

## Effective Criminal Defence in Japan

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<https://hdl.handle.net/2324/4371082>

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出版情報 : Effective Criminal Defence in Japan : Report of a research project commissioned to Kyushu University (Online version 1.2), pp.1-88, 2021-03-01

バージョン :

権利関係 :



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Report of a research project commissioned to Kyushu University

(Online version 1.2)

Koji Tabuchi

## PREFACE

This report summarises the results of research conducted from May 2018 to December 2020 by Kyushu University with financial support from the Open Society Foundations and methodological advice from the Open Society Justice Initiative. Members of the research team were as follows:

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In preparing this report, I would like to express my gratitude to the following individuals for their valuable advice:

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The overarching goal of this research report is to contribute to the effective implementation of the rights of suspects and defendants – especially those who are indigent – to ensure a potent and effective form of legal defence in Japan, thereby putting the idea of right to fair trial into practice. By exploring access to effective criminal defence in Japan, the report aims to advance the rights of suspects and defendants in criminal proceedings by providing policymakers and practitioners with evidence on how such rights operate in practice, and by offering recommendations for reforms to promote their implementation.

The project in Japan was inspired by a similar project conducted in the European Union, culminating in the publication of a book in 2010, *Effective Criminal Defence in Europe*. This marked a major development in comparative criminal law in Europe, and has been an important resource supporting reforms across the region. Subsequent studies were

produced on *Effective Criminal Defence in Eastern Europe* in 2012 and *Effective Criminal Defence in Latin America* in 2014. Like the original research project, the current study places the suspect and the defendant at the centre of the enquiry and examines the question of access to effective criminal defence from their perspective. We consider that procedural safeguards and effective criminal defence are not only essential to a fair trial as an outcome but are also essential to a fair trial when considered in terms of process. Effective criminal defence has a wider meaning than simply competent legal assistance. Even if superior legal assistance is provided, it will not guarantee a fair trial if the other essential elements of a fair trial process are missing. Thus, for criminal defence to be effective, there must be an appropriate constitutional and legislative structure, an adequate institutional framework, political commitment to effective criminal defence, and legal and professional cultures that facilitate it.

We hope that this research report, like the original study, will contribute to a deeper knowledge and understanding of the factors that influence the access to effective criminal defence. Our aim is for this report to be a source of inspiration for national policymakers and practitioners to make access to effective criminal defence available to all who need it.

February 2021

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# I. INTRODUCTION

## 1.1. The state of criminal detention in Japan

The population of Japan on 1 July 2020 was approximately 125.809 million, of which Japanese nationals accounted for approximately 123.334 million (98.0%). The breakdown of the total population by age group shows a society with a declining birth rate and an ageing population: 11.9% are under 15 years of age, 59.2% are between 15 and 64 years, and 28.8% are 65 years or more.<sup>1</sup> Against the background of an ageing population, crime in Japan has decreased in recent years and the number of detainees in penal institutions and police detention facilities is also decreasing. The sum of the daily number of detainees in penal institutions throughout Japan in one year peaked at 29,449,745 in 2007, and then drastically decreased to 18,089,990 in 2019.<sup>2</sup> The sum of the daily number of detainees in police detention facilities throughout Japan in one year also decreased, from 4,381,166 in 2009 to 2,938,484 in 2019.<sup>3</sup>

**Table 1** shows the average daily number of detainees in penal institutions and police detention facilities throughout Japan over the past five years. Numbers for both continue to decline. The average daily number in 2019 was 43,871 for penal institutions for sentenced persons, 5,685 for penal institutions for suspects (persons under investigation before prosecution) and defendants (accused or prosecuted persons), and 8,051 for police detention facilities (mostly suspects under police investigation). In terms of population ratio, 1 in approximately 2,100 people was being held in a penal institution or police detention facility on any one day in 2019.

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<sup>1</sup> Population Census of the Statistics Bureau.

<sup>2</sup> Statistics on Correction from the Ministry of Justice.

<sup>3</sup> White Paper on Police 2019, 215.

**Table 1 Average daily number of detainees in penal institutions and police detention facilities throughout Japan**

Year	Penal institutions				Police detention facilities
	Total	Sentenced persons	Suspects and Defendants	Others	
2015	59,670	53,127	6,539	4	9,540
2016	57,369	51,138	6,227	4	9,087
2017	54,876	49,002	5,869	4	8,559
2018	51,947	46,314	5,628	4	8,433
2019	49,562	43,871	5,685	4	8,051

Notes: 1. 'Sentenced persons' includes inmates sentenced to imprisonment or penal detention, persons sentenced to death and placed in detention, and detainees in a workhouse in lieu of the payment of fines.

Source: Statistics on Correction from the Ministry of Justice, Table 00-02 for each year and White Paper on Police 2020, Table 7-15.

## 1.2. The nature of Japanese criminal justice

### 1.2.1. Overview

The Japanese government's modernisation of the justice system was strongly influenced by German law. However, after Japan's defeat in World War II, Anglo-American law strongly influenced the reconstruction of the current criminal justice system. As a result, the structure of Japanese criminal procedure changed from an inquisitorial to an adversarial system. However, it differs substantially from the Anglo-American type of criminal procedure. In terms of the legal system, investigations are designed to proceed on the basis of the voluntary cooperation of the relevant persons. A warrant issued by a judge is indispensable in principle to apply the compulsory dispositions, such as arrests, searches, and seizures. The decision whether to prosecute a case is made by the public prosecutor as a representative of the public interest. The investigation and the trial are completely separate, and investigation records are not sent to the trial court itself. Judges must conduct trials without prejudice and make findings only on the evidence examined at the

trial. In its operation, the criminal justice system in Japan is traditionally characterised by an extremely high conviction rate, because an investigation is accompanied by the lengthy interrogation of suspects in police custody – suspects are obliged to participate in the interrogation (inquisitorial investigation) – the broad discretion of the public prosecutor in prosecution, and detailed fact-finding by judges using written statements recorded by investigation officers. Thus, while the proportion of cases in which confessions are obtained before prosecution remains high, the credibility of these confessions has always been an important issue in trials. These characteristics of Japanese criminal justice are rather positively presented as ‘minute justice’.<sup>4</sup> However, the minute justice theory has been criticised as an idea that abandons the reform of the due process model.<sup>5</sup> The 2004 reform of criminal procedure centred on introducing the *saiban-in* (lay judge) system, which was implemented under the slogan ‘From minute justice to core justice’ (trials that do not depend so much on written statements).<sup>6</sup> However, the concept of ‘core justice’ does not require drastic strengthening of due process either<sup>7</sup> and the effect of reform is currently limited.

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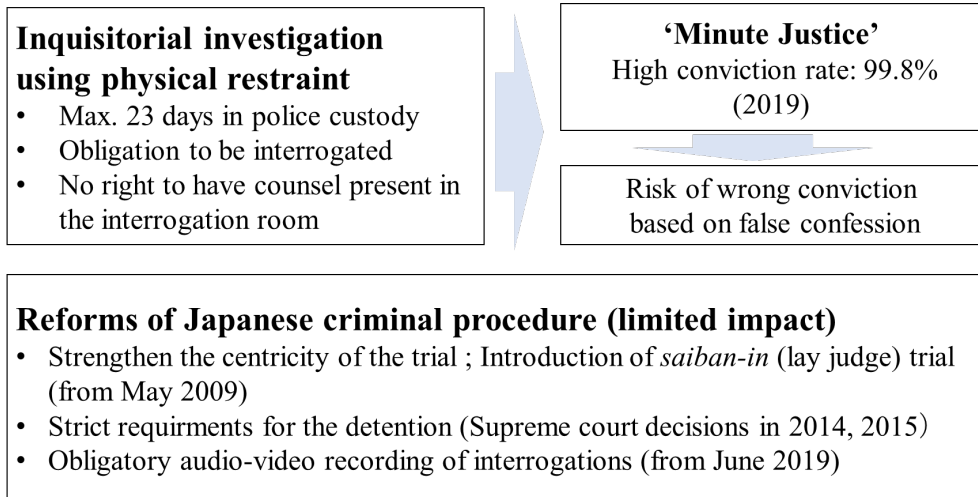
<sup>4</sup> Matsuo (1994), 1249; Matsuo (2012), 30-31.

<sup>5</sup> Odanaka (1995), 306-307; Shiratori (2012), 46.

<sup>6</sup> Hirano (1999), 2; Matsumoto (2004), 82.

<sup>7</sup> Odanaka (2006), 281.

Figure 1 Typical characteristics of Japanese criminal procedure



### 1.2.2. Outline of arrest and detention

#### (1) Period of arrest and detention

Arrests are carried out in principle on a warrant issued by a judge. When a judicial police officer has arrested a suspect, the officer must follow procedure and refer the person to a prosecutor within 48 hours of the suspect being placed under physical restraint, unless the officer voluntarily releases the suspect (Code of Criminal Procedure [CCP], Art. 203). Furthermore, the police have the power to dispose of petty offences designated by a prosecutor (CCP, Art. 246) or refer to a family court a case involving a juvenile who is, as a result of the investigation of the case, suspected of committing a crime punishable by a fine or lighter punishment (Juvenile Act, Art. 41).

When a prosecutor receives a suspect from the police officer, the prosecutor must request detention with a judge or institute prosecution within 24 hours and within 72 hours of the suspect being arrested, unless releasing the suspect of their own volition (CCP, Art. 205). If a prosecutor has arrested a suspect, the prosecutor must request detention with a judge or institute prosecution within 48 hours of the suspect being placed under physical

restraint, unless releasing the suspect of their own volition (CCP, Art. 204). On the basis of the above, a suspect arrested by a police officer will be brought before a judge for a detention hearing within 72 hours of the arrest, in principle, unless the suspect is released or prosecuted.

Detention is carried out after a judge's detention hearing (CPP, Arts. 207(1), 61). Under Article 207 and Article 61, counsel has no right to be present at the judicial inquiry for detention. Therefore, in practice, before the judicial inquiry for detention, counsel submits a written opinion and materials to the judge or is in contact with the judge if necessary.<sup>8</sup> If a detention warrant is issued after arrest, the detention period for the suspect is generally ten days from the date when detention was requested. If it is found that there are unavoidable circumstances for the investigation, the detention period may be extended by up to ten days (Art. 208). In cases involving crimes provided for in Part II, Chapters II to IV or VIII of the Penal Code (crimes related to insurrection, foreign aggression and foreign relations, and crimes of disturbance), a further extension of five days is possible (Art. 208-2). If a prosecutor does not institute prosecution within the permitted detention period, the suspect must be released immediately.

A repeat arrest and detention for the same suspected offence is not permitted in principle. It is possible to re-arrest and detain the same person based on suspicion of another offence, unless it is a pretext to exceed the limit of the physical restraint period. Thus, physical restraint prior to the prosecution of the same person can continue for several months by repeatedly arresting and detaining them for each suspected offence. There is no legislative limit on repeating arrests and detentions serially for different causes.

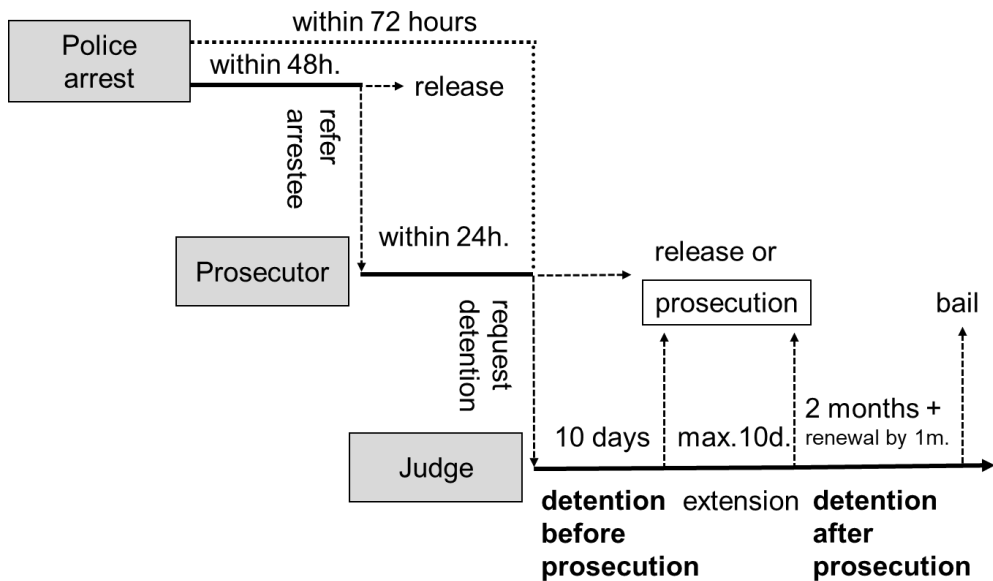
If a defendant has to be detained for a prosecuted case, the court or a judge may issue a detention warrant *ex officio*. In principle, the detention period for a defendant is two months from the prosecution, and it may be renewed for one-month periods if detention is to continue. However, an extension is only allowed once, except as otherwise prescribed in

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<sup>8</sup> Tokyo Bar Association, *Kiseikai* (2006), 31; Koma & Serizawa (2012), 160 (Inayoshi Daisuke); *Keiji-bengo Beginners* (2014), 60.

Article 89, Item (i) (the defendant has allegedly committed a crime that 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), Item (iii) (the defendant was previously found guilty of a crime punishable by the death penalty, life imprisonment with or without work, or a sentence of imprisonment with or without work whose maximum term of imprisonment was in excess of ten years), Item (iv) (there is probable cause to suspect that the defendant may conceal or destroy evidence), and Item (vi) (the name or residence of the defendant is unknown) (CCP, Art. 60 (2)). In this regard, Paragraph 38 of the Human Rights Committee General Comment No. 35 states that if the length of time the defendant has been detained is the longest sentence that could be imposed for the crimes charged, the defendant should be released. Accordingly, if the detention of the defendant is renewed repeatedly because of procedural delay and the length of detention would exceed the maximum sentence possible, it must be considered an inappropriately long detention.

**Figure 2 Outline of arrest and detention in the case of police arrest**



### (2) Places of detention

While police arrestees are placed in police custody, the CCP designates the place of detention as a penal institution (Art 64(1)). However, the Act on Penal Detention Facilities allows a police detention facility to be used as an alternative to a penal institution (Art. 15 (1)). In fact, police detention facilities are most often substituted as places of detention to maintain the efficiency of a police investigation (a so-called ‘substitute prison system’). In this regard, Article 9.3 of the International Convention on Civil and Political Rights (ICCPR) requires that suspects be promptly brought before a judge. The Human Rights Committee also states in Paragraph 36 of its General Comment No. 35 that ‘[i]n the view of the Committee, detention on remand should not involve a return to police custody, but rather to a separate facility under different authority, where risks to the rights of the detainee can be more easily mitigated’. Against this opinion, the National Police Agency of Japan explains that to safeguard the rights of detainees in police facilities, investigators are prohibited from controlling the treatment of those held in the detention facility and that they are in the hands of the general affairs (administration) division, which is not responsible for the investigation (implemented in 1980), and that this separation of investigation and detention has been rigidly enforced. Moreover, the National Police Agency explains that the checking functions related to this separation has been strengthened since the legislation of the Penal and Detention Facilities Act of 2016, in which Article 16, Paragraph 3 clearly stipulates the principle of the separation of investigation and detention.<sup>9</sup> However, the detention officer, for example, does not have the authority or obligation to stop the investigation from continuing until midnight, and the functional separation of investigation and detention in police organisations is still inadequate.<sup>10</sup> Thus, the substitute detention system of the Japanese police is not aligned with the purpose of Article 9.3 of the ICCPR.

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<sup>9</sup> The National Agency of Police, Police detention system in Japan 2017, 11-13 ([https://www.npa.go.jp/about/overview/ryuchi/Detention\\_house-J\\_080415-3.pdf](https://www.npa.go.jp/about/overview/ryuchi/Detention_house-J_080415-3.pdf)).

<sup>10</sup> Kuzuno (2007), 127; Sato M (2013), 134-137.

### 1.2.3. Current situation of arrest and detention

No statistics are available on the number of those arrested for all criminal offences. **Table 2** shows the number of persons arrested by police for Penal Code offences, excluding negligent driving offences causing death or injury, and the rate of referral to a prosecutor in the past five years. In total, 90–92% of persons arrested by the police are referred to a prosecutor. While the referral rate of ordinary arrests is 96–97%, that of on-the-spot arrests is more than 10% lower than for other types of arrest.

**Table 2** Number of persons arrested by the police for Penal Code offences and rate of referral to a prosecutor

Year	Total number		Ordinary arrest		Emergency arrest		On-the-spot arrest	
	Arrested persons	Referral rate	Arrested persons	Referral rate	Arrested persons	Referral rate	Arrested persons	Referral rate
2015	78,688	92.1%	42,383	97.0%	4,141	95.6%	32,164	85.1%
2016	76,848	91.5%	41,008	96.8%	3,974	94.7%	31,866	84.2%
2017	74,087	91.0%	39,353	96.3%	3,905	95.3%	30,829	83.7%
2018	71,381	90.5%	37,847	96.3%	3,493	94.4%	30,041	82.7%
2019	68,059	89.7%	36,268	96.0%	3,289	93.9%	28,502	81.2%

Notes: 1. The number of arrested persons for Penal Code offences excluding negligent driving offences causing death or injury.

2. For details of each category of arrest, see Section 3.1.2.

Source: Statistics of the National Police Agency, Crimes per year, Table 31 for each year.

**Table 3** shows details for the past five years of the measures taken after transfer to a prosecutor or arrest by a prosecutor, excluding negligent driving offences causing death or injury and violations related to road traffic. The proportion of arrested suspects whose detention was permitted decreased from approximately 90% to below 88% over the past 5 years. On the other hand, the proportion of arrested suspects released without detention increased from approximately 8% to 11%. In 2014 and 2015, the Supreme Court rendered

judgements requiring that the likelihood of concealing or destroying evidence or of fleeing be taken into consideration, given the concrete circumstances, when considering the conditions for detention.<sup>11</sup> This is believed to have affected the recent increase in the number of people for whom a detention request was dismissed.

**Table 3 Measures taken after transfer to a prosecutor or arrest by a prosecutor**

Year	Total	Detention		Release by Prosecutor	Others
		Permit	Reject		
2015	118,456	106,979	2,866	6,301	2,310
	100.0%	90.3%	2.4%	5.3%	2.0%
2016	114,493	102,089	3,580	6,859	1,965
	100.0%	89.2%	3.1%	6.0%	1.7%
2017	110,576	97,357	3,901	7,539	1,779
	100.0%	88.0%	3.5%	6.8%	1.6%
2018	108,885	95,079	4,888	7,259	1,659
	100.0%	87.3%	4.5%	6.7%	1.5%
2019	103,269	90,359	4,919	6,606	1,385
	100.0%	87.5%	4.8%	6.4%	1.3%

Notes: 1. Negligent driving offences causing death or injury and road traffic-related violations are excluded.

2. The lower row shows the percentage for each measure.

3. 'Others' includes 'Referral of a juvenile to a juvenile classification home (permitted and rejected)', 'Observation and protection of a family court probation officer (permitted and rejected)', 'Request for a trial', 'Request for a summary-order procedure', and 'Referral to family courts' during arrest.

Source: Statistics on Prosecution from the Ministry of Justice for each year, Table 18-00-39.

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<sup>11</sup> Supreme Court (hereunder SC) ruling of 17 November 2014, HJ 2245-129=HT 1409-129; SC ruling of 22 October 2015, CT 1638-2.

**Table 4** shows the details for the past five years of the number of days that suspects spent in detention before prosecution, excluding negligent driving offences causing death or injury and violations related to road traffic. Detentions of 16 to 20 days account for the majority (58–61%), followed by those of 6 to 10 days (33–36%).

**Table 4 Length of detention before prosecution**

Year	Total	Detained days					
		Within 5 days	Within 10 days	Within 15 days	Within 20 days	Within 25 days	Over 25 days
2015	106,993	1,233	38,660	5,192	61,766	17	125
	100.0%	1.2%	36.1%	4.9%	57.7%	0.0%	0.1%
2016	102,107	1,199	36,281	4,836	59,713	15	63
	100.0%	1.2%	35.5%	4.7%	58.5%	0.0%	0.1%
2017	97,372	1,305	33,496	4,775	57,703	7	86
	100%	1.3%	34.4%	4.9%	59.3%	0.0%	0.1%
2018	95,098	1,307	31,269	4,533	57,882	19	88
	100%	1.4%	32.9%	4.8%	60.9%	0.0%	0.1%
2019	90,377	1,391	30,781	4,725	53,402	5	73
	100.0%	1.5%	34.1%	5.2%	59.1%	0.0%	0.1%

Notes: 1. Negligent driving offences causing death or injury and road traffic-related violations are excluded.

2. The lower row shows the percentage for each period of detention.

3. Detained days are added up when the same person is detained several times.

Source: Statistics on Prosecution from the Ministry of Justice, Table 00-40 for each year.

**Table 5** shows details for the past five years of the length of detention after prosecution in the first instance (district courts and summary courts) in ordinary cases (excluding summary-order cases and retrial cases). Most defendants were detained for between more than one month and less than three months. The proportion of these defendants decreased from approximately 62% to 54%. Although the detention period in the first instance is

decreasing, the number of defendants detained over one year is still more than 1% of all those detained.

**Table 5 Length of detention in the first instance in ordinary cases**

Year	Detained person	Length of detention						
		Within 15 days	Within 1 mon.	Within 2 mon.	Within 3 mon.	Within 6 mon.	Within 1 year	Over 1 year
2015	46,815	6,459	2,708	17,567	10,334	6,488	2,723	536
	100.0%	13.8%	5.8%	37.5%	22.1%	13.9%	5.8%	1.1%
2016	44,761	6,270	2,729	15,865	9,801	6,264	2,764	669
	100.0%	14.0%	6.1%	35.4%	21.9%	14.0%	6.2%	1.5%
2017	41,975	6,942	2,563	14,549	8,872	5,787	2,630	632
	100.0%	16.5%	6.1%	34.7%	21.1%	13.8%	6.3%	1.5%
2018	40,582	6,678	2,578	13,810	8,806	5,579	2,498	633
	100.0%	16.5%	6.4%	34.0%	21.7%	13.7%	6.2%	1.6%
2019	38,953	6,589	2,585	12,133	8,774	5,684	2,523	665
	100.0%	16.9%	6.6%	31.1%	22.5%	14.6%	6.5%	1.7%

Note: The lower row shows the percentage of all those detained.

Source: Annual Report of Judicial Statistics for each year, Table 32.

#### 1.2.4. Lengthy interrogation in physical restraint cases

Relatively lengthy interrogations of suspects are conducted in investigations of physical restraint cases. No periodic statistics are available on the length of interrogations by investigative agencies. In 2011, the Ministry of Justice conducted a survey of 8,233 physical restraint cases of suspects processed by the district or ward prosecutors' offices in September 2010.<sup>12</sup> The findings indicated that the average interrogation time by police

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<sup>12</sup> The Ministry of Justice, Report of the domestic survey on interrogations, Aug. 2011, Table 1, Table 2, and Table 3 (<http://www.moj.go.jp/content/000079391.pdf>).

## I. INTRODUCTION

and prosecutors in a physical restraint case was 21 hours 35 minutes; interrogations in prosecuted cases took 23 hours on average and those not prosecuted took 16 hours 56 minutes on average. With regard to type of offence, interrogations in bribery cases were the longest on average, at 130 hours 28 minutes, followed by offences against the Public Office Election Act (69 hours 36 minutes) and injury causing death (63 hours 24 minutes).

**Table 6** shows the average interrogation time in physical restraint cases according to suspects' attitudes at the beginning of the arrest and end of the investigation. In 78.9% of the cases, a confession was obtained at the beginning of the arrest, and the average interrogation time in these cases was the shortest, at 19 hours 57 minutes. However, the longest interrogation was also for a case in which a confession was obtained. By contrast, the average interrogation time of cases in which suspects changed from providing a confession to denial was the longest, at 33 hours 51 minutes, although this only occurred in 0.6% of cases. The average interrogation time of cases in which suspects changed from a confession to denial or from denial to confession was 27 hours. With regard to the average interrogation time for prosecutors, the proportion was slightly larger in cases where suspects did not admit to the charges in the final stage of the investigation. This suggests that prosecutors are also interested in obtaining confessions before processing cases.

**Table 6 Average interrogation time in physical restraint cases according to suspect's attitude**

Suspect's attitudes at the beginning and end	Number of cases (Percentage)	Total interrogation time (Interrogation time by prosecutors)	
		Average	Longest
Confession to Confession	6,495 (78.9%)	19 h 57 m (2 h 25 m)	249 h 00 m (29 h 36 m)
Confession to Denial	46 (0.6%)	33 h 51 m (6 h 34 m)	88 h 18 m (49 h 23 m)
Denial to Confession	861 (10.5%)	27 h 14 m (3 h 49 m)	140 h 12 m (27 h 38 m)
Denial to Denial	831 (10.1%)	27 h 53 m (4 h 14 m)	151 h 23 m (6 h 14 m)

Source: The Ministry of Justice, Domestic survey report on interrogations, Table 4.

The National Police Agency also conducted a survey on interrogations by the police in physical restraint cases in 2011<sup>13</sup>. The results indicate that the interrogations of the 397 suspects in ordinary physical restraint cases at the 36 police stations selected from across Japan took place over an average of 5.7 days, and took an average of 15 hours 15 minute. Furthermore, a study of 86 suspects in special investigation cases resolved in 2010 (cases for which special investigation headquarters were set up to quickly solve the case and arrest the criminal when a brutal and serious crime occurs) showed that the interrogations took place over an average of 17.6 days and took an average of 65 hours 31 minutes.

**Table 7** shows the average interrogation time by police in physical restraint cases according to the suspect's attitude. The interrogation of those suspects who denied the charges took much longer on average than when confessions were initially obtained. Furthermore, the statistics indicate that the average interrogation time of suspects who did not confess at all was shorter than in cases where suspects confessed during the interrogation. This suggests that the length of an interrogation may be affected by the possibility of obtaining a confession.

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<sup>13</sup> The National Police Agency, On the realities of the interrogation of suspects by the police, October 2011, Table 1 ([https://www.npa.go.jp/sousa/kikaku/20111020\\_kekka.pdf](https://www.npa.go.jp/sousa/kikaku/20111020_kekka.pdf)).

**Table 7 Average interrogation time by police in physical restraint cases according to suspect's attitude**

	Number of suspects	Average time of interrogation
Ordinary cases	397	15 h 15 m
Confession cases	340	14 h 49 m
On the first day	279	13 h 24 m
After the second day	61	21 h 13 m
Denial or remained silent	57	17 h 51 m
Investigation headquarters cases	86	65 h 31 m
Confession cases	57	64 h 41 m
On the first day	48	61 h 24 m
After the second day	9	82 h 11 m
Denial or remained silent	29	67 h 10 m

Source: The National Police Agency, On the realities of the interrogation of suspects by the police, Table 5.

The legal basis that allows lengthy interrogations of suspects who are arrested and detained is the so-called 'theory of the obligation to be interrogated'. The proviso to Article 198, Paragraph 1 of the CCP provides that 'the suspect may, except in cases where they are under arrest or detention, refuse to appear or after they have appeared, may withdraw at any time'. In practice in an investigation in Japan, an obligation to appear and remain for the investigation (also known as the 'obligation to be interrogated') is imposed on arrested or detained suspects on the basis of this provision. For interrogations pertaining to an arrest and detention, many precedents have approved the obligation to appear and remain for the interrogation.<sup>14</sup> The Supreme Court maintains with regard to the suspect

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<sup>14</sup> Tokyo District Court (hereunder DC) ruling of 9 December 1974, CrM 6-12-1270; Urawa DC judgement of 12 October 1990, HJ 1376-24=HT 743-69; Saga DC ruling of 16 September 2004, HJ 1947-3.

in physical custody having an obligation to appear and remain for the interrogation, that this does not directly take away that suspect's freedom to refuse to testify involuntarily.<sup>15</sup> Academic opinions on this investigative practice are divided: some reject the obligation to appear and remain for interrogation,<sup>16</sup> some affirm it,<sup>17</sup> and others argue that even if a suspect who has been arrested or is in detention is obliged to appear and stay in the interrogation room, lengthy persuasion to make them rescind the refusal to be interrogated should not be permitted because it infringes on the freedom of a statement.<sup>18</sup>

Suspects are not granted the right to have a lawyer present during an interrogation. Furthermore, court precedents highlight that even if a suspect in custody asks to consult a lawyer during an interrogation, the interrogation may be allowed to take precedence.<sup>19</sup> The Supreme Court permits this constitutional restriction on the grounds that the rights to investigate and to defence must be balanced, since Japanese laws limit the period a suspect may be under arrest and detention to no more than 23 days in ordinary cases.<sup>20</sup> Thus, in Japanese criminal procedure, the suspect has a position as the defence subject and interrogation object, especially in physical restraint cases. Furthermore, suspects in custody are not guaranteed the right to defence in a form that would inhibit the purpose of the interrogation. Therefore, strengthening a suspect's right to defence is recognised in particular as key in changing the inquisitorial structure of Japanese investigations.<sup>21</sup>

The CCP, revised in 2016 (and implemented in June 2019), mandates the recording of the entire interrogation process of a suspect under arrest and detention with audio-visual technologies to increase the transparency thereof and prevent undue interrogation coercing the suspect into a confession. However, the legal obligation to record is limited to

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<sup>15</sup> SC judgement of 24 March 1999, CiR 53-3-514.

<sup>16</sup> Goto (2001), 151; Takada (2003), 98; Toyosaki (2013), 127; Kawasaki & Shiratori eds. (2015), 192 (Fuchino, Takao); Takauchi (2016), 304; Abe (2019), 376.

<sup>17</sup> Dai-konmentâru, 190 (Watanabe, Sakiko); Matsuo (1999), 67; Osawa (2015), 94.

<sup>18</sup> Tada (1999), 203; Sakamaki (2015), 94; Sato T (2019), 353; Saito (2019), 190-191.

<sup>19</sup> SC judgement of 10 July 1978, CiR 32-5-820; SC judgement of 10 May 1989, CiR 45-5-919; SC judgement of 31 May 1989, LM 38-2-298.

<sup>20</sup> SC judgement of 24 March 1999, CiR 53-3-514.

<sup>21</sup> Tamiya (1971), 400; Wakamatsu (1987), 7-8; Ishikawa (1993), 5; Ode (2019), 188-189.

interrogations for crimes punishable by the death penalty or imprisonment for life, which are subject to *saiban-in* trials, and to cases in which prosecutors initiate the investigation. Furthermore, the practice guidelines of the National Police Agency and Supreme Prosecution Offices make it mandatory to audio-visually record the interrogations of suspects with a mental or intellectual disability. Both investigative agencies have tried to record their interrogations ahead of the implementation of the law. **Table 8** shows the details for the recording of interrogations of suspects by prosecutors over the past five years. The interrogations in 103,380 cases were recorded by prosecutors countrywide from April 2019 to March 2020. Of these, 2,707 (2.7%) comprised two of the types of case mandated by law to be recorded, 4,635 (4.5%) comprised four types of case mandated by law or directed by the practice guidelines to be recorded, and 98,735 (95.5%) were other cases. Thus, in most cases, whether or what part of an interrogation to record audio-visually is still at the discretion of the investigators. The defence is entitled to a copy of audio-visual records through disclosure proceedings of evidence, and both parties can use the records as evidence at trial.

**Table 8 Audio-visual recording of the interrogation of suspects by prosecutors**

Fiscal Year	Number of recorded cases	Breakdown of numbers				
		Cases subject to <i>saiban-in</i> trial	Cases in which prosecutors initiated the investigation	Suspects with a mental disability	Suspects with an intellectual disability	Other cases
2015	59,411	3,183	128	1,071	2,610	52,419
2016	80,463	2,734	103	874	2,318	74,407
2017	100,395	2,772	83	630	1,857	95,053
2018	102,154	2,603	115	469	1,653	97,314
2019	103,380	2,707	94	347	1,487	98,745

Source: The Supreme Public Prosecutors Office, the state of the audio-visual recording of interrogation (from April 2015 to March 2019)

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

### 1.2.5. Broad discretion of the prosecutor and high conviction rate

The public prosecutor plays an important role in processing criminal cases. The authority to prosecute a case is held exclusively by the prosecutor (CCP, Art. 247). The prosecutor supposedly chooses not to prosecute unless evidence indicating the strong possibility of a guilty verdict can be gathered. In reality, the conviction rate in prosecuted cases is extremely high. Maintaining this high conviction rate is often used to justify the need for a lengthy interrogation. Furthermore, the prosecutor has the broad discretion to suspend prosecution in any case depending on circumstances. Exceptionally, because the Juvenile Act prioritises the investigation and hearing in a family court, the prosecutor must refer to the family court those cases involving juveniles who are, as a result of the investigation of the case, suspected of committing a crime. To decide whether to grant a suspension of prosecution, the public prosecutor must be aware of the criminal's character, age, and environment, as well as the gravity and circumstances of the offence and the situation arising from it (CCP, Art. 248). This is explained as another reason for the time taken in an investigation. The suspension of a prosecution is a disposition with no punishment or forcible conditions. However, when the circumstances are changed significantly and grounds to suspend disappear, it is construed possible to re-commence prosecution of the suspended persons without breaching Article 39 of the Constitution of Japan (CJ), which prohibits double jeopardy.<sup>22</sup>

**Table 9** shows the details for the past five years of the prosecution rate in all cases and the conviction rate in the first instance, excluding retrials and summary trials. While the prosecution rate remained at around 33%, the conviction rate stayed high at 99.8%–99.9%.

**Table 10** shows the breakdown of suspects not prosecuted in the previous five years according to reason, excluding negligent driving offences causing death or injury and violations related to road traffic. Non-prosecution because of the suspension of prosecution

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<sup>22</sup> SC judgement of 24 May 1949, CrR 11-5-1540; SC judgement of 11 December 1964, HJ 399-56.

accounted for around 70% of the total every year. Insufficient evidence, etc., accounted for just over 20% of the total every year.

**Table 11** shows the details for the past five years of the acquittal rate of denial cases in the first instance, excluding summary trials. As shown, around 9% of all defendants sentenced denied their accusation, indicating a high confession rate. The percentage of defendants found not guilty on all or part of the counts was between 3.0% and 3.8% of all denial cases.

**Table 9 Prosecution and conviction rates in the first instance**

Year	Prosecuted (a)	Not Prosecuted (b)	Prosecution Rate $a/(a+b)$	Convicted (c)	Acquitted (d)	Conviction Rate $c/(c+d)$
2015	371,459	733,937	33.4%	59,375	76	99.9%
2016	352,669	701,719	33.4%	57,578	107	99.8%
2017	329,517	671,694	32.9%	54,543	116	99.8%
2018	308,721	632,323	32.8%	53,257	109	99.8%
2019	282,844	576,677	32.9%	51,674	110	99.8%

Notes: 1. 'Prosecuted' and 'Not Prosecuted' show the number of persons processed by the prosecutor at the end of investigation.

2. 'Convicted' in this table includes persons found guilty on all or some counts.

Source: Public prosecution statistics of the Ministry of Justice: Table 00-05 and Annual Report of Judiciary Statistics: Tables 9 and 12 for each year.

**Table 10 Persons not prosecuted by reason**

Year	Total	Suspension of prosecution	Insufficient evidence, etc.	Lack of prerequisites to prosecute
2015	163,248	113,130	34,125	15,993
	100.0%	69.3%	20.9%	9.8%
2016	160,226	112,809	34,136	13,281
	100.0%	70.4%	21.3%	8.3%
2017	158,780	112,263	34,400	12,117
	100.0%	70.7%	21.7%	7.6%
2018	159,262	114,014	33,082	12,166
	100.0%	71.6%	20.8%	7.6%
2019	153,759	108,308	33,820	11,631
	100.0%	70.4%	22.0%	7.6%

Notes: 1. The lower row shows the percentages for each reason of all those not prosecuted.

2. Negligent driving offences causing death or injury and road traffic-related violations are excluded.

3. 'Insufficient evidence, etc.' includes absence of evidence, absence of facts constituting a crime, insanity, and unpunishable age.

Source: Public prosecution statistics of the Ministry of Justice: Table 00-08 for each year.

**Table 11 Acquittal rate in denial cases in the ordinary first instance**

Year	Sentenced persons		Persons sentenced not guilty		Acquittal rate in denial cases (b/a)
	Total	Denial (a)	Total	Denial (b)	
2015	59,458	5,134	155	153	3.0%
2016	57,691	5,287	186	186	3.5%
2017	54,662	5,188	182	180	3.5%
2018	53,386	4,759	174	173	3.6%
2019	51,788	4,763	185	182	3.8%

Notes: 1. 'Not guilty' in this table includes persons found not guilty on some counts.

Source: Overview of Criminal Cases 2019 Part I, Table 94.

If a victim or similar is dissatisfied with the prosecutor's non-prosecution process, they may file an examination with the Committee for the Inquest of Prosecution. The Committee for the Inquest of Prosecution provides a system for democratic control over the prosecutor's prosecuting power. It consists of 11 people selected through a random lottery of those with the right to vote for members of the House of Representatives. The Act on the Committee for the Inquest of Prosecution was revised in 2004 to grant the committee the authority to force prosecution under certain circumstances. There have been discussions that this revision will lead to a review of the prosecution standard for prosecutors,<sup>23</sup> and that the prosecuting criteria will be relaxed because it is becoming increasingly difficult to obtain detailed confessions in investigations.<sup>24</sup>

### 1.2.6. Emphasis on written statements as evidence

In Japanese criminal procedure, written statements made before an investigator play an important role as evidence. Statements by a suspect or witness before an investigator are taken down by the investigator as a written record. Usually, however, the questions and direct answers are not literally recorded. Rather, the written record describes the results of the interrogation in narrative form. As a result, the public prosecutor is able to prove facts efficiently using the written record of the statement made before an investigator. It had been standard practice for judges to admit the written record of statements claimed by the public prosecutor as evidence of hearsay exceptions and then to form an impression of the case by carefully considering the contents of the record in their chambers. Correspondingly, the focus of defence activities is on agreeing to use the written record as evidence and then examining the deponent and disputing the truth of the statement written in the record if necessary. Consequently, criminal trials in Japan have come to be known as 'trial by written statement'.<sup>25</sup> Under the *saiban-in* system implemented in 2009,

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<sup>23</sup> Mitsui (2005), 86.

<sup>24</sup> Mitsui et al. eds., Vol. 2. (2017), 16 (Okamoto Akira).

<sup>25</sup> Hirano (1985), 418.; Watanabe et al. (1992), 551; Ishimatsu (1993), 2.

the criminal court in Japan has been trying to move away from its excessive reliance on written records of statements.

**Table 12** shows statistics regarding the examination of evidence in the *saiban-in* trials in 2009 and 2019. In total, the average trial time accounted for by the average time for witness examination and defendant questioning in 2009 was 39.2% for all cases, 34.1% for confession cases, and 39.6% for denial cases. In 2019, these had increased to 64.1% in all cases, 59.2% in confession cases, and 64.2% in denial cases. These figures show that oral evidence is increasingly required in both confession and denial cases in *saiban-in* trials. However, opinion leaders of public prosecutors maintain a position that written records of statements made before an investigator increase the speed and efficiency of procedures.<sup>26</sup> In addition, the way statements are recorded is also being reconsidered to bring about improvements to ensure that judges can easily understand its contents even if the written record of statements is read at the trial.<sup>27</sup> It is therefore unclear whether the recent move towards focusing on oral evidence will change the inquisitorial structure of an investigation.

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<sup>26</sup> See, Mitsui et al. eds. (2017), 13 (Watanabe Kazuhiro).

<sup>27</sup> Kiyono (2016), 34.

**Table 12 Examination of evidence in *saiban-in* trials for 2009 and 2018**

	2009			2019		
	All	Confession cases	Denial cases	All	Confession cases	Denial cases
Average number of witnesses, evidential documents, and tangible objects examined	23.8	23.4	25.3	20.9	17.4	24.3
Average number of examined witnesses	1.6	1.4	2.4	2.9	1.7	4.1
Average trial time in min. (a)	526.9	482.5	701.3	621.3	407.0	829.8
Average time of witness examination in min. (b)	92.1	79.6	129.6	221.6	99.4	322.0
Average time of defendant questioning in min. (c)	114.5	105.9	148.4	176.6	141.4	210.9
Percentage ((b+c)/a)	39.2%	34.1%	39.6%	64.1%	59.2%	64.2%
Source: The Supreme Court, General Secretariat, The State of the <i>saiban-in</i> Trial system, Tables 45,46-2, and 54 of 2009 and 2018; Tables 46, 47, and 55 of 2019.						

## II. LEGAL AID FOR THE SUSPECT/DEFENDANT

### 2.1. Court-appointed counsel system

#### 2.1.1. Operating entity

Equivalent to the system of public legal aid in criminal cases are the systems of the court-appointed counsel for a suspect and defendant, and of the court-appointed attendant for a juvenile in the family court procedure (below, ‘court-appointed counsel, etc.’). The Japan Legal Support Centre (JLSC) nominates candidates for the court-appointed counsel, etc., to courts and is responsible for the payment of remuneration and expenses of the court-appointed counsel, etc. The JLSC is a unique corporation that uses the framework of an independent administrative agency for which the Minister of Justice is responsible. Attorneys who wish to be nominated as a candidate for the court-appointed counsel, etc., must contract with the JLSC to provide these legal services in advance. If the court-appointed counsel breaches the court-appointed counsel agreement with the JLSC, the JLSC can take measures to suspend the court-appointed counsel agreement for a certain period or suspend appointments of the attorney as court-appointed counsel (Contract on Court-Appointed Counsel Business, Art. 34 (2)).

Nominations of candidates for the court-appointed counsel, etc., are made in accordance with the list of nominated candidates and with the consent of a contracting attorney. The compilation of the contract application forms for the JLSC and preparation of the list of nomination candidates are conducted according to the law with the cooperation of bar associations. These two systems are important in ensuring the quality of court-appointed counsel, etc., and the independence of defence activities from the JLSC and other national agencies.<sup>28</sup> According to the White Paper on Attorneys 2019, the number of contract attorneys with JLSC was 28,737 (70.2% of all attorneys) as of December 31, 2018.

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<sup>28</sup> Kawazoe (2016), 77.

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**Table 13** shows the total remuneration and expenses paid to court-appointed counsel, etc., and the number of cases accepted by the JLSC in the previous five years. The total paid to court-appointed counsel, etc., was ¥12.2–13.6 billion (1 Japanese yen is about 0.0091 US dollar) in these five years. The number of accepted cases was 80,145 for suspects, 53,010 for defendants, and 3,325 for juveniles in the family court procedure. The large increase in the number of accepted cases for suspects in 2019 was due to the extension of the court-appointed counsel system to all detained suspects from June 2018. Until then, the court-appointed counsel system for a suspect was restricted to suspects in cases punishable by the death penalty, life imprisonment, life imprisonment without work, or imprisonment without work whose maximum term was more than three years.

**Table 13 Total remuneration and expenses for court-appointed counsel, etc. and number of cases accepted by the JLSC**

Fiscal year		2015	2016	2017	2018	2019
Total amount (millions of JPY)		13,221	12,510	12,205	13,243	13,644
Number of accepted cases	Court-appointed counsel for a suspect	70,393	66,579	63,839	78,780	80,145
	Court-appointed counsel for a defendant	59,504	56,388	53,655	53,862	53,010
	Court-appointed attendant for a juvenile	3,698	3,427	3,417	3,489	3,325

Source: Japan Legal Support Centre, 'Financial statements' and 'Business performance report' for each fiscal year.

In addition, the JLSC employs staff lawyers who are also nominated as candidates for court-appointed counsel. The salaries and activity expenses of the staff lawyers are not included in the total amount of compensation in Table 12. According to the business performance report of the JLSC for the fiscal year 2019, 201 staff lawyers were assigned to 85 offices nationwide as of 31 March 2019. They were engaged in all kinds of legal services and did not specialise in criminal defence.

### 2.1.2. Remuneration standards

The remuneration and expenses paid to a court-appointed counsel is calculated under the Remuneration and Expenses Computation Standards provided for in the court-appointed counsel contract terms. Remuneration is calculated separately as (a) basic remuneration, (b) remuneration commensurate with labour, and (c) remuneration commensurate with results. The remuneration in the court of second instance and court of final appeal is calculated in a similar way to the above standards for the court of first instance. Expenses include (a) copy costs, (b) long-distance travel expenses and accommodation fees for interviewing a suspect or defendant, (c) travel expenses, daily allowances, and accommodation fees, (d) interpreter expenses, and (e) litigation preparation expenses (max. ¥30,000). However, copy costs are not paid to the court-appointed counsel for a suspect as an expense. The copy cost for a defendant is deducted from the expenses of the court-appointed counsel for 200 pages. The JLSC has received complaints from contract lawyers and has taken steps to amend the calculation standards as necessary. However, to revise the contract terms, the approval of the Minister of Justice is ultimately required, and the financial constraints of the state budget must be considered. Since the operation began in 2006, the Computation Standards have been revised six times. The latest version was implemented on 1 June 2018, stipulating the points shown below. In addition, the Computation Standards below detail the items of payment, their requirements, and each amount to systematically eliminate the possibility that individual defence activities are evaluated arbitrarily by the JLSC and to protect its independence.

**Remuneration Computation Standards for the Court-Appointed Counsel (2018 version)**

## (i) Remuneration for the court-appointed counsel for a suspect

(a) The basic remuneration is computed according to the base number of interviews (fixed according to the defence period in days: e.g. one interview to 4 days, 5 interviews to 17–20 days) and the total points for interviews (1 point for one interview, 0.5 points for one telephone interview, 0.5 points for one quasi-interview). Several interviews in one day are calculated as one interview. If the total points for an interview, etc., are less than the base number of interviews, the basic remuneration is  $\text{¥}20,000 \times \text{number of interviews} + \text{¥}10,000 \times \text{number of telephone interviews and quasi-interviews}$ . If the total points for interviews, etc., are not less than the base number of interviews, the basic remuneration is  $\text{¥}20,000 \times (\text{base number of interviews} - 1) + \text{¥}264,000$ .

(b) For remuneration commensurate with labour, if the total points of interviews, etc., exceed the base number of interviews, supplementary remuneration is added according to the difference between them (e.g.  $\text{¥}10,000$  to 1 point over,  $\text{¥}16,000$  to 2 points over). In addition, for activities that cannot be fully assessed from the number of interviews alone, such as cases requiring long-distance travel, separate criteria are established for assessing labour ( $\text{¥}4,000$  if 25 km or longer;  $\text{¥}8,000$  if 50 km or longer).

(c) Remuneration commensurate with results is  $\text{¥}50,000$ , payable if the suspect is released from physical custody. If out-of-court discussions with the victims or others result in a settlement, supplementary payments are made according to the number of victims and the results.

## (ii) Remuneration for the court-appointed counsel for a defendant

(a) The base remuneration is set according to the type of case, whether pre-trial arrangement proceedings are held, and the number of counsel members (see **Tables A and B**).

(b) As remuneration commensurate with labour, the trial addition is calculated from an assessment of activities at the trial (number of hearings and length of time in attendance) using basic indexes. The remuneration standards are classified on the basis of indexes representing the seriousness and complexity of the matter, according to the type of case, and whether pre-trial arrangement proceedings are held. The highest remuneration is for cases eligible for a *saiban-in* trial: the supplementary remuneration is  $\text{¥}123,300$  for the first trial proceedings and  $\text{¥}146,100$  for the second and further trial proceedings if the hearings last longer than 5 hours and 30 minutes. In a case before a single judge in the district court, the supplementary remuneration is  $\text{¥}40,600$  for the first trial proceedings and  $\text{¥}47,700$  for the second and further trial proceedings if the hearings last longer than 5 hours and 30 minutes.

(c) Remuneration commensurate with results is an additional 100% of the ordinary remuneration (to a maximum of  $\text{¥}500,000$ ) if an acquittal verdict is rendered, or an additional 30% of the ordinary remuneration (to a maximum of  $\text{¥}200,000$ ) if facts for a lesser offence than that charged are found.

## II. LEGAL AID FOR THE SUSPECT/DEFENDANT

**Table A Basic remuneration for cases requiring a court-appointed counsel for a defendant (excluding cases eligible for *saiban-in* trials)**

Type of Court	Without pre-trial arrangement proceedings	With pre-trial arrangement proceedings
Summary court	¥66,000	¥70,000
District court, single judge	¥77,000	¥80,000
District court, collegiate panel (ordinary)	¥88,000	¥90,000
District court, collegiate panel (serious)	¥99,000	¥100,000

**Table B Basic remuneration for cases eligible for a *saiban-in* trial**

Days of proceedings	Two or more counsel	One counsel
1–4 pre-trial arrangement proceedings	¥190,000	¥240,000
5–7 pre-trial arrangement proceedings (and three or more days of trial proceedings)	¥240,000	¥300,000
8–10 pre-trial arrangement proceedings (and three or more days of trial proceedings)	¥300,000	¥380,000
11 or more pre-trial arrangement proceedings (and four or more days of trial proceedings)	¥400,000	¥500,000

### 2.2. Voluntary services from bar associations

In addition to work relating to court appointments, the JLSC also engages in assistance enterprises under commission from the Japan Federation of Bar Associations (JFBA). JFBA-commissioned assistance enterprises are mainly funded by membership fees received from attorneys and do not receive public funding. They include criminal suspect aid for criminal cases and juvenile aid for juvenile protection cases. Criminal suspect aid is a system that pays attorneys' fees on behalf of the client to attorneys who provide general

## II. LEGAL AID FOR THE SUSPECT/DEFENDANT

criminal defence activities for suspects in custody. It is not available to those eligible for the court-appointed counsel system. Juvenile aid is a system that pays attorneys' fees on behalf of the client to attorneys who provide attendant activities for a juvenile referred to the family court. Again, it is not available if a court-appointed attendant is selected. Both systems require that the suspect be lacking in financial resources and that it is necessary and appropriate for an attorney to be engaged. According to the JLSC, in FY2018, criminal suspect aid was accepted in 6,789 cases for approximately US\$2.9 million, and juvenile aid was accepted in 1,860 cases for approximately US\$1.9 million.<sup>29</sup> Because all suspects under detention have become eligible for the court-appointed counsel system since June 2018, the amount of the criminal suspect aid enterprise has decreased significantly from around US\$7.6 million. Expenses for the juvenile aid enterprise also continue to decrease rapidly with the expansion since June 2014 of the court-appointed attendant system to the same range as the court-appointed counsel system at the investigation stage.

In addition, local bar associations have operated a duty lawyer system since 1990. The duty lawyer system was created with reference to the United Kingdom's duty solicitors. Upon request by an arrested suspect or their family, the lawyer on duty that day immediately heads to the police station or prison where the suspect is located for a meeting and provides legal advice without charge on the first occasion only. Expenses for the operation of the service are paid for by the local bar association out of membership fees and payments from attorneys. Since the court-appointed counsel system is not available during the arrest stage, the duty lawyer system is essential in substantially guaranteeing all arrestees the right to counsel as demanded by Article 34 of the Constitution. To operate the duty lawyer system in a stable way, it is necessary to strengthen the financial bases of this system by national funds.

**Table 14** shows the operation of the duty lawyer system for the last five years. In total, 17,171 lawyers were registered as duty lawyers on 1 February 2019, a registration rate of 42%. Around 53% of suspects who contacted the duty lawyer appointed them as counsel.

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<sup>29</sup> White Paper on *Houterasu* fiscal year 2018, 80.

## II. LEGAL AID FOR THE SUSPECT/DEFENDANT

This clearly confirms suspects' need for advice or the assistance of a lawyer from the time of their arrest.

**Table 14 Operation of the duty lawyer system**

Year	Registered lawyers	Registration rate	Accepted cases	Appointed cases	Appointment rate
2015	16,840	46%	50,705	22,858	49%
2016	17,744	47%	51,370	25,382	53%
2017	18,266	45%	52,980	24,363	50%
2018	17,214	43%	47,264	21,636	50%
2019	17,171	42%	41,160	20,240	53%

Notes: 1. The numbers are as of 1 February each year.

2. 'Appointment rate' is the percentage of the number of appointed cases in the number of accepted cases, except for cancelled cases, unknown cases, and unreported cases.

Source: White Paper on Attorneys 2020, Data 2-1-1-3.

## III. LEGAL RIGHTS AND THEIR IMPLEMENTATION

### 3.1. The right to information

#### 3.1.1. Duty to notify rights

##### (1) Notice of the right to silence

The investigator must notify suspects of their right to remain silent (i.e. the right to silence) before conducting an interrogation (CCP, Art. 198 (2)). The court must notify defendants of their right to silence at the commencement of trial proceedings (CCP, Art. 291 (4)). The notification is done orally. There is no special mechanism for verifying that the suspect has actually been notified of the right to silence. However, the form of the written record of the statement made before a public officer for suspects has printed on it a statement that the interrogation was conducted after the suspect was notified of the charge and of their right to silence. For the legal effect of a breach of the duty to notify a suspect of their right to silence, the Supreme Court of Japan takes the view that the admissibility of a statement acquired through an interrogation breaching the duty to notify will not immediately be denied because notice of the right to silence is not guaranteed by the CJ.<sup>30</sup> However, according to one court precedent, in cases where it is suspected that the police officers did not notify the suspect of the right to silence at any time during the interrogation, this fact makes the voluntariness of any confession doubtful.<sup>31</sup>

##### (2) Notice of the right to appoint counsel

When the police arrest a suspect, they must (a) notify the suspect of the right to appoint counsel, (b) inform them of the procedures for appointing counsel, and (c) inform them of the right to request court-appointed counsel if detention has been requested (CCP, Art. 203

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<sup>30</sup> SC judgement of 14 July 1948, CrR 2-8-846; SC judgement of 9 February 1949, CrR 3-2-146; SC judgement of 21 November 1950, CrR 4-11-2359; SC judgement of 27 March 1952, CrR 6-3-520; SC judgement of 2 April 1953, CrR 7-4-745; SC judgement of 27 March 1984, CrR 38-5-2037.

<sup>31</sup> Urawa DC judgement of 25 March 1991, HT 760-261.

### III. LEGAL RIGHTS AND THEIR IMPLEMENTATION

(1)–(3)). The same applies when the public prosecutor arrests a suspect (CCP, Art. 204 (1)–(3)). Furthermore, the circular notice of the National Police Agency of 26 March 2019 directs police to inform a suspect at the time of giving them an opportunity for explanation after arrest that if they ask to contact a lawyer during the investigation, the request will be immediately transmitted to a lawyer.<sup>32</sup>

Both notifying and informing are performed orally. There is no mechanism for verifying that a suspect has actually been notified of the right to appoint counsel but omission of notification of this right has rarely been reported. The form of the written record of explanation prepared after an arrest has printed on it a statement that the explanation was recorded after notifying the suspect of the right not to make a statement and the right to appoint counsel. When a police officer receives a request from an arrested suspect to appoint counsel and notifies the relevant lawyer, etc., of this request, the fact will be stated in the notification book for the appointment of counsel (Police Code of Criminal Investigation, Art. 132). Because the duty lawyer system is not a public system, on the basis of Article 131 (1) of the Police Code of Criminal Investigation, police inform arrested suspects about the duty lawyer system only when asked about it.<sup>33</sup>

Judges must notify defendants of their right to appoint counsel and of their right to request court-appointed counsel at the detention hearing, and inform them of procedures to appoint counsel and request court-appointed counsel (CCP, Art. 207(2)–(4)). Furthermore, once the court has accepted a prosecution, it must without delay notify the defendant of their rights to appoint counsel and to request court-appointed counsel, and when doing so, must inform the defendant of the procedures related to the court-appointed counsel system (CCP, Art. 272 (1), (2)). Notice to the defendant of the right to appoint counsel and other information is provided in writing.

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<sup>32</sup> The National Police Agency, Criminal Affairs Bureau, Planning Division No. 62, ‘Further considerations for interviews between suspects in arrest and detention and defence counsel to ensure proper investigation (Circular notice by order)’ (26 March 2019).

<sup>33</sup> Answer from the Metropolitan Police Department to the questionnaire from our research team.

#### 3.1.2. Duty to notify grounds

##### (1) Notifying the grounds of arrest

The methods of notifying the suspect of the grounds of arrest differ according to the type of arrest. There are three types of arrest: (a) ordinary arrest (CCP, Art. 199), (b) emergency arrest (CCP, Art. 210), and (c) on-the-spot arrest (CCP, Art. 212). Ordinary arrest is an arrest under a warrant issued by the judge. This arrest warrant can be issued when there is probable cause to suspect that the suspect has committed a crime and arrest is considered necessary because of the flight risk posed by the suspect or risk of evidence being concealed or destroyed (CCP, Arts. 199 (1), (2); Rules of Criminal Procedure (RCP), Art. 143-3). Emergency arrest occurs when there is no time to obtain a warrant in advance. The arresting investigator has to request a warrant immediately after arrest. Emergency arrest is only available for crimes with statutory penalties greater than a certain level. Furthermore, there must be probable cause to suspect that the suspect committed the crime. On-the-spot arrest is possible without an arrest warrant against a person who is caught in the act of committing an offence or who is caught having just committed an offence (CCP, Art.199 (1)) or where any person who falls under one of the following items is clearly found to have committed an offence a short time beforehand: (i) a person being engaged in fresh pursuit, (ii) a person carrying property obtained through a property crime, or carrying a dangerous weapon or other things that are believed to have been used in the commission of a criminal act, (iii) a person with visible traces of the offence on their body or clothing, or (iv) a person who attempts to run away when challenged (CCP, Art.199 (2)).

The arrest warrant describes the charged offence forming the grounds for arrest and an outline of the alleged facts, among other information (CCP, Art. 200 (1)). In the case of an ordinary arrest, the arrest warrant should be shown to the suspect at the time of arrest (CCP, Art. 201 (1)). However, it is not necessary to read out the outline of the alleged facts or to allow the suspect to peruse the warrant when showing the arrest warrant. In the case of an emergency arrest, the suspect may be arrested after being notified of the grounds of arrest (the fact that the situation is urgent and an outline of the alleged facts) (CCP, Art. 210 (1)). When an arrest warrant is issued after an emergency arrest, it must be shown to

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the suspect. By contrast, in the case of an on-the-spot arrest, the suspect does not need to be notified of the grounds of arrest when being arrested. For each arrest procedure, the arrested suspect must be notified of the essential facts of the suspected crime (all the essential facts, not just an outline of them) immediately after being taken into custody and given an opportunity to explain (CCP, Arts. 203 (1), 204 (1), 211, 216). The suspect is not given a copy of the arrest warrant, and does not have the right to request one. Because of this, counsel cannot directly confirm the outline of the alleged facts described in the arrest warrant before prosecution.

Article 9, Paragraph 2 of the ICCPR demands that notice of the grounds of arrest be given to the arrestee at the time of arrest. In addition, the Human Rights Committee states in Paragraph 30 of General Comment No. 35 that the reasons for arrest must be given in a language understood by the arrested person. In this regard, innovative steps are apparently being taken in investigation practice in Japan, such as having an interpreter available when conducting an arrest to read the matters written on the arrest warrant and attaching a translation if possible.<sup>34</sup> However, it is unclear in how many cases such measures are possible.

#### (2) Notice of the grounds of detention

Detention procedures differ for detention before or after prosecution. The suspect is detained before prosecution by the public prosecutor making a request of a judge for detention. The defendant is detained by the trial court *ex officio* after prosecution has been initiated (however, until the first hearing date, a different judge who does not belong to the trial court presides). The judge who has been asked for detention by the prosecutor has the same authority as a court or presiding judge regarding the disposition thereof (namely provisions of detention after prosecution are applied correspondingly to the detention before prosecution), provided that this does not apply to bail (CCP, Art. 207(1)).

The court may detain a defendant if (a) it is found that there are reasonable grounds to suspect that the defendant committed a crime and (b) it is found that the defendant has no

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<sup>34</sup> Fujinaga et al. eds. (2007), 96.

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fixed address, there are reasonable grounds to suspect that the defendant may conceal or destroy evidence, or the defendant has fled or there are reasonable grounds to suspect that the defendant may flee (CCP, Art. 60 (1)). Even if these grounds of detention are found, the defendant may not be detained unless (c) detention is necessary (see CCP, Art. 87 (1)). In this case, the ‘necessity of detention’ is generally considered on its merits, having considered the seriousness of the case, the degree of risk of concealment or destruction of evidence or flight, and the degree of social disadvantage the suspect would suffer from being in detention.<sup>35</sup> Note that for cases punishable by a fine of not more than ¥300,000, a misdemeanour detention, or a petty fine, the defendant can be detained only if they have no fixed address (CCP, Art. 60 (3)). For juvenile suspects, the public prosecutor can file a request with the family court for measures for observation and protection in lieu of a request for detention (Juvenile Act, Art. 43 (1)). Juvenile suspects cannot be detained unless it is ‘unavoidable’ (Juvenile Act, Art. 48).

With regard to the detention procedure, the defendant must not be detained until they have been notified of the facts of the case and a statement has been taken from them in relation to those facts, unless the defendant has fled (CCP, Art. 61). The detention warrant must provide the name and address of the defendant, the crime, an outline of the facts relating to the charges, and the place where the defendant is to be brought or the penal institution where they are to be detained, among other information (CCP, Art. 64 (1)). The detention warrant must be shown to the defendant when executing it (CCP, Art. 73 (2)). The defendant can request a transcript to be delivered of the detention warrant (RCP, Art. 74).

A defendant who has been detained can request that the grounds of detention be disclosed in an open court (CJ, Art. 34; CCP, Art. 82 (1)). If disclosure of the grounds of detention is requested, the court must disclose the charges that form the basis for and grounds of detention (CCP, Art. 84 (1)). However, major opinions in practice consider it unnecessary to explain the evidence on which the court or judge accepted the grounds of

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<sup>35</sup> Jōkai, 147; Dai-konmentāru Vol. 2, 36 (Takuichi Kawakami); Chikujō jitsumu, 136; Shin-konmentāru, 162 (Midori Daisuke).

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detention.<sup>36</sup> Therefore, requests for disclosure of the grounds of detention are not often used. In 2019, detention warrants were issued to 96,378 persons, while 478 suspects and 67 defendants used this procedure.<sup>37</sup>

#### (3) Notice of the grounds of prosecution

When a prosecution has been instituted, the court shall serve a transcript of the charge sheet (CCP, Art. 256 (2)) on the defendant without delay (CCP, Art. 271 (1)). If the transcript of the charge sheet is not served within two months of the date of the institution of prosecution, the prosecution loses its effect retroactively (Art. 271 (2)). The transcript of the charge sheet describes (a) the name of the defendant and other particulars sufficient to identify them, (b) the facts relating to the charges, and (c) the charged offences. If the public prosecutor adds, withdraws, or revises the counts or applicable penal statutes described in the charge sheet, they must notify the defendant about the relevant parts (CCP, Art. 312 (3)). Furthermore, when the case is put into pre-trial arrangement proceedings, the public prosecutor must send documents to the defendant describing the facts that the public prosecutor plans to prove (CCP, Art. 316-13 (1)).

Furthermore, according to one precedent, the transcript of the charge sheet need not be translated and served, even if the defendant cannot understand Japanese. In this regard, the precedent takes the position that when the transcript of a charge sheet is served, even if the defendant cannot immediately understand the nature of the facts about which the prosecution is being instituted against them, as long as the suspect can understand through the trial procedure that the facts of the prosecution against them have been clearly notified and they have been given an opportunity for defence against them, the procedures do not breach the guarantee of fair procedure under Article 31 of the CJ.<sup>38</sup> In addition, in a case where the meaning of ICCPR, Article 14, Paragraph 3 (a) was at issue, the court took the position that because 'promptly' in Subparagraph (a) of that Paragraph is an

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<sup>36</sup> Jōkai, 182; Dai-komentāru Vol. 2, 141 (Takuichi Kawakami).

<sup>37</sup> Annual Report of Judiciary Statistics for 2019, Table 15, 17.

<sup>38</sup> Tokyo High Court (hereunder HC) judgement of 29 November 1990, HCrR 43-3-202.

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instructive expression of comparatively lax immediacy, its requirement is considered fulfilled as a minimum by the charge sheet being read out and interpreted in a language the defendant understands at the opening of the trial proceedings at the latest, that being the place for making ‘a ruling on the criminal offence’ of the defendant.<sup>39</sup> However, on this point, Paragraph 31 of the Human Rights Committee General Comment No. 32 states that ‘[t]he right to be informed of the charge “promptly” requires that information be given as soon as the person concerned is formally charged with a criminal offence under domestic law, or the individual is publicly named as such’. Therefore, the interpretation of this clause by the aforementioned Japanese court does not comply with international standards.

#### 3.1.3. Inspection of judicial records and disclosure of evidence

At the investigation stage, secrecy is emphasised (CCP, Art. 196) and the suspect has no right before prosecution to view records related to judicial procedures of arrest or detention or to ask the investigative agencies to disclose evidentiary materials that form the basis of the alleged facts. Because of this, the suspect and their counsel cannot obtain an accurate understanding of the evidence that the investigative agencies have gathered, unless it is voluntarily disclosed to the suspect or their counsel. After the institution of a prosecution, the defendant’s counsel may inspect and copy documents and articles of evidence relating to the trial in the court (CCP, Art. 40(1)). However, because the CCP of Japan forbids the prosecutor from attaching documents or other articles that may prejudice the judge to the charge sheet or refer to them in the charge sheet, no investigation records and evidence are transferred to the court at the time the prosecution is instituted. Therefore, it is not possible to view investigation records and evidence without the prosecutor disclosing them. As an exception, the arrest and detention warrant are promptly submitted to a judge of the court in which prosecution has been instituted (RCP, Art. 167(1)), meaning that counsel

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<sup>39</sup> Tokyo HC judgement of 18 September 1991, HCrR 44-3-187.

can inspect them in court after prosecution (on the disclosure of evidence after prosecution, see Para. 3.4.2.)

## 3.2. The right to defence

### 3.2.1. The right to defend oneself

The Japanese CCP is based on the principle of the adversarial system, and suspects and the defendant are allowed the right to defend themselves in view of their position under the CCP. However, restrictions on the suspect's right to defence at the investigation stage have been justified because the principle of coordination with the efficiency of the investigation works<sup>40</sup> and because the suspect is both an object of the investigation and the subject of defence.<sup>41</sup> Furthermore, defence activities through counsel are all that is permitted when it would be inappropriate for the suspect or defendant to directly exercise their rights. For example, the right to view documents and material evidence relating to the trial is allowed only to counsel to prevent the destruction or damage of records and evidence (CCP, Art. 40). Defendants without counsel are granted only the right to view the trial record (CCP, Art. 49). In addition, when disclosing the names and addresses of persons the public prosecutor plans to call as witnesses, if witness protection is considered necessary, names and addresses may be disclosed to counsel on the condition that counsel does not inform the defendant (CCP, Art. 299-4 (1)). Moreover, the court may, when finding that a witness is unable to testify adequately owing to the pressure of being in the presence of the defendant, have the defendant leave the courtroom on the condition that counsel is present (CCP, Art. 304-2). Arguments in appeal trials must also be made through counsel (CCP, Arts. 388, 414), and counsel has the right to attend procedures to appoint *saiban-in*, etc., but the defendant does not (*saiban-in* Act, Art. 32). Furthermore, if there are reasonable grounds to suspect that a suspect or defendant in detention may flee or conceal or destroy evidence, they may be prohibited from having an interview with or from giving

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<sup>40</sup> Atsumi (1979), 18.

<sup>41</sup> Shiibashi (1994), 46.

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or receiving documents and articles to or from any person other than counsel (CCP, Art. 81). In cases where interviews are prohibited, it is almost impossible to prepare defence without going through counsel.

#### 3.2.2. The right to counsel

##### (1) Constitutional guarantee

The first section of Article 34 of the CJ provides that '[n]o person shall be arrested or detained without being at once informed of the charges against them or without the immediate privilege of counsel'. Furthermore, Article 37 (3) provides that '[a]t all times the accused shall have the assistance of competent counsel who shall, if the defendant is unable to secure the same by his own efforts, be assigned to his use by the State'. The Supreme Court regards these provisions as going further than merely guaranteeing the right to appoint counsel, substantially guaranteeing the opportunity to receive the assistance of counsel,<sup>42</sup> and they have become an important criterion for interpreting laws that restrict the opportunity to receive the assistance of counsel. In addition, there is a theoretical view that Article 37 (3) of the CJ is a provision to guarantee the defendant's right to receive the effective assistance of counsel.<sup>43</sup> A Supreme Court case also reviewed the procedure from this legal point,<sup>44</sup> but few cases exist that relieved a defendant on the ground that they were not given effective assistance by their counsel.<sup>45</sup>

##### (2) The right to appoint counsel

All suspects and defendants can appoint counsel (CCP, Art. 30 (1)). When a defendant is unable to appoint counsel because of indigence or other reasons, the defendant may file a request to the court to have counsel appointed for them (CCP, Art. 36). By contrast, a

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<sup>42</sup> SC judgement of 24 March 1999, CrR 53-3-514.

<sup>43</sup> Okada (2001), 316; Muraoka (2013), 367; Tagusari (2017), 418.

<sup>44</sup> SC ruling of 29 November 2005, CrR 59-9-1847.

<sup>45</sup> Tokyo HC judgement of 12 April 2011, HT 1399-375.

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suspect cannot request court-appointed counsel unless they have been detained (CCP, Art. 37-2 (2)). The defendant can also appoint counsel to request a retrial against a final and binding judgement (CCP, Art. 440 (1)). There is no court-appointed counsel system for requests for a retrial. The defendant under detention may request that the court or penal institution warden (or their deputy) appoint counsel, specifying an attorney, legal professional corporation, or bar association. The court or other body receiving such a request must immediately notify the specified attorney, etc., accordingly (CCP, Art. 78). A suspect under arrest or detention may make the same kind of request to the chief of the investigative authority or penal institution or their deputy. The investigative authority or other body that receives such a request is similarly obliged to make the notification (CCP, Art. 209). It is illegal for an investigative authority to continue an investigation without giving notice of a request to appoint counsel or to use the defendant or suspect's position in custody, and any evidence obtained thereby could be excluded.<sup>46</sup>

When there are special circumstances, the court may limit the number of members of the defence counsel to three persons for each defendant (RCP, Art. 26 (1)). Furthermore, the number of members on the defence counsel for a suspect may in principle not exceed three persons for each suspect (RCP, Art. 27 (1)). As a general rule, the court appoints only one counsel. However, it has become common practice to appoint several (at least two) court-appointed counsels for cases eligible for a *saiban-in* trial. In 2018, 80.9% of such cases had multiple counsels appointed.<sup>47</sup> With regard to the suspect, a judge may appoint a second counsel, if the judge considers it necessary, only in cases where the crime is punishable by the death penalty or life imprisonment (CCP, Art. 37-5).

Court-appointed counsel cannot resign of their own volition. The court may dismiss court-appointed counsel ex officio if it is inappropriate to have the counsel continue their duties because of assault or intimidation by the defendant or some other cause imputable to the defendant (CCP, Art. 38-3 (1) (v)).

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<sup>46</sup> Osaka HC judgement of 26 May 1960, ICrR 2-5/6-676; Fukuoka HC judgement of 31 October 2002, HCrB (2002)-174.

<sup>47</sup> White Paper on Attorneys 2019, 110.

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#### (3) Mandatory counsel cases

When the case involves a crime punishable by the death penalty, life imprisonment, or imprisonment with or without work for more than three years, the trial may not be convened without the attendance of counsel (CCP, Art. 289 (1)). When prosecution has been instituted in a case requiring counsel, if the defendant has not appointed counsel, the court must without delay confirm with the defendant whether they intend to appoint counsel (RCP, Art. 178 (1)). If the defendant does not appoint counsel within a certain period, the presiding judge must immediately appoint counsel for the defendant (RCP, Art. 178 (3)). Other situations requiring the appointment of counsel include those in which a case is put to pre-trial arrangement proceedings or inter-trial arrangement proceedings (CCP, Arts. 316-4, 316-29) and those under a speedy trial procedure (CCP, Art. 316-23).

If the counsel in a mandatory counsel case is dismissed, the court must appoint new counsel. However, the Supreme Court has construed that if, notwithstanding that the court has taken every possible measure to ensure that counsel attends, the defendant inhibits counsel's attendance at hearing dates or otherwise causes a situation whereby a trial examination cannot be conducted in the presence of counsel, and it is extremely difficult to resolve the situation, then CCP, Article 289 (1) does not apply to that hearing date.<sup>48</sup>

#### (4) Current situation of appointing counsels

The state of the appointment of counsel in ordinary first-instance trials (district and summary courts) over the past five years is shown in **Table 15**. Of the defendants whose cases concluded, 99.4–99.5% of defendants obtained counsel. Of these, 16–20% had private counsel, while 85–86% had court-appointed counsel. Around 67–71% of these defendants had counsel from the suspect stage, and more than 30% appointed counsel just after being prosecuted.

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<sup>48</sup> SC ruling of 27 March 1995, CrR 49-3-525.

**Table 15 Appointment rate of counsel in ordinary first-instance trials**

Year	Concluded defendants	Defendants who had counsel			
		Appointment rate	Private counsel	Court-appointed counsel	From the suspect stage
2015	60,887	60,536 (99.4%)	11,506 (18.9%)	51,653 (84.8%)	41,452 (68.1%)
2016	59,103	58,787 (99.5%)	11,456 (19.4%)	49,963 (84.5%)	39,870 (67.5%)
2017	56,115	55,806 (99.4%)	11,076 (19.7%)	47,450 (84.6%)	37,754 (67.3%)
2018	54,862	54,610 (99.5%)	9,944 (18.1%)	46,725 (85.2%)	37,461 (68.3%)
2019	53,262	52,979 (99.5%)	8,642 (16.2%)	45,558 (85.5%)	37,831 (71.0%)

Source: Annual Report of Judiciary Statistics for each year, Tables 23 and 24.

### 3.2.3. The right to interview and communicate with counsel

#### (1) Guarantee of freedom and secrecy to communicate with counsel

The defendant or suspect in custody may have an interview with or send to or receive documents or articles from counsel or prospective counsel, without any official present, upon the request of a person entitled to appoint counsel (CCP, Art. 39 (1)). This right originates from the right to engage counsel guaranteed by CJ, Article 34.<sup>49</sup> Moreover, the right to communicate between the suspect or defendant and counsel is the original right of counsel. Investigative agencies are obliged to refrain from questioning a suspect or defendant about the contents of interviews with their counsel in a way that would interfere with the purpose of Article 39 (1) of the CCP.<sup>50</sup>

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<sup>49</sup> SC judgement of 10 July 1978, CiR 32-5-820; SC judgement of 10 May 1989, CiR 45-5-919; SC judgement of 31 May 1989, LM 38-2-2981; SC judgement of 24 March 1999, CiR 53-3-514.

<sup>50</sup> Fukuoka HC judgement of 1 July 2011, LM 64-7-991.

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#### (2) Restriction by laws and regulations

With regard to the interview or the sending or receiving of documents or articles prescribed in Article 39 (1), such measures may be provided by laws and regulations as necessary to prevent the flight of the accused or suspect, concealment or destruction of evidence, or the sending or receipt of articles that may hinder safe custody (Art. 39 (2)). For example, in the interview room, the suspect or defendant and counsel are separated by a clear acrylic panel so that they cannot freely exchange documents or articles. If a detainee awaiting a judicial decision or counsel commits an act detrimental to discipline and order during an interview, the detention facility may restrain the action or suspend or terminate the visit (Act on Penal Detention Facilities, Arts. 117, 113 (1) (i)). A circular notice by the order of the Ministry of Justice requires prior permission for a counsel to bring recording equipment, video players, and computers into the interview room, and prohibits any photography equipment and mobile phones from being brought in, given the need to prevent discipline and order violations.<sup>51</sup> Precedents also dictate that photographing of the interview with the suspect or defendant by counsel would be an act detrimental to discipline and order.<sup>52</sup>

The guarantees of the privacy of documents or articles sent and received by the suspect or defendant and counsel are imperfect. Letters sent by counsel to a detainee awaiting a judicial decision may not be examined in terms of content but can be in order to determine whether they fall under a relevant item (Act on Penal Detention Facilities, Arts. 135 (2), 222 (3)). However, the practical understanding is that it is not prohibited to inspect letters by opening them for this examination.<sup>53</sup> Documents other than letters sent by counsel are classified as books, etc., and are all subject to examination. The contents of letters sent by detainees awaiting a judicial decision may be checked, even if addressed to counsel.

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<sup>51</sup> The Ministry of Justice, Correction Bureau, No 3350, 'Operation of the instruction on external transportation of inmates (Circular notice by order)' (30 May 2007).

<sup>52</sup> Tokyo HC judgement of 9 July 2015, LM 62-4-517, Fukuoka HC judgement of 20 July 2017, LM 64-7-1041, Fukuoka HC judgement of 13 October 2017, LM 64-7-991.

<sup>53</sup> Chikujō-kaisetsu, 691.

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Although it is argued that checking the contents of letters addressed to counsel is unconstitutional,<sup>54</sup> the precedent denies this argument.<sup>55</sup>

In this respect, Article 14 (3) (b) of the ICCPR provides that the defendant must be able to prepare a defence and communicate with a counsel of their own choosing. On the meaning of this right, Paragraph 34 of General Comment No. 32 by the Human Rights Committee states that '[c]ounsel should be able to meet their clients in private and to communicate with the defendant in conditions that fully respect the confidentiality of their communications'. This comment indicates that it is seriously problematic that the Act on Penal Detention Facilities only partially considers the confidentiality of letters exchanged between counsel and the defendant in detention.

#### (3) Designation by investigative agencies

If investigation is necessary, the investigating organisation may designate the date, place, and time of the interview or the sending or receiving of documents or articles between counsel and the suspect only before the institution of prosecution (CCP, Art. 39 (3)). A court precedent states that 'necessary for investigation' in Article 39 (3) means it must be limited to cases where allowing an interview, etc., will markedly impair the investigation through the interruption of an interrogation or similar. This applies in cases where the investigative authority is interrogating the suspect or having the suspect attend an on-the-scene investigation or examination, etc., when they receive a request for an interview, etc., from counsel, etc. Another example is when they definitely intend to conduct the above interrogation, etc., in the near future and allow an interview, etc., as requested by counsel, etc., that risks preventing the interrogation, etc., from commencing as planned (the marked impairment theory).<sup>56</sup> Furthermore, with regard to the method of specifying the interview, if the above requirements are satisfied, failure by the

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<sup>54</sup> Kuzuno (2016), 240; Kuzuno & Ishida (2018), 112 (Takahiro Nakagawa)

<sup>55</sup> Osaka HC judgement of 12 October 2012 (LEX/DB25483106)

<sup>56</sup> SC judgement of 10 July 1978, CrR 32-5-820; SC judgement of 10 May 1989, CiR 45-5-919; SC judgement of 31 May 1989, LM 38-2-2981; SC judgement of 24 March 1999, CiR 53-3-514; SC judgement of 24 March 1999, CiR 53-3-514.

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investigative authority to discuss with counsel, etc., a time and date for the interview, etc., as promptly as possible and to take measures allowing the suspect to prepare a defence with counsel, etc., is illegal.<sup>57</sup> According to the circular notices of the Supreme Public Prosecutors Office and National Police Agency, if counsel requests an interview during an investigation, they should be given the opportunity as soon as possible or at the time of the next meal or break.<sup>58</sup>

#### (4) Physical presence of a counsel at interrogation

The law does not prohibit counsel from being present at the interrogation of a suspect or defendant. However, the physical presence of counsel at the interrogation is denied in practice. Even if the interrogation is voluntary (when the client is not in custody), counsel is almost always refused permission to be present at the site of the interrogation. This is in contrast to the new interpretation of Article 6, Paragraph 3(c) of the European Convention of Human Rights, also referred to as the ‘Salduz doctrine’ by the ECtHR.<sup>59</sup> According to the Salduz doctrine, even where compelling reasons may exceptionally justify denial of access to a lawyer, such a restriction – whatever its justification – must not unduly prejudice the rights of the accused under Article 6. The rights of the defence will in principle be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction. Some Japanese scholars also argue that the suspect under arrest or detention should be guaranteed the right to have counsel present at the interrogation based on constitutional provisions, such as

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<sup>57</sup> As illegal cases: Sapporo DC judgement of 23 June 1988, LM 35-3-379; Nagoya DC judgement of 29 January 1993, HJ 1473-106=HT 824-145.

<sup>58</sup> The Supreme Public Prosecutor’s Office No. 206, ‘Further considerations for the interview between the suspect in arrest and detention and his/her counsel, etc., to ensure proper investigation (Circular notice by order)’ (1 May 2008); the National Police Agency, Criminal Affairs Bureau, Planning Division No. 62, ‘Further considerations for interviews between suspects in arrest and detention and defence counsel to ensure proper investigation (Circular notice by order)’ (26 March 2019).

<sup>59</sup> ECtHR, Grand Chamber, 27 November 2008, *Salduz v. Turkey*, No. 36391/02, § 54-55 and ECtHR 11 December 2008, *Panovits v. Cyprus*, No. 4268/04, § 66 and 70-73.

Article 34, which guarantees the privilege of counsel for the arrestee and detainee, and Article 38, Paragraph 1, which guarantees privilege against self-discrimination.<sup>60</sup>

## 3.3. Procedural rights of the suspect/defendant

### 3.3.1. The right to release from custody

#### (1) Legal means to dispute unfair arrest and detention

If a defendant objects to a judicial decision concerning detention, they may request a rescission of the decision through a *kōkoku* or quasi-*kōkoku* appeal (CCP, Arts. 420, 429 (1) (ii)). By contrast, judicial decisions concerning arrest are not eligible for a quasi-*kōkoku* appeal. Furthermore, precedent dictates that the application, *mutatis mutandis*, of provisions concerning detention is not allowed.<sup>61</sup> In relation to legal means against arrest, the Human Rights Council states in Paragraph 42 of its General Comment No. 35 that in relation to the right to bring proceedings to be released from unlawful or arbitrary detention guaranteed by Article 9.4 of the ICCPR, '[t]he right to bring proceedings applies in principle from the moment of arrest and any substantial waiting period before a detainee can bring a first challenge to detention is impermissible'. Therefore, it must be considered an infringement of Article 9, Paragraph 4 of the ICCPR for an arrestee not to be given the legal means to directly dispute the illegality of their arrest.

To combat detention, besides a quasi-*kōkoku* appeal, a defendant, etc. can request the rescission of detention through a request because the grounds of necessity for detention no longer exist (CCP, Art. 87). In addition, when the confinement of detention has been unduly long, the court shall upon the request of a person with the right to request bail or *ex officio*,

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<sup>60</sup> Watanabe (1992), 216; Watanabe (1995), 250-252.; Takezawa et al. (1994), 99-100 [Takano Takashi]; Kobayakawa (1995), 360; Takada (2003), 100; Kuzuno (2013), 199; Abe (2019), 391.

<sup>61</sup> SC ruling of 13 February 1979, RCr 214-55; SC ruling of 27 August 1982, CrR 36-6-726.

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rescind the detention or grant bail (CCP, Art. 91). In 2019, the detention of 133 suspects and 98 defendants was rescinded under Article 87 before litigation concluded.<sup>62</sup>

#### (2) The right to bail

No system accommodates bail for detention before prosecution is instituted. With regard to the detention of the defendant, the second sentence of Article 9, Paragraph 3 of the ICCPR provides that '[i]t shall not be the general rule that persons awaiting trial shall be detained in custody, but release may be subject to guarantees to appear for trial, at any other stage of the judicial proceedings, and should occasion arise, for execution of the judgement'. In Paragraph 38 of its General Comment No. 35, the Human Rights Committee states that the sentence applies after the defendant has been charged. However, a similar requirement prior to charging results from the prohibition of arbitrary detention in Article 9, Paragraph 1. If the lack of a bail system for release from detention before prosecution has caused the detention of suspects to become the general rule, this must be considered as infringing Article 9, Paragraph 1 of the ICCPR.

Bail may be requested for release from detention after institution of prosecution (CCP, Art. 88). If bail is requested, it must be granted, subject to the exceptions stipulated in the following items in Article 89 (mandatory bail of the CCP): (1) The defendant has allegedly committed a crime that 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; (2) the defendant was previously found guilty of a crime punishable by the death penalty, life imprisonment with or without work, or a sentence of imprisonment with or without work whose maximum term of imprisonment was in excess of ten years; (3) the defendant allegedly habitually committed a crime punishable by imprisonment with or without work whose maximum term of imprisonment was in excess of three years; (4) there is probable cause to suspect that the defendant may conceal or destroy evidence; (5) there is probable cause to suspect that the defendant may harm or threaten the body or property of the victim or any other person who is deemed to

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<sup>62</sup> Annual Report of Judiciary Statistics 2019, Table 16.

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have essential knowledge for the trial of the case or the relatives of such persons; or (6) the name or residence of the defendant is unknown. Of the causes in these items, the wording 'probable cause to suspect that the defendant may conceal or destroy evidence' in Item (4) is abstract and risks being broadly interpreted as though applicable to cases in which the defendant denies the allegations against them. Even if mandatory bail does not apply, the court may grant bail ex officio if it finds it appropriate, considering the degree of risk of the defendant fleeing or destroying or concealing evidence if released on bail; the degree of the detriment to the defendant of their health, finances, social life, and defence preparation if physical custody continues; and other circumstances (CCP, Art. 90: discretionary or ex officio bail). Even discretionary bail should be determined whether bail is appropriate while considering the concrete possibility and feasibility of acts by the defendant to conceal or destroy evidence in the case.<sup>63</sup>

Bail screening is conducted by checking documents without a personal appearance by the defendant before a judge. Counsel can interview with the judge in charge if the need is expressed at the time of the bail request.<sup>64</sup> When making a ruling to grant or dismiss bail, the court must hear the opinion of the public prosecutor (CCP., Art. 92 (1)). To grant bail, the court must set the amount of the bail bond (CCP, Art. 93 (1)). The amount of the bail bond must be set at a sufficient level to ensure the appearance of the defendant in light of the nature and circumstances of the crime, the probative value of the evidence, and the character and property of the defendant (CCP, Art. 93, Para. (2)). Furthermore, the court may specify the residence of the defendant or add other appropriate conditions to the bail (CCP, Art. 93, Para. (3)). It is common to add conditions prohibiting contact with accomplices or victims. The ruling of release on bail may not be executed before payment of the bail bond (CCP, Art. 94 (1)). The court may permit a person other than the person requesting bail to pay the bail bond or permit the bail bond to be paid in securities or with

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<sup>63</sup> See, SC ruling of 18 November 2014, CrR 68-9-1020; SC ruling of 15 April 2015, CT 1626-1.

<sup>64</sup> Tokyo Bar Association, *Kiseikai* (2006), 39; *Keiji-bengo Beginners 2* (2014), 142; Oka & Kamiyama (2015), 52.

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a written guarantee issued by an appropriate person other than the defendant in place of cash (CCP, Art. 93, Paras. (2) and (3)). It is usual to request bail bonds.

**Table 16** shows the details for the past five years of the detention rate and bail rate for concluded persons in the first instance (district courts and summary courts) for ordinary cases. While the defendants' detention rate decreased from around 77% to 73%, the bail rate of detained persons increased from about 25% to 31%. In 2019, 12,328 defendants were removed from detention without bail after sentencing. Numerous defendants remain detained until the end of the trial, even if their sentences were lighter than imprisonment without suspension of execution.

**Table 16 Detention rate and bail rate among concluded persons in the first instance**

Year	Concluded persons (a)	Measures after prosecution			
		Detained (b)	Detention rate (b/a)(%)	Bailed (c)	Bail rate (c/b)(%)
2015	60,887	46,815	76.9%	11,464	24.5%
2016	59,103	44,761	75.7%	12,283	27.4%
2017	56,115	41,975	74.8%	12,218	29.1%
2018	54,862	40,582	74.0%	11,946	29.4%
2019	53,262	38,953	73.1%	11,984	30.8%

Source: Annual Report of Judicial Statistics for each year, Table 32.

#### 3.3.2. The right to be present when tried

The defendant's appearance at trial is their duty and right, and as a general rule, the trial may not be held in the absence of the defendant. The following are permitted as exceptions: (a) The attendance of a representative if the defendant is a corporation (CCP, Art. 283), (b) exemption from the duty to attend trial dates except for the date of the pronouncement of judgement in minor cases (CCP, Arts. 284, 284 (1)), and (c) exemption from the duty to attend trial dates except for the opening proceedings and date of pronouncement of judgement in cases with lesser statutory penalties (CCP, Art. 284 (2)).

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Furthermore, to prevent defendants from abusing their right to attend and delay the litigation, (d) when the court cannot be convened without the appearance of the defendant, the defendant under detention has been summoned to the trial but refuses to appear without justifiable reason, and it is extremely difficult for officials of the penal institution to bring the defendant to the court, the court may commence the proceedings of the trial without the appearance of the defendant (CCP, Art. 286-2).

A defendant who has appeared may not leave the court without the permission of the presiding judge (Art. 288 (1)). On the other hand, if it is necessary to maintain the order of the court, the presiding judge may order the defendant to leave the court (Art. 288 (2); RCP, Art. 71). In addition, if it is found that the witness is unable to testify adequately owing to the pressure of being in the presence of the defendant, the judge can have the defendant leave the courtroom, but only when counsel is present (Art. 304-2). When the defendant leaves the court without permission or is ordered to leave the court by the presiding judge to maintain order, the court may render a judgement without hearing their statement (CCP, Art. 341).

#### 3.3.3. The right to be presumed innocent

While not an explicit provision, the Japanese CCP applies the notion that the defendant is presumed innocent until proven guilty. Furthermore, ICCPR Article 14, Paragraph 2, which defines the right to be presumed innocent, has a direct legal effect on the interpretation of domestic laws. However, a shared understanding of the meaning of the ‘presumption of innocence’ has not necessarily been formed. First, the presumption of innocence is construed as the legal basis for putting the burden on the public prosecutor to prove guilt. Second, executing a sentence before a guilty verdict is finalised is understood to breach the presumption of innocence.

On the meaning of the right to be presumed innocent provided in ICCPR, Article 14, Paragraph 2, the Human Rights Council’s General Comment No. 32, Paragraph 30 notes that, ‘Defendants should normally not be shackled or kept in cages during trials or

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otherwise presented to the court in a manner indicating that they may be dangerous criminals. The media should avoid news coverage undermining the presumption of innocence'. In relation to this statement, the Japanese CCP explicitly provides that the defendant shall not be subject to restraints during the trial (CCP, Art. 287). However, in practice, defendants held in detention are brought to court in handcuffs with a rope around their waist, both of which are removed directly before the court comes into session. Thus, the treatment of defendants meant to be presumed innocent is not as stipulated. Furthermore, in relation to crime reporting, the National Association of Commercial Broadcasters in Japan (NAB) Reporting Guidelines (2003 amendment) explicitly advises, '[W]hen reporting crimes, respect the principle of the presumption of innocence and lend an ear to the arguments by the suspect's side as well'. If there is problematic reporting, the committees of the Broadcasting Ethics & Programme Improvement Organisation investigate whether the reporting was problematic and whether human rights were infringed and publish their findings. In reality, the decision on whether to make the effort to avoid 'presumed guilty' news items is left to the media. Procedural countermeasures in the case of a violation of the defendant's right to a fair trial as a result of presumed guilty news items are also argued in Japan, while no relieved cases have been reported until now.<sup>65</sup>

#### 3.3.4. The right to silence

Article 38 (1) of the CJ guarantees citizens the right not to be compelled to testify against themselves. This privilege includes (a) prohibitions against imposing an obligation to testify by criminal punishment or other sanctions and (b) prohibitions against de facto compulsory testimony. However, as mentioned in Paragraph 1.2.4., the Supreme Court maintains that regarding a suspect in physical custody to have the obligation to appear and remain for the interrogation does not directly take away the suspect's freedom to refuse to testify involuntarily.

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<sup>65</sup> See Fuchino (2007), 240f.

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Given Article 38 (1) of the CJ, the CCP guarantees the right of suspects and defendants to silence (see 3.1.1.(1)). The defendant may remain silent at all times or may refuse to answer particular questions (CCP, Art. 311(1)). The defendant is not requested to waive the right to silence, even when they choose to make a statement at the trial. Furthermore, common opinion and precedents show that silence must not be construed to the suspect or defendant's disadvantage.<sup>66</sup> However, when a defendant answers their counsel's main questions, it does not constitute a violation of the right to silence to mistrust the defendant's statement on the grounds that they did not answer the prosecutor's questions.<sup>67</sup> In addition, silence itself must not be considered a factor in sentencing to the defendant's disadvantage; conversely, it is usual in practice to recognise the confession as a sign of reflection and regret, and to treat it advantageously in sentencing.<sup>68</sup>

#### 3.3.5. The right to reasoned decisions

Decisions must be accompanied by the reasons for them, except for rulings and orders against which no appeal can be filed (CCP, Art. 44 (1) (2)). When pronouncing a sentence, the court must provide as the reasons (a) the facts constituting the crime, (b) the list of evidence, and (c) the application of laws and regulations (CCP, Art. 335 (1)). When a reason to preclude establishment of a crime by act or grounds for aggravation or reduction of the punishment have been argued, the court shall render an opinion on that as well (Art. 335 (2)). In addition, in practice, explanations of factual or legal issues and the reason for the sentence are provided if important for related persons pursuant to the purpose of CCP, Article 44. For the 'list of evidence', it is sufficient if the evidence used as materials for fact-finding is listed, and neither the reasons for selecting the evidence nor the fact-finding process is required.<sup>69</sup> However, since the examination of fact-finding errors in the appeals court extends to the rationality of selecting and inferring facts from the evidence, the process of finding facts in the evidence is explained in the reason for the decision to ensure

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<sup>66</sup> Jōkai, 680; Dai-komentāru vol.6, 378 (Takahashi Shogo); Chikujō jitsumu, 726; Sapporo HC ruling of 19 March 2002, HJ 1803-147=HT 1095-287.

<sup>67</sup> Kadono (2015), 251-255.

<sup>68</sup> Dai-komentāru vol.6, 378 (Takahashi Shogo).

<sup>69</sup> SC ruling of 24 November 1959, CrR 13-12-3089.

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objective rationality in cases where the assessment of evidence is divided.<sup>70</sup> If the judgement was groundless or there was a discrepancy regarding the grounds, grounds for the appeal are admitted (CCP, Art. 378, Sentence 5).

#### 3.3.6. The right to appeal

Since Japan's judicial system adopts the system of three instances, two-stage appeals against a judgement are possible: the appeal to the court of second instance (CCP, Art. 372) and a final appeal to the Supreme Court (CCP, Art. 405). The right to appeal is granted to the prosecutor and defendant (CCP, Art. 351(1)). The counsel in the former instance may also appeal for the defendant independently, although this may not be filed contrary to the intent the defendant has indicated (CCP, Arts. 355, 356).

The appeal to the court of second instance is possible on grounds that include violation of laws, the erroneous finding of facts, and unreasonable sentencing (CCP, Arts. 372, 377–384). When an appeal is filed on the grounds of the erroneous finding of facts, the decision on whether to conduct a new examination of the disputed facts in the second instance is left to the discretion of the court. An exception is made for facts that can be proven with evidence the examination of which could not be requested before oral arguments were concluded in the court of the first instance because of unavoidable circumstances (CCP, Art. 393 (1)).

The final appeal to the Supreme Court is possible against a judgement of the court of second instance (CCP, Art. 405). Grounds for the final appeal are restricted to a violation of the Constitution and conflicts with a precedent. However, the Supreme Court may also reverse a judgement of the court of former instance *ex officio* on the grounds of an error in the application of laws and regulations, an erroneous finding of facts, and an unreasonable sentence when it deems that not doing so would clearly be contrary to justice (CCP, Art. 411).

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<sup>70</sup> Jōkai, 935; Chikujō jitsumu, 939.

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**Table 17** shows the reversal rates in the court of second instance in the past five years. While around 10% of appeals by the defendant's side were successful, around 60% of those by prosecutors succeeded, except in 2017.

**Table 18** shows the number of reversals in the court of final appeal in the past five years. Around 2,000 appellants had their cases finalised in the final appeal instance each year, but the number of reversed cases remained in the single digits. According to the case reports from the Supreme Court, five defendants had judgements of previous instances reversed in total, while eight prosecutors had judgements of previous instances reversed in total in this period.

**Table 17 Reversal rate in the court of second instance**

Year	Appeal by the defendant's side			Appeal by the prosecutor		
	Concluded Cases (a)	Reversed Cases (b)	Reversal rate (b/a)(%)	Concluded Cases (a)	Reversed Cases (b)	Reversal rate (b/a)(%)
2015	6,000	540	9.0%	95	62	65.3%
2016	5,289	616	11.6%	95	63	66.3%
2017	6,001	549	9.1%	124	52	41.9%
2018	5,641	534	9.5%	83	51	61.4%
2019	5,736	493	8.6%	72	43	59.7%

Source: Annual Report of Judicial Statistics for each year, Tables 58 and 69.

**Table 18 Number of reversals in the court of final appeal**

Year	Concluded Cases	Reversed Cases
2015	1,891	0
2016	1,957	2
2017	2,106	1
2018	1,993	6
2019	2,091	3

Note: Retrial cases and extraordinary appeal cases are not included.

Source: Annual Report of Judicial Statistics for each year, Table 76.

### 3.3.7. No double jeopardy and the right to retrial

Article 39 of the CJ provides that no person shall be held criminally liable for an act for which they have already been acquitted, nor shall they be placed in double jeopardy, thus prohibiting retrial of a defendant to their disadvantage. However, the Supreme Court stipulates that an appeal by the prosecutor against an acquittal does not breach the Constitution on the grounds that the same risk continues until the acquittal is finalised.<sup>71</sup> By contrast, the unconstitutionality of the prosecutor's appeal or its abuse is a contested issue.<sup>72</sup>

Even after a conviction has been finalised and is binding, a retrial is possible in the interests of the person found guilty when one of the grounds in Article 435 of the CCP is evident. Article 435, Item (vi) provides as a ground of retrial that 'Clear evidence has been found that should make the court render an acquittal of the person who has been sentenced'. After the Supreme Court admitted the application of the principle of *'in dubio pro reo'* to determine whether new evidence falls under 'clear evidence',<sup>73</sup> the possibility of retrial relief for false convictions has widened. However, some barriers remain in the current law that prevent the retrial system from properly functioning, including the lack of a court-appointed counsel system for retrial requests, a lack of rules of disclosure of evidence for retrial requests, a lack of concrete provisions on how the court of retrial request hearing should progress, and the right of the public prosecutor to appeal against a ruling to commence a retrial. The inadequacy of these retrial provisions should not be overlooked, especially because Japan retains the death penalty.

**Table 19** shows the status of the retrial requests processed in the past five years. In total, 24 persons of the 1,200 processed cases were granted a retrial, including those revised in the upper instance in the last five years.

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<sup>71</sup> SC judgement of 27 September 1950, CrR 4-9-1805.

<sup>72</sup> Shiratori (2012), 322.

<sup>73</sup> SC judgement of 20 May 1975, CrR 50-5-177; SC judgement of 12 October 1976, CrR 30-9-1673.

**Table 19 Status of processing retrial requests**

Year	Disposed cases	Persons granted a retrial
2015	268	6
2016	252	6
2017	228	5
2018	223	3
2019	229	4

Source: Annual Report of Judicial Statistics for each year, Tables 2, 5, 8, and 11.

### 3.4. Rights relating to effective defence

#### 3.4.1. Counsel’s ability to investigate

The criminal procedure of Japan adopts the adversary system, and it is the responsibility of both parties to investigate cases and gather the necessary evidence (RCP, Art. 178-2). Therefore, counsels should actively conduct investigative activities and gather evidence.<sup>74</sup> However, there is a de facto limit to the counsel’s own investigations.

When conducting an investigation for a client, attorneys can use the system whereby bar associations survey or inquire about necessary matters from government agencies, enterprises, and other groups under the Attorney Act, Article 23-2, at their own cost. Furthermore, counsel may request the court to ask public offices or public or private organisations for reports on matters needed for the trial in preparation for it (CCP, Art. 279). It is also possible to request to have case records sent from another court. If expert evidence is necessary, counsel can file a request with the court, but whether it will be ordered is entrusted to the discretion of the court. If counsel directly requests an expert to

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<sup>74</sup> Keiji-bengo Beginners 2 (2016), 80; Osaka Bengo-gawa Risshô Kenkyu-kai ed. (2017), 3; Japan Federation of Bar Associations, Research Office for Criminal Justice (2019), 48.

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provide expert evidence, the costs are borne by the suspect or defendant. These costs are not covered by public legal aid.

Counsel may not use enforcement measures to investigate a case. Counsel may request a judge for a disposition on the seizure, search, inspection, witness examination, or expert evidence before the first trial date when circumstances suggest it will be difficult to use the evidence unless it is preserved in advance (CCP, Art. 179). However, evidence preservation procedures cannot be used for the purpose of discovering evidence. Therefore, it is stipulated that the preservation of evidence collected or held by investigative agencies will not be allowed other than in exceptional circumstances.<sup>75</sup>

#### 3.4.2. Adequate time and facilities for the preparation of defence

##### (1) Specification of the trial date

When prosecution has been instituted, the court must serve a transcript of the charge sheet on the defendant without delay (CCP, Art. 271 (1)). When specifying the first trial date, trial preparations to be made by the persons concerned in the case prior to said date shall be considered (RCP, Art. 178-4). A period of suspension specified in the Rules of Court (five days) shall be set between the first trial date and service of the writ of summons on the defendant (CCP, Art. 275; RCP, Art. 179 (2)). The court may change the trial dates upon the request of the public prosecutor, defendant, or their counsel, or ex officio (CCP, Art. 276 (1)). The court shall hear in advance the opinions of the public prosecutor and the defendant or their counsel pursuant to the Rules of Court to change the trial dates, provided that this shall not apply in a case requiring urgency (CCP, Art. 276 (2)). If the proviso applies, the court shall give the public prosecutor and the defendant or their counsel an opportunity to raise an objection at the commencement of the trial (CCP, Art. 276 (3)). When a court has changed a trial date in abuse of its powers, the persons concerned in the case may request the taking of judicial administrative measures pursuant

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<sup>75</sup> SC ruling of 25 November 2005, CrR 59-9-1836.

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to the Rules or Instructions of the Court (CCP, Art. 277). Thus, the court cannot specify or change trial dates unilaterally without considering the defendant's preparations.

#### (2) Disclosure of evidence

When requesting the examination of a witness, expert witness, interpreter, or translator, the public prosecutor, defendant, or the defendant's counsel shall give their opponent an opportunity to know the name and address of that person in advance. In addition, when requesting to examine documentary or material evidence, the public prosecutor, defendant, or the defendant's counsel shall give their opponent an opportunity to inspect the evidence in advance (CCP, Art. 299 (1)). However, the CCP allows the prosecutor to impose upon counsel the condition that the names and addresses of witnesses and others not be made known to the defendant or to designate the timing and method of making them known to the defendant when disclosing evidence that the prosecutor plans to request for examination of evidence if there is a risk of harm, threat, or confusion to the witnesses or others (CCP, Art. 299-4 (1), (3)). Furthermore, if there is a risk that this will still not prevent harm to the witnesses or others, it is possible to conceal the witnesses' names and addresses, even from counsel. In this case, the prosecutor must provide counsel with the opportunity to know a pseudonym as a substitute for the name and contact information as a substitute for the address (CCP, Art. 299-4 (2), (4)). A request for disposition is planned as a response to breaches of protective measures by counsel (CCP, Art. 299-7).

No general provisions impose an obligation to disclose evidence that the public prosecutor does not plan to request. Given this, precedent shows that at the stage when examination of evidence has commenced, the court can order, pursuant to its power to control a trial, the disclosure of reasonable evidence counsel has identified individually, and can request such in light of the degree of importance, necessity, damage, etc.<sup>76</sup> Nevertheless, partly because of the application of the principle of the exclusion of preconception, in normal cases the evidence disclosure order using the court's power to control a trial is issued after the examination of evidence has commenced.

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<sup>76</sup> SC ruling of 25 Apr. 1969, CrR 23-4-275.

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Article 14, Paragraph 3 (b) of the ICCPR provides that the defendant must be provided with adequate time and facilities to prepare a defence. On the meaning of 'adequate facilities', the Human Rights Committee states in Paragraph 33 of its General Comment No. 32 that it 'must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the defendant or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence, but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary).' Therefore, it is seriously problematic that the current CCP does not have general provisions obliging the public prosecutor to disclose exculpatory material. In addition, the absence of provisions obliging investigative agencies to retain evidence restricts the possibility for the defendant to access evidence that may be to their advantage and should be reconsidered.<sup>77</sup>

The defendant can enjoy greater disclosure of evidence in cases put to pre-trial or inter-trial arrangement proceedings. If a case is put to pre-trial arrangement proceedings, first, the evidence offered by the public prosecutor is disclosed to the defendant's side, and if requested by the defendant's side, a list of evidence held by the public prosecutor is delivered (CCP, Art. 316-14). This list describes the minimum items needed to identify evidence but does not include outlines of evidence. The defendant's side should also disclose their evidence to the prosecutor (CCP, Art. 316-18). After the prosecutor's disclosure of evidence, the defendant's side can request that the prosecutor disclose further evidence in two stages. The reason for two stages is that the discovery system in the pre-trial arrangement procedure was designed to promote the arrangement of issues between both parties.<sup>78</sup>

The first stage is a request for the categorical disclosure of evidence listed in the provision (CCP, Art. 316-15). The purpose of the categorical disclosure is to disclose the types of evidence considered important to judge the credibility of the evidence offered by the public prosecutor and to enable the defendant and counsel to develop a defence strategy against

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<sup>77</sup> See, Ibusuki (2014), 301.

<sup>78</sup> Tsuji (2005), 203-204.

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the public prosecutor's arguments and proof. The request is admitted when it is appropriate, considering the degree of importance, other necessities for disclosure to prepare for the defence of the defendant, and the contents and extent of any possible harmful effects of the disclosure.

The second stage is a request for the disclosure of evidence connected to the claim that the defendant plans to make at trial (CCP, Art. 316-20). The purpose of this disclosure is to enable the defendant to prepare an aggressive defence and to further organise the points at issue by clarifying the arguments the defendant plans to make at trial and then disclosing the evidence relating to those arguments. To obtain a disclosure of evidence connected to the claim, the defendant's side must first clarify to the public prosecutor the arguments they plan to make at trial. The request is admitted when it is appropriate in light of the extent of the relevance to the defence's argument, other necessities for disclosure to prepare for the defence of the defendant, and the contents and extent of any possible harmful effects of disclosure.

When the court deems that the prosecutor has not disclosed the evidence that was to be disclosed pursuant to the aforementioned articles, it shall, upon a request from the defendant's side, order the disclosure of evidence on a ruling (CCP, Art. 316-26(1)). The court may then order the public prosecutor to present a list of evidence held that falls within the range specified by the court when it deems it necessary in making a ruling for the request. However, in this case, the court shall not let anyone, including counsel inspect or copy the list (CCP, Art. 316-27(2)) to prevent information leaks through disclosing the list, which includes outlines of the evidence needed for the ruling.

For the defendant, having the case put in pre-trial or inter-trial arrangement proceedings makes it possible to use the extended disclosure of evidence system. Given this, the 2016 amendment of the CCP granted the right to request pre-trial or inter-trial arrangement proceedings to parties (Art. 316-2(1)). In addition, when there is a dispute over voluntary disclosure of evidence between the prosecutor and defendant, it is considered preferable to resolve it according to the disclosure system specified by the pre-trial arrangement

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procedure.<sup>79</sup> However, upon provision, courts need not put a case to pre-trial arrangement proceedings unless it deems it necessary for conducting the proceedings of a trial consecutively, systematically, and speedily. Furthermore, it is not possible for the parties to file an appeal against the decision even when the request is rejected. Therefore, the deficiencies in the general rules for discovery have not yet been completely overcome.

**Table 20** shows the status of the pre-trial or inter-trial proceedings in the first instance for ordinary cases in the past five years. The percentage of defendants put into arrangement proceedings varied from 2.4% to 2.7% of the total persons disposed at courts and no significant change happened after the 2016 amendment.

**Table 20 The status of the pre-trial of inter-trial arrangement proceedings in the first instance**

Year	Total persons disposed at courts (a)	Defendants put into the pre-trial arrangement proceedings (b)	Defendants put into the inter-trial arrangement proceedings (c)	Arrangement proceedings rate (b+c)/a
2015	60,887	1,366	166	2.5%
2016	59,103	1,327	204	2.6%
2017	56,115	1,174	184	2.4%
2018	54,862	1,255	209	2.7%
2019	53,262	1,245	211	2.7%

Source: Annual Report of Judicial Statistics for each year, Table 39.

#### 3.4.3. Equality of arms in examining witnesses

Article 37 (2) of the CJ guarantees that the defendant will be permitted a full opportunity to examine all witnesses and have the right of a compulsory process to obtain witnesses on their behalf at the public expense. The first part is intended to guarantee the right to be permitted a full opportunity to face the witnesses for the public prosecutor in court and to

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<sup>79</sup> Osawa (2014), 48.

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challenge their credibility through cross-examination. The second part is intended to guarantee the right to have the court compulsorily summon the witnesses the defendant requests and to examine them. To guarantee the right to examine witnesses, CCP, Article 320, adopts the hearsay rule, although the CCP also incorporates exceptions to hearsay in Articles 321 to 328. On the relationship between CJ, Article 37 (2) and the hearsay exception provisions, early precedents of the Supreme Court held that the provisions intend to require the provision of a proper opportunity to cross-examine a witness summoned by the court *ex officio* or by request of a party to the litigation. They are not provisions that absolutely prohibit the inclusion as evidence of a document recording statements by a witness for whom no opportunity to cross-examine will be given.<sup>80</sup> However, current precedent interprets the hearsay exception provisions restrictively, based on the purport of CJ, Article 37 (2).<sup>81</sup>

With regard to the problematic hearsay exceptions from the viewpoint of the defendant's right to examine witnesses, the first section of Article 321 (1) (ii) allows a written record of a statement given before the public prosecutor as an exception to hearsay if the deponent is unable to testify at the trial or in the trial preparation (due to death, a mental or physical disorder, their whereabouts being unknown, their being out of the country, or any other obstacles difficult to overcome). Even if it were possible to grant the suspect or defendant the opportunity for advance cross-examination by filing a request for witness examination by the judge before the commencement of trial, the taking of such measures is not included as a condition. Furthermore, the second section of Article 321 (1) (ii) allows a written record of a statement given before the public prosecutor as an exception if the contents of the testimony by the deponent contradict the contents of the written record of the statement given before the public prosecutor. If the latter is found to be testimony in circumstances rendering it more credible than the former, the latter will be allowed as substantial evidence in the exception to hearsay. In this case, although the defendant is granted the

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<sup>80</sup> SC judgement of 18 May 1949, CrR 3-6-789; SC ruling of 4 October 1950, CrR 4-10-1866; SC judgement of 9 April 1952, CrR 6-4-584.

<sup>81</sup> SC judgement of 20 June 1995, CrR 49-6-741.

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opportunity for cross-examination at trial, if the earlier testimony is determined to have been given in circumstances that render it more credible, it will not be sufficient to challenge the trial testimony of the witness for the public prosecutor, and the defendant will need to challenge the statements in the written record of the statement given before the public prosecutor.

ICCPR, Article 14, Paragraph 3 (e) guarantees the defendant's right to examine or have examined the witnesses against them and to obtain the attendance and examination of witnesses on their behalf under the same conditions as witnesses against them. With regard to the purpose of this provision, the Human Rights Committee states in Paragraph 39 of its General Comment No. 32 that '[a]s an application of the principle of equality of arms, this guarantee is important for ensuring an effective defence by the defendant and their counsel and thus guarantees the defendant the same legal powers of compelling the attendance of witnesses and of examining or cross-examining any witnesses as are available to the prosecution'. It continues, 'It does not, however, provide an unlimited right to obtain the attendance of any witness requested by the defendant or their counsel, but only a right to have witnesses admitted that are relevant for the defence, and to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings'. However, the current CCP, Article 321 (1) assigns written records of statements given before the public prosecutor the status of a special document similar to the written records of statements given before a judge. Consideration for the defendant's rights is also not sufficient, both in the sense of 'the same legal powers as the public prosecutor vis-à-vis the opportunity to examine or cross-examine witnesses' and of 'the right to be given a proper opportunity to question and challenge witnesses against them at some stage of the proceedings'.

#### 3.4.4. Free interpretation and translation

##### (1) The right to interpretation

The language to be used in courts in Japan is defined as Japanese (Courts Act, Art. 74). When the court has a person who is not proficient in Japanese make a statement, it shall have an interpreter interpret for them (CCP, Art. 175). Furthermore, when the court has a person who is unable to hear or speak make a statement, it may have an interpreter interpret for them (CCP, Art. 176). The appointment of an interpreter is made in accordance with the procedures for appointing expert witnesses (CCP, Art. 175). Interpretation is provided in the mother tongue or first language. However, precedent stipulates that if an interpreter for the defendant's mother tongue cannot be secured, substituting this with interpreting in another language the defendant can understand does not breach ICCPR, Article 14, Paragraphs 3 (a) and (f), and is legal.<sup>82</sup>

Interpreters can claim interpreting fees as well as travel expenses, daily allowances, and accommodation charges (CCP, Arts. 175, 173). The costs incurred for interpretation when the court engages the interpreter are included in the calculation of court costs. Article 181 of the CCP states, 'When the court renders punishment, it must have the defendant bear all or part of the court costs; provided however, that this shall not apply when it is clear that the defendants cannot afford the court costs because of indigence'. If this provision is applied formally, the defendant may be made to bear all or part of the interpreting costs if convicted. Nevertheless, precedent takes the standpoint that international human rights covenants can be applied directly in domestic trials, and holds that the guarantee 'to have the free assistance of an interpreter' provided for by ICCPR, Article 14, Paragraph 3 (f) is absolute and unconditional, and even if a defendant should be convicted at trial and punishment rendered against them, the court is not permitted to order the defendant to bear the costs incurred for interpretation under the body of CCP, Article 181 (1).<sup>83</sup>

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<sup>82</sup> Tokyo HC judgement of 26 December 1960, ICrR 2-11=12-1369; Tokyo HC judgement of 8 April 1992, THTCr 43-1=12-34.

<sup>83</sup> Tokyo HC judgement of 3 February 1993, THTCr 44-1=12-11.

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Therefore, the cost of the interpreter appointed by the court is not actually included in the calculation of the court costs.

If interpretation is necessary for investigation (which is determined by the investigating organisation, although there are no formal criteria for judging necessity), it is requested by the investigating organisation (Art. 223 (1)), which bears the costs of the interpreter engaged for the investigation. The suspect does not have the right to demand an interpreter for the investigation. To have an investigator who can speak the foreign language also act as the interpreter is undesirable in terms of the impartiality of the interpretation, but not illegal.<sup>84</sup> With regard to interpreters in investigations, issues to consider include (a) the stage of investigation in which the interpreter was introduced, (b) whether the interpreting is in the interpreter's first language, (c) the skill of the interpreter, and (d) the impartiality, neutrality, etc., of the interpreter.<sup>85</sup> In some cases, the probative value of the written records of statements prepared during the interrogation by investigating organisations were denied on the grounds that the necessary interpretation was not conducted or was inaccurate at the interrogation.<sup>86</sup> However, the interpretation at the interrogation is usually not recorded, meaning it may not always be possible to confirm after the fact the accuracy thereof in the investigative stage. Furthermore, from the post-check viewpoint, appointing the interpreter who worked in the investigative stage as the court interpreter is not desirable, but not illegal if an interpreter cannot be easily secured.<sup>87</sup>

An interpreter for the defence must be arranged by counsel. In the case of a court-appointed counsel, an interpreter can be introduced through the JLSC. If counsel engages an interpreter for defence activities, it must conclude a contract with the interpreter. In the case of court-appointed counsel, interpretation costs are paid by the JLSC to a certain limit. Issues mentioned specific to interpretation for the defence include (a) securing suitable interpreters, (b) the response of investigating organisations and penal institutions

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<sup>84</sup> Osaka DC judgement of 28 January 1983, HJ 1089-159.

<sup>85</sup> Ohki et al. (2014), 74.

<sup>86</sup> Sapporo DC judgement of 29 March 1999, HT 1020-284.

<sup>87</sup> Osaka HC judgement of 19 November 1999, HJ 1436-143.

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when having an interpreter accompany counsel at interviews, (c) the burden of interpreting costs, and (d) how to respond when an interpreter cannot be arranged.<sup>88</sup>

#### (2) The right to translation

Domestic law does not have a provision that defines a right to have documents or evidence translated without charge if the suspect or defendant cannot understand the Japanese in them. Article 177 of the CCP provides that '[t]he court may have letters or marks written in languages other than the national language translated'. If an interpreter has been appointed, it is usual to have the interpreter interpret after translating the court documents and evidence into Japanese. It is the responsibility of counsel to request the translation of the documents it sends and receives. The burden of costs incurred by the court, investigating organisation, or counsel for translation is the same as that under the rules for the burden of costs incurred for interpretation.

In relation to preparing written records of statements given before a public officer during interrogation, CCP, Article 198 (4) provides that the written record of a statement before a public officer must be inspected by the suspect or read to them for verification. If the suspect makes a motion for any addition, removal, or alteration, their remarks must be entered in the written record. Furthermore, Paragraph (5) of that article provides that if the suspect affirms that the contents of the written record are correct, they may be asked to attach their signature and seal to it. Given this, the legality of having a suspect attach their signature and seal to a written record of a statement in Japanese without preparing a translation thereof is an issue. In this regard, precedent specifies that the written record of statement is legal even if it is signed and sealed without preparing a translation thereof when, at the investigation where the defendant's statements were recorded in each of the written records, interpreters interpreted each of them in the language that the defendant could understand, the contents of the written records were interpreted accurately and were understood by the defendant before they were signed and sealed, while no specific counter

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<sup>88</sup> Ohki et al. (2014), 68.

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evidence were found on capacity of each interpreter and accuracy of each interpretation in preparing those written records.<sup>89</sup>

#### (3) Capacity of interpreters

There are no national qualifications or public accreditation systems for judicial interpreters. The current situation is that the police in each prefecture, district public prosecutor's offices, high courts, local bar associations, and the JLSC have each prepared their own rolls of interpreters and provide training for their registered interpreters. However, it has been noted that sufficient training opportunities are scarce.<sup>90</sup> According to the court's public relations brochure, as of 1 April 2018, 3,788 people were registered as court interpreter candidates throughout Japan for 62 languages.<sup>91</sup> In addition, the Japan Law Interpreter Association has been formed as a civilian group with the aim of improving the skills and status of judicial (law) interpreters. It holds judicial interpretation training sessions and conducts judicial interpreter skill assessment examinations. In addition, the Japan Law Interpreter Association also provides interpreters who have passed a judicial interpreter skills assessment and are assured of having a certain level of skill, and offers translation services by judicial interpreters assured of having a certain level of technical ability, where requested by courts, lawyers, and others. According to a survey of 101 court interpreters conducted by a group at Shizuoka Prefectural University in 2012, there is a great sense of burden on interpreters, especially those who have experienced lay judge trials, and it is desirable to develop court interpretation as a professional field.<sup>92</sup>

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<sup>89</sup> See, Tokyo HC judgement of 24 November 1976, HCrR 29-4-639.

<sup>90</sup> Mizuno (2017), 199-201.

<sup>91</sup> [http://www.courts.go.jp/vcms\\_lf/h31.1ban-gozonji.pdf](http://www.courts.go.jp/vcms_lf/h31.1ban-gozonji.pdf).

<sup>92</sup> Mizuno & Tsuda (2016), 64 (Takahata Sachi).

## IV. PROFESSIONAL CULTURE OF CRIMINAL DEFENCE

### 4.1. Attorney system

Attorneys must in principle be appointed as counsel (CCP, Art. 31 (1)). Accordingly, the professional culture of criminal defence reflects ideas about the mission, role, professional ethics, and specialisation of attorneys. A person who has passed the national examination and completed the legal training course is qualified to become an ‘attorney’ in principle (Attorney Act (AA), Art. 4). To become an attorney, a person must have their name registered, through the bar association to which they intend to be freshly admitted, in the roll held with the JFBA (AA, Arts. 8, 9). The JFBA is a corporation incorporated under the AA on 1 September 1949. Its members are attorneys, legal professional corporations, and the 52 bar associations throughout Japan. Article 45 (2) of the AA defines the purpose of the JFBA as ‘be[ing], in view of the mission and duties of attorneys and Legal Professional Corporations, to manage matters relating to the guidance, liaison, and supervision of attorneys, Legal Professional Corporations, and bar associations, in order to maintain the dignity and improve and advance the work of attorneys and Legal Professional Corporations’. Attorneys are not under the supervision of the state, and bar associations hold the right to punish attorneys as part of attorney self-governance. Thus, under the attorney system in Japan, attorneys do not hold back from fulfilling their professional duties for fear of punishment by the state. According to the Attorney’s White Paper 2019, there were 41,118 attorneys in Japan of March 31, 2019, a more than double that of 15 years ago.

### 4.2. Ethics of the attorney

The mission and professional ethics or code of conduct of attorneys is defined by the AA and the Basic Rules of Attorney’s Duties enacted by the JFBA. Article 1 of the AA defines an attorney’s mission as the protection of fundamental human rights and achievement of social justice, and lists as three behavioural targets to carry out that mission the

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performance of duties in good faith, the maintenance of order in society, and improvement of the legal system. There are opposing views on the obligation of good faith as defined by Article 1, namely, whether it is defined as a legal obligation accompanied by liability for damages or merely an ethical duty. Here, the first theory carries more weight.<sup>93</sup> Furthermore, attorneys bear an obligation of confidentiality in their duties (AA, Art. 23), which is also important in the code of conduct for criminal defence. It can be said that the attorney's responsibility as a criminal counsel to the public is believed to hold only by keeping his obligation of good faith and providing the best defence for the suspect or defendant.<sup>94</sup> There has been a case in which counsel conducted defence activities that breached the obligation of good faith to perform litigation activities for the benefit of the defendant, substantially infringing the defendant's rights to defence and to appoint counsel, and was thus illegal. An appeal to the court of second instance was allowed on the grounds that the court's control of the trial ignored this, and it was concluded that the trial breached the law.<sup>95</sup>

Article 1 (2) of the AA and Article 5 of the Basic Rules of Attorney's Duties provide that '[an] attorney shall carry out their duties with respect for the truth and complying with deliberations in fairness and good faith'. This article includes the added commentary that it is not intended to oblige an attorney in a criminal case to actively cooperate in the discovery of the truth.<sup>96</sup> By contrast, attorneys are prohibited from inducing a false statement or submitting false evidence (Basic Rules of Attorney's Duties, Art. 75). Thus, it is argued that the attorney's obligation to the truth is 'passive truth obligation'; that is, not to base arguments upon statements by a defendant the attorney knows to be false. The JFBA has not presented a unified view to prevail when the obligations of passive truth and good faith for the client are in opposition.<sup>97</sup> In this regard, competing views exist, namely,

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<sup>93</sup> Jōkai Bengoshi, 13.

<sup>94</sup> Goto, et al. eds. (2013), 28 (Ura Isao).

<sup>95</sup> Tokyo HC judgement of 12 April 2011, HT 1399-375.

<sup>96</sup> Kaisetsu Bengoshi, 12.

<sup>97</sup> Kaisetsu Bengoshi, 14, 16.

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the view that approves the passive truth obligation,<sup>98</sup> the view that denies that the attorney has any obligation to reveal the truth even against the defendant's wishes (the 'hired gun' theory),<sup>99</sup> and the view that denies the truth obligation in any sense but affirms a public obligation not limited to the obligation of good faith to the client.<sup>100</sup> In any case, there is a strong view that arguing a case of not guilty when defending a substitute criminal who pleads guilty for the true criminal is not contrary to the obligation of good faith on the grounds that counsel's duty is to defend the defendant's 'legitimate interests'.<sup>101</sup>

The Basic Rules of Attorney's Duties also specifically stipulates the disciplines of criminal defence. The rules state that the attorney shall endeavour to ensure the best defence activities (Article 46) to secure an interview with the suspect/defendant in custody and release from physical restraint (Article 47). Furthermore, it is necessary to explain defence rights to the suspect/defendant and take countermeasures against unfair restrictions (Article 48). In addition, it is prohibited to receive remuneration from the suspect/defendant or other persons concerned, or to approach them about appointment as private counsel when appointed as counsel by the court (Article 49).

Attorneys and legal professional corporations will be subject to disciplinary action if they violate the AA and rules of the bar association they belong to or the JFBA, damage the order or reputation of that bar association, or otherwise 'misbehave in a manner impairing their own integrity', whether in the conduct of their professional activities or not (AA, Art. 56). Disciplinary action is carried out by the bar association to which the Legal Service Provider belongs under a decision of the Disciplinary Actions Committee. The four types of disciplinary action for attorneys are (a) admonition, (b) suspension for not more than two years, (c) order to withdraw from the bar association, and (d) disbarment (AA, Art. 57 (1)). When a bar association or the JFBA disciplines a Legal Service Provider, the JFBA

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<sup>98</sup> Sato H (2007), 32.

<sup>99</sup> Muraoka (1997), 713; Oka & Kamiyama (2015), 235.

<sup>100</sup> See Morishita (2017), 584f.

<sup>101</sup> Ueda (2000), 35; Morishita (2000), 42; Oka & Kamiyama (2015), 17; Tsujimoto (2017), 74.

announces it in the government gazette and *Jiyū to seigi* (Liberty & Justice), the JFBA's bulletin, along with an outline of the grounds for the disciplinary action.

### 4.3. Professionalism of criminal defence

Attorneys generally spend most of their time on civil cases and undertake criminal cases using their remaining capacity, and few attorneys specialise in criminal cases like the public prosecutor does. Furthermore, almost all prosecuted cases result in a conviction; thus, in criminal defence, interest tends to be directed towards reaching a private settlement with the victim, having the defendant present an attitude of self-reflection, and determining how to best turn sentencing to the defendant's advantage, rather than arguing for an acquittal. Therefore, until the end of the 1980s, it was generally thought that criminal defence did not require advanced specialist knowledge or capabilities, except for cases where the attorney would seriously argue for an acquittal, cases eligible for the death penalty, and other special cases.

However, this state of affairs changed at the start of the 1990s. In 1990, the JFBA established the Center for Criminal Defence, with the purpose and duty of seeking to comprehensively review criminal procedures in Japan and to revise the system and amend its operation, as well as to support attorneys to enrich defence activities and, in conjunction with these, as an attempt to obtain the understanding and participation of the people in criminal trials. To begin with, the Center proposed reinforcing the structure for defence before prosecution as its primary focus for activities, and decided to commence a movement to establish a court-appointed counsel system for suspects and extend the duty attorney system throughout the country as a feasible model.<sup>102</sup> Then, in 1992, the duty attorney system was expanded to all unit bar associations in Japan. Criminal defence committees were established in all unit bar associations as organisations to operate the system. This

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<sup>102</sup> Ueda (1992), 39.

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increased efforts to improve the quality of criminal defence, and a periodical journal specialising in criminal defence and many practical guides about it have been published.

An interview-based survey by the JFBA Center for Criminal Defence found that vigorous work is now being carried out on various training programmes aimed at qualitative improvements in criminal defence. Furthermore, in order to investigate strategies and other measures for the establishment of a responsive attitude to the court-appointed counsel system for suspects and *saiban-in* trials, such as securing the attorneys who will handle these services, in 2007 the JFBA established the 'Headquarters for Promoting the Establishment of a Responsive Attitude to Court-Appointed Counsel', renaming it the 'Headquarters for Court-appointed Counsel' in April 2011. Thus, it is continuing efforts to establish a responsive attitude to the court-appointed counsel system and to improve the specialisation of court-appointed counsel. All attorneys are obliged to receive the general training held by individual bar associations when they have their name registered on the roll. However, there is no special compulsory training for registration to the lists of nominated candidates for court-appointed counsel.

## V. POLITICAL COMMITMENT TO EFFECTIVE CRIMINAL DEFENCE

### 5.1. Legislative activities for effective criminal defence

The current CCP was enacted in the midst of the political task of reforming the pre-war criminal judicature that supported militarism, in order to create a new criminal judicature that conformed to the CJ under the slogan of respect for basic human rights. However, the government's aim was 'to establish a new Code of Criminal Procedure by perfectly combining the continental law-style criminal procedures familiar from long practice and the Anglo-American criminal procedures manifested in the new constitution'.<sup>103</sup> The legislators of the current laws thought that the position of the suspect and defendant based in Anglo-American law should be adjusted to fit the continental law way of thinking, which emphasised the discovery of the substantive truth. After the current law was enacted in 1948, no amendments to strengthen the right of the suspect and defendant to defence were enacted for many years.

In the 1970s, the Supreme Court presented several judgements that were important from the perspective of strengthening due process and relief from misjudgements, such as ending procedures on the grounds of a breach of a speedy trial,<sup>104</sup> relaxation of the requirements for commencing retrial,<sup>105</sup> strictly interpreting the conditions for designating interviews,<sup>106</sup> and approving the exclusion rule of illegally obtained evidence.<sup>107</sup> These precedents played an important role in strengthening due process through interpretation of the law, but no amendments have been made to incorporate these precedents' doctrines into statute until now. In the 1980s, when acquittals were handed

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<sup>103</sup> Explanation of reasons for proposal of the bill by the government at the 2<sup>nd</sup> Diet, the House of Representatives, Committee of Justice (28 May 1948).

<sup>104</sup> SC judgement of 20 December 1962, CrR 25-10-631.

<sup>105</sup> SC ruling of 20 May 1975, CrR 29-5-177 (*Shiratori* case).

<sup>106</sup> SC judgement of 10 June 1978, CiR 32-5-820.

<sup>107</sup> SC judgement of 7 September 1978, CrR 32-6-1672.

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down upon retrial in four consecutive cases in which the death penalty had been finalised,<sup>108</sup> the amendment of the Prisons Act became a legislative issue. Then, a movement emerged to abolish the substitute prison system (see Para. 1.2.2.(2)), which had been criticised as ‘a hotbed for false accusations’, with the JFBA at its centre.<sup>109</sup> Nonetheless, the Japanese government enacted the new Act on Penal Detention Facilities in 2005, which retained the substitute prison system.

However, once the 1990s began, the start of practical efforts to enrich criminal defence, including the development of the duty lawyer system in bar associations nationally, led to later amendments of the law. When reform of the justice system arose as part of Japan’s structural reform at the end of the 20th century, the demand to strengthen the procedural rights of the suspect and defendant became a matter the government could no longer disregard. In 1999, the government formed the Justice System Reform Council under the Cabinet and commenced reforms of the Japanese justice system as a whole, including criminal justice. The 2004 legal amendments that resulted from that (a) created pre-trial arrangement proceedings accompanied by a new disclosure of evidence system, (b) created a court-appointed counsel system for suspects, (c) made decisions on the institution of prosecution by the Committee for the Inquest of the Prosecution binding, and (d) created the *saiban-in* system. However, strongly opposed opinions on the reform of investigations emerged, and it remains an issue for future consideration.

Despite this, triggered by the false charge case in 2009 with the concealment and destruction of evidence by a public prosecutor in the special investigation department, and the change from a conservative to liberal government in the same year, there was a period when political interest was directed towards the reform of criminal procedures, including how interrogations should be conducted. The Ministry of Justice then established the ‘Council to Consider the State of Criminal Investigation’ in November 2010, which

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<sup>108</sup> Menda case (15 July 1983), Saitagawa case (12 March 1984), Matsuyama case (11 July 1984), Shimada case (31 Jan. 1989).

<sup>109</sup> See Niwayama & Igarashi (1981); Nichibenren ed. (1995); Niwayama et al. (1997); Keij Rippô Kenkyu-kai ed. (2005).

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summarised its advice in March 2011, including the comment that '[i]n order to radically review the state of investigations and trials, which rely excessively on interrogation and written records of statements before a public officer, and to build a new criminal judicial system that includes visible interrogation as a system, we should immediately provide a venue for proper consideration while reflecting the opinions of the people and the knowledge of experts, including the relevant authorities, and commence consideration'.<sup>110</sup>

Besides these movements, investigation methods have developed in response to organised and cross-border crimes and the progress of the information society, and revision of the investigation law came to be recognised as an important legislative issue. 'The Act on Wiretapping for Criminal Investigation' was enacted in 1999, and new investigative measures to seize electromagnetic records as evidence were legislated in 2011. The introduction of new investigation methods was positioned as a necessary 'double issue' that could not be avoided in the effort to break away from inquisitorial investigation by perpetuating the principles of modern law in criminal procedure. As such, the importance of advancing both needs at the same time in a well-balanced manner has become emphasised.<sup>111</sup>

On the basis of this idea, in June 2011, the 'Special Subcommittee on a Criminal Justice System for a New Era' was established under the Legislative Council of the Ministry of Justice and given the task of proposing various strategies to improve the interrogatory culture within the broader scope of regulating means to gather evidence and further enriching trial examination. This resulted in the 2016 amendment, which was built on the pillars of (a) imposing an obligation to record sound and images from all processes in the interrogation of suspects under arrest or detention for crimes that are subject to *saiban-in* trials and for cases in which prosecutors initiate the investigation, (b) expanding the court-appointed counsel system for suspects to all detention cases, (c) rationalising and improving the efficiency of wiretapping, (d) introducing the formal justice bargaining system, and (e) expanding systems to protect victims and witnesses. Although the 2016

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<sup>110</sup> 'Towards the recovery of the prosecution' (30 March 2011).

<sup>111</sup> Tamiya (2000), 357; Matsuo (2012), 374.

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amendment was triggered by political attention on preventing a disproportionate emphasis on interrogation, the revisions were achieved by tying this to increases in investigative powers. However, as mentioned in the introduction, the 2016 amendment cannot be assessed in terms of whether it has drastically reformed the inquisitorial investigation structure, and evaluations thereof are divided.<sup>112</sup>

The background to politicians' low interest in problems pertaining to the rights of suspects and defendants in criminal justice is based on the fact that the public did not have much interest in issues regarding the guaranteeing of human rights for suspects and defendants or, if they did, it was temporary, when a false charge case was reported. In the 'Opinion Survey on the Basic Legal System', conducted by the Cabinet Office in December 2004, the following question was asked: 'Do you think that the rights of people suspected of being a criminal in a crime investigation and criminal trial procedures in Japan are respected or not?' In response, 37.7% thought that 'they are sufficiently respected' or 'they are more respected than not'. However, 40.5% thought that 'they are not respected much' or 'hardly respected at all', showing that a greater proportion thought rights were not respected.<sup>113</sup> By contrast, when asked whether they thought the rights of victims were respected in a crime investigation and criminal trial procedures in Japan, 15.9% believed 'they are respected' and 70.6% that 'they are not respected'. This indicates that an extremely high proportion of the public felt that victims' human rights were not respected. Partly because of this increase in problem awareness in public opinion, the act to protect the rights and interest of the crime victim was enacted in 2007, creating the victim participation system and information protection system for names and other details of the victim and others.

The government still conducts the 'Opinion Survey on the Basic Legal System' every five years, but the question items are changed each time to highlight reasons for affirming or denying the need for legislative measures on issues of interest to the government. Since the 2004 survey, no questions have been asked about whether the rights of the suspect and

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<sup>112</sup> See, Kawasaki (2017), 172-173.

<sup>113</sup> <https://survey.gov-online.go.jp/h16/h16-houseido/index.html>

defendant are believed to be respected. On the other hand, questions about the pros and cons of the death penalty are consistently asked, and the fact that 80% of the nation (2014 survey: 80.3% and 2019 survey: 80.8%) accepts the death penalty has been used as a reason not to abolish it.

## 5.2. Government's commitment to international human rights standards

In the past, the Japanese government has repeatedly received recommendations from international human rights organisations to guarantee human rights in criminal justice. Specifically, the United Nations Human Rights Committee has repeatedly recommended that the Japanese government improve the situation in relation to the police detention system, lengthy interrogations during arrest and detention of the suspect, and so on in their 1993, 1998, 2008, and 2014 reports. The United Nations Committee against Torture also asked the Japanese government to resolve these problems in their 2007 and 2013 reports.<sup>114</sup>

For example, the concluding observations on the sixth periodic report of Japan by the Human Rights Committee makes several recommendations in Paragraph 18.<sup>115</sup>

The State party should take all measures to abolish the substitute detention system or ensure that it is fully compliant with all guarantees in articles 9 and 14 of the Covenant, inter alia, by guaranteeing:

- (a) That alternatives to detention, such as bail, are duly considered during pre-indictment detention;
- (b) That all suspects are guaranteed the right to counsel from the moment of apprehension and that defence counsel is present during interrogations;

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<sup>114</sup> These documents and their translations are available through the JFBA homepage ([https://www.nichibenren.or.jp/activity/international/library/human\\_rights.html#torture](https://www.nichibenren.or.jp/activity/international/library/human_rights.html#torture)) See also, Mizutani (2017), 73f.

<sup>115</sup> Human Rights Committee, Concluding observations on the sixth periodic report of Japan (CCPR/C/JPN/CO/6).

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(c) Legislative measures setting strict time limits for the duration and methods of interrogation, which should be entirely video-recorded;

(d) 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.

Paragraph 13, relating to the death penalty system, makes additional comments.

The State party should ...

(c) Immediately strengthen the legal safeguards against wrongful sentencing to death, inter alia, by guaranteeing to the defence full access to all prosecution materials and ensuring that confessions obtained by torture or ill treatment are not invoked as evidence.

(d) In light of the Committee's previous concluding observations (see CCPR/C/JPN/CO/5, Para. 17), establish a mandatory and effective system of review in capital cases, with requests for retrial or pardon having a suspensive effect, and guaranteeing the strict confidentiality of all meetings between death row inmates and their lawyers concerning requests for retrial[.]

In the 'List of issues prior to submission of the seventh periodic report of Japan'<sup>116</sup> of 2017, the Human Rights Committee also asks the Japanese government to report on measures taken to meet each recommendation with reference to the previous concluding observations (Para. 13) and the Committee's evaluation of the follow-up replies of the state party (see CCPR/C/116/2 and CCPR/C/120/2). Therefore, similar recommendations will likely be repeated in the future on issues for which the Japanese government has not taken any concrete measures. Despite these repeated recommendations, since state parties are not legally obliged to follow them, the Japanese government has only partially revised the criminal justice system, citing financial constraints and the need for efficient investigation as reasons for this.

The escape of defendant Carlos Ghosn abroad at the end of 2019 turned an international spotlight on Japanese criminal justice. In 2020, the Japanese government extended the

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<sup>116</sup> Human Rights Committee, List of issues prior to submission of the seventh periodic report of Japan (CCPR/C/JPN/QPR/7).

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retirement period of a superintendent public prosecutor of the Tokyo High Public Prosecutor's Office by changing an interpretation of the National Public Service Act and attempted to stabilise it by revision of the Public Prosecutor's Office Act but failed because of severe public criticism. These incidents damaged public trust in the government and the Ministry of Justice significantly. Therefore, the Ministry of Justice established the Legal Affairs and the Public Prosecution Administration Reform Conference in July 2020 to identify problems with the current legal and public prosecution administration and to compile new issues in the legal and public prosecution administration from a broad perspective. The report of the Legal Affairs and the Public Prosecution Administration Reform Conference was released in December 2020.<sup>117</sup> At the conference, measures to gain international understanding of Japan's criminal procedures were one item on the agenda, alongside the ethics of the public prosecutor and the future transparency of legal administration. In relation to that agenda, opinions were exchanged on the issues of reforming Japanese criminal procedure according to international human rights standards, such as the introduction of a system to have a counsel present during the interrogation of suspects. However, there was also a large gap in opinions among members of the conference, and they were not able to indicate the direction of reforms of Japanese criminal procedure in a way that better conforms to international human rights standards.

In conclusion, it should be said that the current Japanese government is strongly defensive of the domestic criminal justice system and does not have the positive willingness to contribute to the formation and development of international human rights standards in the field of criminal justice as a member of the international community.

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<sup>117</sup> <http://www.moj.go.jp/content/001337339.pdf>.

## VI. CONCLUSIONS AND RECOMMENDATIONS

Because the Japanese CCP adopts the adversary system, the defendant and public prosecutor have equal positions as parties to the action. However, it is difficult to say that equality of arms is guaranteed in relation to the means of supporting each side's litigation activities. Furthermore, the interrogation of suspects under arrest or detention is inquisitorial, and there are limitations on the effective exercise of procedural defence rights, rendering it difficult for suspects to deal with the interrogation on an equal footing to investigative agencies, even though the right to silence is granted. In this regard, criminal defence should be improved in Japan with a focus on the following aspects.

### (1) Expanding and improving legal aid for the suspect

The CCP does not afford the right to court-appointed counsel to suspects under arrest in police custody. To make up for this deficiency, bar associations have operated the duty lawyer system for arrested suspects and a legal aid system for suspects who cannot use court-appointed counsel. However, they are funded by membership fee income from the bar associations and similar sources, which is unstable. Measures should be taken to provide public financial resources to operate the duty lawyer system.

### (2) Reforming inquisitorial interrogation

Suspects under arrest or detention are interrogated under the obligation to be interrogated. It should theoretically be clarified that the purpose of arrest and detention is not to obtain a confession. Mandatory recordings should be expanded to all interrogations to prevent coercion and induction of confessions through unjust interrogation. Detention authorities should be separate entities from investigative agencies and ensure that the detention system is not misused as a means to obtain a confession. Police custody and interrogation should be more closely regulated, particularly in respect of the length of interrogations, and the overall length of detention at the investigative stage should be significantly reduced.

## VI. CONCLUSIONS AND RECOMMENDATIONS

Interrogation is also an opportunity for the suspect to tell investigators the facts in his favour. However, counsel is not afforded the right to be present at an interrogation. If suspects are not able to decide whether to remain silent or answer questions during the interrogation, they will not be receiving the effective assistance of their counsel. In this regard, to substantially guarantee the opportunity to receive assistance from counsel, the law should be reviewed to grant suspects the right to have counsel present at an interrogation.

### (3) Expanding and improving the right to bail

Although the detention rate has tended to decline in recent years, the lack of a bail system in the suspect stage has led the detention of suspects to continue, which could be avoided if a bail system was in place. Furthermore, 'probable cause to suspect that the defendant may conceal or destroy evidence' is a reason for excluding mandatory bail, which leads to the kind of abuse in which probable cause is found, even if the defendant denies it. Given this, the current act should be reviewed to enable bail from the stages before charging and to add the suspicion of concrete actions to conceal or destroy evidence to the conditions for excluding mandatory bail.

### (4) Expanding the right to access evidence

No system exists for disclosing evidence and other materials at the suspect stage, which inhibits early defence activities. Furthermore, the disclosure of evidence to the defendant after charging depends on voluntary disclosure by the public prosecutor in most cases not put to pre-trial arrangement proceedings. In addition, even in pre-trial arrangement proceedings, evidence advantageous to the defendant could be buried when the defendant is not aware of its existence. To resolve these problems, the system of disclosure of evidence under the current act should be expanded. In addition, a new provision should be established that requires investigative agencies to keep evidence to ensure that the discovery system works effectively.

### (5) Improving the right to equality of arms in examining witnesses

## VI. CONCLUSIONS AND RECOMMENDATIONS

Article 37 (2) of the CJ guarantees the defendant's right to examine witnesses for the public prosecutor, and CCP, Article 320 adopts the hearsay rule. However, the hearsay exception of CCP, Article 321 (1) (ii) unfairly limits the opportunity for cross-examination of the prosecutor's witnesses or unjustly weakens the effectiveness of the cross-examination by the defendant. Given this, the hearsay exception provisions of CCP, Article 321 (1) (ii) should be revised to enable fair and equal trials in line with the intent of CJ, Article 37 (2).

### (6) Reform of retrial proceedings

Even if examinations of erroneous findings of fact are possible in the courts of second instance and final appeal under the current law, procedures to request a retrial after a conviction is finalised do not lose their importance. Specifically, the carrying out of the wrong sentence in a death penalty case should not cost a life. The law should be reformed to ensure that the current retrial request procedures function effectively as procedures for relief from misjudgement.

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