronic monitoring system and the house arrest system should be considered to be used as sorts of alternative measures that are less restrictive than physical detention, and are used only when necessary as a minimum restriction.

*(Opinion Calling for the Elimination of Hostage Justice)*

**Amendments to grounds for an exception concerning mandatory bail**

Grounds for an exception concerning mandatory bail (Code of Criminal Procedure, Article 89) should be amended to correct the situation in which the principle and exception regarding bail have been reversed.

Item (iv) of this Article states that if "there is probable cause to suspect that the accused may conceal or destroy evidence", this will be a ground for an exception concerning mandatory bail. However, this wording is identical to the requirements for detention (Article 60(1)(ii)). Prescribing a ground for an exception that is identical in wording to the requirements of detention, coupled with the tendency to moderately accept "probable cause to suspect that the accused may conceal or destroy evidence," stultifies the provision on mandatory bail thereby creating a situation in which principle and exception are reversed. The above Article does not state "the accused has fled or there is probable cause to suspect that the accused may flee" as a ground for an exception. This has been interpreted to mean that by arranging a bail bond and supplementary conditions situation is prevented. Concealment or destruction of evidence could also be prevented by arranging a bail bond and supplementary

conditions. Item (iv) should be deleted.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.3),*

*Opinion Calling for the Elimination of Hostage Justice)*

Item (i) in the above Article states that where “the accused has allegedly committed a crime which is punishable by the death penalty, life imprisonment with or without work or a sentence of imprisonment with or without work whose minimum term of imprisonment is one year or more,” such allegation may be grounds for an exception of necessary bail. The scope should be limited by amending the provision to, “the accused has allegedly committed a crime which is punishable by the death penalty.”

Item (iii) states that where “the accused allegedly habitually committed a crime punishable by imprisonment with or without work whose maximum term of imprisonment was in excess of three years.” Such allegation may serve as grounds for an exception of mandatory bail. This item should either be abolished, or more stringent requirements should be set for what is meant by “habitually”.

Item (v) states that where “there is probable cause to suspect that the accused may harm the body or property of the victim or any other person who is deemed to have the knowledge essential to the trial of the case or the relatives of such persons or may threaten them,” such may serve as grounds for an exception of mandatory bail. However, like item (iv), moderate acceptance stultifies the provision on necessary bail, creating a situation where the principle and exception are reversed. Item (v) should either be deleted, or more stringent requirements should be set by amending “probable cause” to “sufficient grounds”.

*(Opinion concerning detention/bail system reform)*

## **2-6 First instance**

### **2-6-1 Current situations and problems of criminal litigation in the first instance**

#### **Insufficient disclosure of evidence**

Citizens who have not committed a crime do not have any power to exercise the enforcement of the collection of evidence to establish their innocence for the upcoming criminal trial. On the other hand, the criminal investigation agency may

search for and seize articles of evidence. It also has a large amount of evidence including those collected by exercising their enforcing powers such as taking people into custody. However, public prosecutors submit to the court only evidence that they deem necessary and may request the examination of such evidence in a trial. Under the current Code of Criminal Procedure, public prosecutors are also not obligated to disclose all evidence to the accused party.

With cases that have been placed in pretrial or inter-trial arrangement proceedings, where the purpose is the arrangement of issues and evidence, public prosecutors are obligated to disclose evidence falling into the prescribed categories necessary for evaluating the probative value of the evidence in the case-in-chief (Categorized Evidence), and evidence deemed related to the allegations by the accused (Allegation-Related Evidence) upon request from the accused party. The 2016 amendment of the Code of Criminal Procedure has also made it obligatory to deliver a list of evidence stored by the public prosecutor upon request from the accused party. However, the headings in the list of documentary evidence delivered by the public prosecutor often state only the primary heading such as “investigation report.” It can hardly be said that the information required by defense counsel to identify the evidence is sufficiently described.

In 2021, out of the total 50,026 persons (finalized) in ordinary first instance cases, 1,104 persons (2.2%) were placed in pretrial arrangement proceedings, and 151 persons (0.3%) were placed in inter-trial arrangement proceedings<sup>17</sup>. With cases that are not placed in pretrial arrangement proceedings or inter-trial arrangement proceedings, there is no obligation to disclose evidence or to deliver a list. Operationally, the public prosecutor generally refuses to deliver the list of evidence.

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<sup>17</sup> Annual Report of Judicial Statistics 2021 criminal cases table 39 “Total number of persons (finalized) in ordinary first instance cases By implementation status of pretrial arrangement proceedings and inter-trial arrangement proceedings and by panel, single judge, and degree of confession -All district court and summary courts”

Fig. 7 Number of accused placed in pretrial/inter-trial arrangement proceedings  
(2021, total number of district and summary courts)

	No. of persons	Proportion
Total persons (finalized)	50,026	—
of which the accused was placed in pretrial arrangement proceedings	1,104	2.2%
of which the accused was placed in inter-trial arrangement proceedings	151	0.3%

Even if the criminal investigation agency is in possession of evidence that would establish the innocence of a citizen, miscarriages of justice occur because the prosecutors fail to disclose them to the accused party. With each of the Himi case, Fukawa case, Tokyo Electric Power Company’s female employee murder case, Osaka rape false testimony retrial case, and Higashi-Sumiyoshi case, it has become clear that despite the existence of evidence pointing to innocence, such evidence has often not been disclosed. Had all the evidence been disclosed to the accused party from the outset, it is highly likely that the erroneous convictions would not have occurred.

**Trial proceedings that are not differentiated depending on whether there is a dispute**

The current Code of Criminal Procedure does not differentiate case proceedings depending on whether the accused is pleading guilty or not guilty. The accused who has not committed a crime and plead not guilty, and those who have pleaded guilty and have received sentencing, go through the same criminal trial proceedings. In 2021, out of the total 50,026 persons (finalized) in ordinary first instance cases, those who have pleaded guilty comprised 44,026 persons (88.0%), and those who have pleaded not guilty comprised 4,481 persons (9.0%)<sup>18</sup>.

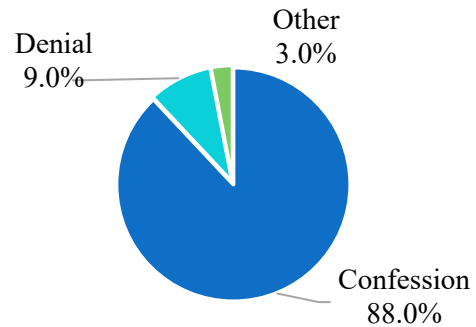
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<sup>18</sup> Annual Report of Judicial Statistics 2021 criminal cases table 39 “Total number of persons (finalized) in ordinary first instance cases By implementation status of pretrial arrangement proceedings and inter-trial arrangement proceedings and by panel, single judge, and degree of confession All district court and summary courts”

Fig. 8-1 The proportion of those who pleaded guilty vs not guilty (2021, total number of district and summary courts)

	No. of persons	Proportion
Total persons (finalized)	50,026	—
Guilty plead	44,026	88.0%
Not guilty plead	4,481	9.0%
Other	1,519	3.0%

Fig. 8-2 The proportion of those who pleaded guilty vs not guilty (2021, total number of district and summary courts)



**Proceedings that do not differentiate between guilty/not guilty decisions and sentencing**

The current Code of Criminal Procedure also does not clearly differentiate between proceedings on guilty/not guilty decisions and those for sentencing. For this reason, even when a citizen who has not committed a crime is pleading not guilty, the “victim” attends the proceedings to present their opinions, and evidence regarding previous convictions is examined for sentencing.

**Saiban-in (lay judge) trials and professional judge trials**

A panel comprising of three judges and six *saiban-in* (lay judges) appointed from the public makes judicial decisions on “cases punishable by the death penalty or life imprisonment with or without work,” and “cases set out in Article 26(2)(ii) of the Court Act regarding crimes causing death to a person due to an intentional criminal act.” Other cases are decided by one or three professional judges only. In 2021, out of the total 50,026 persons (finalized) in ordinary first instance cases, the total persons (finalized) in *saiban-in* trials comprised 904 persons (1.8%)<sup>19</sup>.

**Interpreters**

In the event that a person facing a criminal trial does not understand Japanese, it is

<sup>19</sup> Annual Report of Judicial Statistics 2021 criminal cases table 45 “Total number of persons (finalized) in ordinary first instance cases in *saiban-in* trials By classification at reception and finalization All district courts within the jurisdiction of district courts”

imperative to secure an accurate interpretation to guarantee their rights and to realize a fair trial. However, there exists no system prescribed by laws and regulations to assure the quality of interpretations, and the qualifications of the interpreters, to guarantee the status, and prevent misinterpretations. Multiple case examples have pointed out issues with the accuracy of interpretation and the eligibility of the interpreters.

### **“Witness test” by public prosecutors**

Public prosecutors conduct detailed meetings with witnesses called “witness tests” prior to the examination of the witness in open court. There have been instances where it was revealed that public prosecutors prepared notes on examination items with answers and did a read-through during witness tests, or let the witness take home the notes prepared by the public prosecutor.

### **Conviction based on witness statements**

Witness statements are prone to errors in each of the processes of perception, recollection, expression, description, and statements are evidence that is subject to change. Statements by “eyewitnesses,” “victims,” and “accomplices” all carry the risks of producing miscarriages of justice. In Japanese criminal trials, even if there is no objective evidence supporting a statement, or the statement has changed, more often than not its credibility is affirmed and forms the basis of a conviction. For example, in the Osaka rape false testimony retrial case, testimonies provided by the “eyewitness” and “victim” had no supporting objective evidence, and their statements had changed. Despite this, credibility was affirmed by the judge and formed the basis of a conviction. It was later revealed that the testimonies were both false.

### **Conviction based on witness statements**

Article 320 of the Code of Criminal Procedure states that in principle, hearsay evidence (testimonial evidence by the other party that is not cross-examined) cannot be used as evidence. An exception to this principle is in regards to “a document which contains a statement given before a public prosecutor.” “When the person has given testimony on the trial date or in the trial preparation that conflicts with or substantially differs from a previous statement,” the previous statement may be used as evidence, “provided however, that this is limited to cases where the previous statement was

made under special circumstances that afford a previous statement more credibility than the statement given at the trial or in the trial preparation” (Latter part of Article 321(1)(ii)). “Special circumstances that afford a previous statement more credibility” is in practice moderately accepted, and when a witness gives a testimony different from that in the written statement prepared by the public prosecutor, the latter is adopted based on this provision and forms the basis of a conviction. Even if a sworn witness in open court testifies to the effect that the accused did not commit the crime, or is impeached by the defense counsel’s cross-examination, it is not unusual for the accused to be convicted based on the written statement prepared by the public prosecutor during interrogation.

### **Conviction based on a false confession**

The accused’s records of statements can also be used as evidence “when the statement contains an admission of a disadvantageous fact,” unless “there is doubt about it being voluntary” (Code of Criminal Procedure, Article 322(1)). Even if the accused gives a statement denying any charge of committing a criminal offence on the trial date, the accused’s record of confessions is adopted by virtue of this provision, and forms the basis of a conviction. In the Ashikaga case, Fukawa case, Kitakyushu nail care case, Higashi-Sumiyoshi case and Koto case, confessions made by the accused during the investigation were used as evidence on the grounds that there was no doubt about their voluntariness. The subsequent convictions were recorded and based on these confessions. However, it was later revealed that they were all false confessions.

### **Handling of statements by the accused**

In criminal trials, judgements should be made to the benefit of the accused when there remains doubt. In order to prove guilty, in principle the public prosecutor must prove the charged facts beyond a reasonable doubt. However, it is not necessarily easy for the innocent accused to have their statements believed. For example, when the testimony given by the witness requested by the public prosecutor conflicts with the accused’s statement, the court often affirms the credibility of the former while denying the credibility of the latter and hands down a conviction. In the judgement of the first instance of the Osaka rape false testimony retrial case, the assessment was that “the statement of denial by the accused does not even have enough credibility to shed any doubt on the statements made by the victim” and even criticized the innocent

accused of “consistently giving unreasonable explanations, completely denying each crime, and showing no signs of remorse.” Judgement for the first instance of the Higashi-Sumiyoshi case also affirmed the credibility of testimony by the investigator, while denying the credibility of the trial statement by the innocent accused

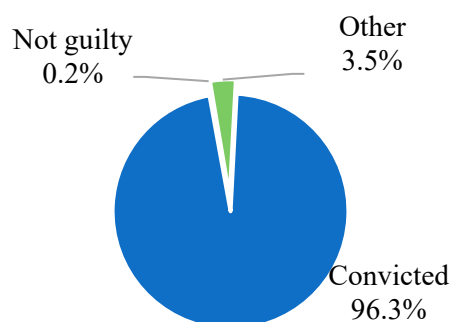
### Conviction by majority rule

Japanese criminal trials permit conviction by majority rule. In a *saiban-in* (lay judge) trial, the opinions of both the judge and the *saiban-in* need to be included, but as long as they are included, a conviction can be handed down by majority rule. For example, even if four out of six *saiban-in* determined the innocence of the accused, if two *saiban-in* and three judges decide that the accused is guilty, the accused will be convicted. The same applies to the selection of the death penalty. In the US, Canada and the UK where the jury system is implemented, a unanimous decision is required in principle for a conviction. In France and Germany where the “mixed jury” system is implemented, a two-thirds majority is required for a conviction. In 2021, out of the total 50,026 persons (finalized) in ordinary first instance cases, the total number convicted comprised 48,175 persons (96.3%), and not guilty comprised 91 persons (0.2%)<sup>20</sup>.

Fig. 9-1 Number of persons by classification at finalization (2021, the total number of district and summary courts)

	No. of persons	Proportion
Total persons (finalized)	50,026	—
Convicted	48,175	96.3%
Not guilty	91	0.2%
Other	1,760	3.5%

Fig. 9-2 Proportion by classification at finalization (2021, the total number of district and summary courts)



<sup>20</sup> Annual Report of Judicial Statistics 2021 criminal cases table 21 “Total number of persons (finalized) in ordinary first instance cases By classification at reception and finalization By all district courts within the jurisdiction of district courts” and table 22 “Total persons (finalized) in ordinary first instance cases By classification at reception and finalization By all summary courts within the jurisdiction of district courts”



## 2-6-2 The JFBA's opinion concerning first instance

### **Clearly setting down the principle of the presumption of innocence**

The principle of the presumption of innocence is set forth in Article 31 of the Constitution, and it is also guaranteed in the International Covenant on Civil and Political Rights. However, Japanese criminal justice presumes that the suspect/accused who has become the criminal investigation agency's target of suspicion is the true perpetrator, and it has operated on the notion that that person must not go unpunished. In order to clearly show that the first priority lies in not punishing the innocent and to promote self-awareness among those involved in the criminal justice system, the principle of the presumption of innocence should be specifically stipulated in the general provisions of the Code of Criminal Procedure.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.1))*

### **Complete disclosure of the evidence**

The disclosure of evidence should be made to the accused for all cases, not limited to the cases subject to pretrial arrangement proceedings. In order not to wrongfully convict and punish the innocent by hiding evidence which is advantageous to the accused, a system should be established where, in principle, all the evidence is disclosed.

Public prosecutors should be required to provide the accused and the accused's counsel the opportunity to inspect and copy all evidence created or obtained during the case's investigation process promptly after the indictment.

Where there is a specific and actual risk that the disclosure of particular evidence will damage critical national interests, or the lives or physical safety of individuals, public prosecutors should be able to request the following court decisions: Exemption from the obligation to disclose such evidence; or designation of the timing or method of disclosure, or setting the conditions for disclosure. The court should allow exemption from the obligation for disclosure only when the above risk is recognized, and there is no need to disclose such evidence to prepare for the defense of the accused.

When a public prosecutor does not disclose the evidence that should be disclosed, the accused's counsel should be able to request a court order requiring the public prosecutor to disclose the evidence.

From the indictment until the first trial date, a judge, rather than the court in which prosecution was instituted, should make decisions regarding disclosure of the evidence.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.2))*

### **Review of the evidence disclosure system under the current Code of Criminal Procedure**

Even if the basic framework of the evidence disclosure system under the current Code of Criminal Procedure is taken as given, the following revisions are necessary in light of the current implementing status of the system:

- (1) It should be stipulated that, if requested by the accused or his/her defense counsel on the grounds that there is a dispute over the charged facts, the court must place the case in pretrial arrangement proceedings before the first trial date.
- (2) The disclosure system of Categorized Evidence and Allegation-Related Evidence in the pretrial arrangement proceedings should be revised as follows:
  - [1] The public prosecutor must disclose evidence other than the evidence that has been disclosed as the evidence used to prove the facts to be proved (including not only the evidence actually stored by the public prosecutor but also any document, etc., that was prepared or obtained in the process of investigations of the case and is actually stored by a public official, etc., in the course of his/her duties and easily available to the public prosecutor) promptly by providing the accused or his/her defense counsel with an opportunity to inspect such evidence (in the case of a defense counsel, an opportunity to inspect and copy such evidence) except for the following cases, provided that, if deemed necessary, the public prosecutor may specify the timing or method of such disclosure or set conditions.

- A. When such evidence does not fall under any of the following (for (c), only in cases where the accused or his/her defense counsel has disclosed the facts to be proved and any other factual or legal allegations to be made on the trial date to the court and the public prosecutor):
- (a) Evidence that is deemed to be connected to the probative value of the evidence for examination requested by the public prosecutor;
  - (b) Written records of seizure procedures for the articles of evidence that are to be disclosed; and
  - (c) Evidence that is deemed to be connected to the allegations of the accused or his/her defense counsel.
- B. When disclosure of such evidence is not deemed appropriate, considering the extent of the connection with the probative value of the evidence for examination requested by the public prosecutor or the allegations of the accused or his/her defense counsel, the extent of other necessities for disclosure in order to prepare for the defense of the accused, and the contents and the extent of possible adverse effects of the disclosure.
- [2] In the event that the public prosecutor does not disclose any evidence stored by the public prosecutor or any evidence that is actually stored by a public official, etc., due to his/her duties and easily available to the public prosecutor, he/she must tell the accused or his/her defense counsel the reason for such nondisclosure.
- [3] In the following cases, the public prosecutor must promptly disclose evidence additionally in accordance with the provision under [1]. In such a case, the provision under [2] shall apply *mutatis mutandis*.
- A. When the public prosecutor has newly stored any evidence (including when any public official, etc., has newly stored any evidence due to his/her duties that is easily available to the public prosecutor and when any evidence stored by a public official, etc., due to his/her duties has become easily available to the public prosecutor);
- B. When the public prosecutor has made an additional request for examination of evidence that will be used to prove the facts to be proved; or
- C. When the accused or his/her defense counsel has disclosed to the court and the public prosecutor their allegations or their allegations to be added or changed.

*(Opinion on the Three-Year Review under Supplementary Provision 9 of the Code*

**Records of criminal investigation**

It should be mandatory for public prosecutors, public prosecutor's assistant officers, and police officers to prepare a “record of investigation” (reasons for commencing the investigation, basic approach to the investigation, records regarding collected material, etc.) for the entire process of a criminal investigation, and its inventory. It should be mandatory for police officers to send an inventory of the records of investigation when referring a case to the public prosecutor. Making it mandatory for the criminal investigation agency to document criminal investigations will be significant in ensuring proper investigative processes and the disclosure of evidence after the indictment.

*(Opinion Calling for Legislation Concerning Records of Criminal Investigations)*

**Separation of procedures**

When there is a dispute over the charged facts, the procedure for judging guilt should be separate from the procedure to determine the severity of the sentence in order to ensure that the judgement regarding the charged crime is based solely on relevant evidence, where firstly, the judgement of guilty or not guilty is based purely upon the existence or non-existence of the charged facts and relevant evidence. Only when the accused has been found guilty should sentencing be assessed.

*(Opinion concerning the Establishment of the New Criminal Justice System (No.2))*

**Increase the number of cases falling under the Saiban-in (lay judge) system**

Cases tried under the Saiban-in (lay judge) system should be increased, so that when there is a dispute over the charged facts and it is requested by the accused or his/her counsel, the cases are handled by a panel consisting of professional and lay judges to ensure double checking.

*(Opinion Paper on the Criminal Trial Procedures in which lay-judges Participate)*

### **Cessation of Using Handcuffs and Waist Ropes in the Courtrooms of Criminal Trials**

In principle, the judge who presides over a criminal trial should order restrained devices removed before the suspect or defendant enters the courtroom, and have the restraint devices applied after he or she leaves the courtroom, to ensure that no one, especially the courtroom observers and the litigants including the judges, will see the suspect or defendant wearing handcuffs and a waist rope, unless there are exceptional circumstances justifying an impending threat, on a distinct and specific basis, that the suspect or defendant may break free, injure himself or herself, harm others, or cause property damages.

The Ministry of Justice and the National Police Agency should disseminate the procedure described in the foregoing item to wardens and staff of the criminal detention centers including police officers in charge of detention.

*(Opinion Calling for the Cessation of Using Handcuffs and Waist Ropes on Suspects or Defendants While Entering and Leaving the Courtrooms in Criminal Trials)*

### **Developing the interpreter system**

A qualification and registration system to ensure interpreters' abilities, and a continuous training system for the maintenance and improvement of their skills should be prescribed by law.

Provisions should be established regarding the following: a remuneration system to guarantee the status of interpreters; the principle of multiple appointments to prevent misinterpretation; the obligation to provide an opportunity for preparation beforehand; audio recording, objection and appraisal for validation after the fact; and the obligation of considerations for persons concerned in the case, and the court.

*(Opinion Concerning Proposal for Legislation Regarding Court Interpreters)*

### **Strict regulation of the admissibility of hearsay evidence**

Based on the understanding that records of statements are the main cause of miscarriages of justice, the requirements for admitting records of statements as evidence should be more stringent. The latter part of Article 321(1)(ii) of the Code

of Criminal Procedure should be deleted.

*(Opinion concerning the Establishment of the New Criminal Justice System  
(No.1))*

#### **Amendments to verdict requirements**

To prevent miscarriages of justice, it is necessary to ensure that the decision to convict is made carefully. The *Saiban-in* (lay judge) system checks - not only by virtue of the common sense of judges but also the common sense of lay judges with a diversity of knowledge and experience - whether one can state that “there is no doubt that the accused committed the crime as charged.” This delivers a better criminal trial that is more faithful to the presumption of innocence. Requiring both the majority of judges and the majority of lay judges to decide that “there is no doubt” in order to convict the accused can better achieve the tenor of a double-checking system. The requirement for a verdict of guilty should be based on the opinion of both a majority of judges and a majority of lay judges.

*(Opinion Paper on the Criminal Trial Procedures in which lay judges  
Participate)*

#### ***Saiban-in* (lay judge) system that enables *Saiban-in* to participate more proactively and substantively**

In order to improve the *Saiban-in* system so that the *Saiban-in* can participate more proactively and substantively, the Code of Criminal Procedure, the Act on Criminal Trials with the Participation of *Saiban-in*, and the Rules for Criminal Trials with the Participation of *Saiban-in* should be amended to include the following:

- (1) A judge who presides over pretrial arrangement proceedings shall not be a member of the court in which prosecution was instituted;
- (2) The presiding judge shall explain to the *Saiban-in* that judges and the *Saiban-in* stand on an equal footing in “fact-finding,” “the application of laws and regulations,” and “sentencing;”
- (3) The presiding judge shall explain in open court about the judge’s “decisions on the interpretation of laws and regulations,” “decisions on court proceedings,” and “decisions other than those made with the participation of the *Saiban-in*,” and

(4) Any decision unfavorable for the accused in verdicts shall be based on an opinion of the members including both the majority of the judges and the majority of the *Saiban-in*.

*(Opinion for Improving the Saiban-in (Lay Judge) System so that the Saiban-in Can Participate More Proactively and Substantively)*

## **2-7 Appeal to the court of second instance and final appeal to the Supreme Court**

### **2-7-1 Current situations and problems of criminal litigation in appellate instances**

When citizens who have not committed a crime are convicted in the court of first instance, they will appeal to the court of second instance to seek redress. In 2021, out of the 5,264 accused persons who appealed to the court of second instance (excluding 13 persons where both parties appealed), 1,588 persons cited error of fact as the reason for the appeal<sup>21</sup>. The court of second instance reversed the first-instance judgement for 131 persons out of the 1,588 (8.2%)<sup>22</sup>. In the same year, the court of second instance rendered its own judgement of acquittal for 21 persons<sup>23</sup>.

### **Appeal against acquittal to the court of second instance and final appeal to the Supreme Court**

Article 39 of the Constitution states that no person “shall be placed in double jeopardy.” However, the current Code of Criminal Procedure allows public prosecutor to appeal to the court of second instance and the Supreme Court against acquittal. Even if citizens who have not committed a crime are acquitted in the first instance, once the public prosecutor appeals to the court of the second instance or the Supreme Court, they again face the risk of a criminal conviction. For example, even if six lay judges and three professional judges reach a unanimous not guilty verdict, it is

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<sup>21</sup> Annual Report of Judicial Statistics 2021 criminal cases table 58 “Total number of persons (finalized) in appeal cases By classification at reception according to charged offence and reason for appeal By all high courts within the jurisdiction of high courts”

<sup>22</sup> Annual Report of Judicial Statistics 2021 criminal cases table 69 “Number of persons reversed in appeal cases By reason for appeal By all high courts within the jurisdiction of high courts”

<sup>23</sup> Annual Report of Judicial Statistics 2021 criminal cases table 72 “Number of persons reversed and rendered own decision in appeal cases By classification at reception according to charged offence and finalization By all high courts within the jurisdiction of high courts”

possible to be convicted at the court of second instance based on the judgement of two out of three professional judges. In the Tokyo Electric Power Company’s female employee murder case, despite the accused being acquitted in the first instance, the public prosecutor appealed to the court of the second instance where the court quashed the judgement and handed down a guilty judgement. This resulted in a person who had not committed a crime serving a prison sentence of over seven years. In 2021, the total number of persons (finalized) whose acquittal in the first-instance was appealed to the court of second instance was 17, of which 15 persons (88.2%) had their first-instance judgement reversed, while 11 persons (64.7%) saw the court of second instance render its own decision to convict without remand<sup>24</sup>.

Fig. 10 Number of persons (by decision) who received a final decision at a court of second instance after acquittal at the court of first instance was appealed

(2021, High Court)

	No. of persons	Proportion
Total persons (finalized)	17	—
Reversed	15	88.2%
Rendered own decision (convicted)	11	64.7%
Remanded/transferred	4	23.5%
Dismissed the appeal to the court of the second instance	2	11.8%

### **Detention of accused who are found not guilty**

Even if citizens who have not committed a crime are acquitted in the first instance, once the public prosecutor appeals the acquittal to the court of the second instance, a warrant for detention may be issued and that detention period may be extended. In the Tokyo Electric Power Company’s female employee murder case, after acquittal at the first instance, the high court approved detention and continued to hold in custody the citizen who had not committed a crime.

### **The nature of the Supreme Court**

When citizens who have not committed a crime are convicted in the court of second

<sup>24</sup> Annual Report of Judicial Statistics 2021 criminal cases table 63 “Total number of persons (finalized) in appeal cases Comparison of first-instance judgement and outcome of court of second instance By all high courts”



instance and seek redress, they do so by making a final appeal to the Supreme Court. Grounds for a final appeal are limited to violations of the Constitution or conflicts with a Supreme Court precedent (Code of Criminal Procedure, Article 405). For errors of fact-finding, the court can only exercise discretionary quash (ibid. Article 411). In 2021, the total number of persons (finalized) whose appeals from the court of second instance were heard before the Supreme Court was 1,852. The Supreme Court reversed the appeals for 3 persons (its own judgement of conviction was rendered for 1 person, and judgement to remand/transfer for 2 persons).<sup>25</sup>

### 2-7-2 The JFBA’s opinion concerning appellate instances

#### **Limitations on appeals to the court of second instance by public prosecutors**

To prevent citizens who have not committed a crime from having their criminal liability called into question again despite being acquitted, public prosecutors should be prohibited from appealing to the court of second instance on grounds of errors of fact.

*(Opinion concerning the prohibition of public prosecutor’s appeal to the court of second instance on grounds of errors of fact)*

#### **Limitations on detention after acquittal**

When the court renders a judgement of not guilty, the accused should be treated as such and not be held in custody at least until this verdict has been reversed on appeal and the court convicts the accused. A second paragraph should be created in Article 345 of the Code of Criminal Procedure that prescribes, “when the court renders a judgement of not guilty, a new detention warrant cannot be issued until the original judgement is quashed on appeal.”

*(Opinion concerning detention after acquittal)*

### 2-8 Retrial

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<sup>25</sup> Annual Report of Judicial Statistics 2021 criminal cases table 80 “Total number of persons (finalized) in final appeal cases By court of prior instance (first instance, second instance) by Penal Code offence, special law offence, and classification at finalization Supreme Court”

## 2-8-1 Current situations and the problems of retrials

### The heavy burden of commencing retrial

When citizens who have not committed a crime are convicted, the last remaining remedy is a retrial. A retrial is literally the final mechanism to save the innocent who may be on the verge of death, preventing the ultimate human rights abuse. Upon request from a person convicted, the court will decide to commence a retrial when it finds that there are grounds for the request (Code of Criminal Procedure, Article 448(1)). However, there are strict requirements that must be met to commence a retrial. In 2020, among the 213 persons who requested retrials, none of these persons were granted retrials (0%)<sup>26</sup>.

Fig. 11 Persons granted retrials

(2020, all courts)

	No. of persons	Proportion
No. of persons who received a decision on a request to commence retrial	213	—
Final decisions to commence retrial	0	0%

### Undeveloped evidence disclosure system

In retrial request proceedings, there are no statutory provisions for the disclosure of evidence. Even if a public prosecutor has evidence which indicates the innocence of a citizen who has been convicted, there is no obligation to disclose it. The disclosure of evidence depends on the stance of the court before which retrial request proceedings are pending. Public prosecutors may also insincerely disregard the court's decisions or recommendations. In the Osaka rape false testimony retrial case, despite the court ordering the public prosecutor to deliver the list of evidence to the accused's defense counsel, the public prosecutor did not comply.

### Filing of appeals by public prosecutors against decisions to commence retrials

The Code of Criminal Procedure does not prohibit public prosecutors from filing an appeal against a decision to commence a retrial. For this reason, even if the court

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<sup>26</sup> Criminal Affairs Bureau, General Secretariat, Supreme Court "Overview of Criminal Cases in 2020" (1) (Lawyers Association journal (Volume 74, Issue 2) page 196

makes a decision to commence a retrial for a citizen who has not committed a crime, once the public prosecutor files an appeal, the commencement of the retrial may be delayed or even revoked. Despite public prosecutors being able to rebut in the retrial, it is not unusual for them to file an appeal against the decision to commence the retrial. Due to appeals by public prosecutors, citizens who have waited years to receive the decision to commence a retrial are exposed to the further burden of defense, spending many more years until redress as a result.

### **Rescission of protective measures under the Juvenile Act**

Protective measures under the Juvenile Act (Article 27 (2)) have a rescission system in place which corresponds with retrial under the Code of Criminal Procedure. However, there are limitations on the avenues of redress after the protective measures have been taken, such as barring rescission in the event of the juvenile's death.

## **2-8-2 The JFBA's opinion concerning retrials**

### **Legislating the disclosure of evidence in retrial request proceedings**

Rules for the disclosure of evidence in retrial request proceedings should be legislated addressing the prosecutor's submission of a list of evidence, court orders for the disclosure of evidence and the investigation of the existence of evidence, as well as preserving tangible evidence including biological samples.

For inspecting and copying evidence outside retrial request proceedings, rules establishing the right to inspect and copy documented evidence as well as to inspect tangible evidence should be legislated.

Regarding the preservation of evidence, relevant rules should be legislated to obligate public prosecutors to preserve the evidence properly, make and send a list of evidence, and keep records of the documents and evidence that the prosecutors did not submit to the court.

*(Opinion Requesting the Legislation of Rules Regarding Disclosure of Evidence in Retrial Request Proceedings )*

### **Prohibit filing appeals against decisions to commence retrials**

To ensure that victims of miscarriages of justice are rescued immediately, public prosecutors should be prohibited from appealing decisions to commence retrials.

*(Resolution Calling for the Immediate Amendment of the Code of Criminal Procedure Part IV to Urgently Rescue Victims Who Have Suffered a Miscarriage of Justice)*

### 3 Investigation into the causes of miscarriages of justice

In order to prevent miscarriages of justice, a thorough investigation into the causes of such convictions is essential. However, the investigation into their causes is woefully insufficient, despite a flurry of cases in recent years, such as the Shibushi case, Himi case, Ashikaga case, the pPostal Fraud case, Kitakyushu Nail Care case, PC Remote Control Virus case, Tokyo Electric Power Company's female employee murder case, Izumiotsu convenience store theft case, Osaka rape false testimony retrial case, Higashi-Sumiyoshi case, Matsubase case, Koto case, Ohkawara Kakohki case and Pressance case.

A third-party agency (commission to investigate the cause of miscarriages of justice) with authority to conduct investigations should be established to: examine the causes of errors in the criminal procedures of cases, such as the process of criminal investigation, prosecution, and trial; and recommend improvements in the operation of relevant systems and legislation towards the prevention of miscarriages of justice.

*(Opinion Calling for Establishment of the Commission to Investigate the Cause of Miscarriages of Justice)*

Fig. 12 List of relevant opinion papers

Date	Opinion Papers
Sept. 14, 2007	Opinion concerning detention/bail system reform
Jan. 20, 2011	Opinion calling for the establishment of the commission to investigate the causes of miscarriages of justice
	Opinion concerning photography (including video recording) and audio recording in the visitation room
Feb. 18, 2011	Opinion concerning the multiple appointment system of court-appointed defense counsels
Apr. 15, 2011	Opinion concerning the establishment of the right to confidential communication and interview
Dec. 15, 2011	Opinion concerning filming direction during video-recorded interrogations
Mar. 15, 2012	Opinion Paper on Criminal Trial Procedures in which <i>Saiban-in</i> Participate
June 14, 2012	Opinion concerning the Establishment of the New Criminal Justice System (No.1)
Sept. 13, 2012	Opinion concerning the Establishment of the New Criminal Justice System (No.2)
	Opinion concerning the Establishment of the New Criminal Justice System (No.3)
Sept. 14, 2012	Opinion Concerning Legislating for the Observer's Presence at Interrogations of Intellectually-Challenged Suspects
July 18, 2013	Opinion Concerning Proposal for Legislation Regarding Court Interpreters
May 8, 2014	Opinion Concerning Overall Augmentation of Records on Procedures in which Courts are Involved during Police Investigations
	Opinion Calling for Legislation of a Law Concerning Records of Criminal Investigations
Oct. 21, 2015	Opinion concerning detention after acquittal
Mar. 17, 2016	Opinion concerning the prohibition of public prosecutor's appeal to the court of second instance on grounds of errors of fact-finding
Apr. 13, 2018	Opinion Calling for the Establishment by Law of the Right to Have Counsel Present in Interrogations
May. 10, 2019	Opinion Requesting the Legislation of Rules Regarding Disclosure of Evidence in Retrial Request Proceedings
Oct. 2019	Declaration on Action for Human Rights 2019 * Revised version of "Declaration on Action for Human Rights 2014 (Oct. 2014)"
Oct. 4, 2019	Declaration Calling for the Establishment of the Right to Have the Assistance of Counsel: Counsel's Presence at Interrogation Changes the Criminal Justice System
Oct. 4, 2019	Resolution Calling for the Immediate Amendment of the Code of Criminal Procedure Part IV to Urgently Rescue Victims Who Have Suffered a Miscarriage of Justice

Oct. 15, 2019	Opinion Calling for the Cessation of Using Handcuffs and Waist Ropes on Suspects or Defendants While Entering and Leaving the Courtrooms in Criminal Trials
Nov. 17, 2020	Opinion Calling for the Elimination of Hostage Justice
Jan. 20, 2022	Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure
Jun. 17, 2022	Opinion for Improving the <i>Saiban-in</i> (Lay Judge) System so that the <i>Saiban-in</i> Can Participate More Proactively and Substantively