Grand Design of Criminal Justice Reform for Preventing Miscarriages of Justice (*Enzai*)
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Japan Federation of Bar Associations (JFBA)

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JFBA Japan Federation of Bar Associations

1. Purpose and Perspective of the Grand Design

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

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

Such practices within the criminal justice continue to result in a number of miscarriages of justice, including the following well-known cases revealed in recent years.

Fig. 1 Well-known miscarriage of justice cases revealed in recent years.

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

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

2011	Fukawa case (Acquitted in a retrial, May 24, 2011, Mito District Court Tsuchiura Branch)
2012	PC Remote Control Virus case
	Murder case of Tokyo Electric Power Company's female employee (Acquitted in a retrial, Nov. 7, 2012, Tokyo High Court)
2014	Izumiotsu convenience store theft case (Acquitted, Jul. 8, 2014, Osaka District Court Kishiwada Branch)
2015	Osaka rape case with false testimony (Acquitted in a retrial, Oct. 16, 2015, Osaka District Court)
2016	Kagoshima Tenmonkan case (Acquitted, Jan. 12, 2016, Fukuoka High Court Miyazaki Branch)
	Higashi-Sumiyoshi case (Acquitted in a retrial, Aug. 10, 2016, Osaka District Court)
2019	Matsubase case (Acquitted in a retrial, March 28, 2019, Kumamoto District Court)
2020	Koto Memorial Hospital case (Acquitted in a retrial, Mar. 31, 2020, Otsu District Court)
2021	Ohkawara Kakohki case (Prosecution dismissed, Aug. 2, 2021, Tokyo District Court)
	Pressance case (Acquitted, Oct. 28, 2021, Osaka District Court)
2024	Hakamada case (Acquitted in a retrial, Sep. 26, 2024, Shizuoka District Court)

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

The purpose of the Grand Design is to provide an overall concept for criminal justice reform that seeks to prevent miscarriages of justice of the many challenges related to criminal justice. The JFBA has made a variety of proposals for the prevention of miscarriages of justice. The Grand Design clarifies the situations that citizens would currently experience at each stage of the procedure when they are suspected of a crime that they did not commit under the current Japanese criminal justice and provides an overview of the JFBA's proposals relating thereto. The proposals included in the Grand Design are summaries of the JFBA's opinion papers and other documents published by the JFBA, and

the full text of each of these has been made available on the JFBA's website.

With regard to criminal justice, the JFBA has been engaged in a variety of important issues, including the prevention of miscarriages of justice, rights of the child, human rights in criminal procedure, toughening and broadening the range of penalties and human rights, human rights of death row inmates, criminal detainees, the convicted and the victims[2]. The JFBA seeks to reform the overall penalties system including abolishing the death penalty system and has declared that it will put its best efforts into realizing this.[3] Due process of criminal procedure must be protected in all cases no matter what the circumstances may be. Even in situations where a penalty is imposed on a person who has committed a crime, restrictions on human rights must be kept to a minimum. This is a matter of course.

The Penal Code and the Code of Criminal Procedure have been repeatedly revised to keep pace with the changing times, but the situation in which the criminal procedures do not conform to the Constitution and international human rights law remains unresolved, and new problems continue to arise one after another within the criminal justice. For this reason, the JFBA continues to hold discussions on system reform. Criminal justice reform for the prevention of miscarriages of justice requires constant efforts. The JFBA will continue to grasp problems in the criminal justice and collect and publish opinions for improvement. This Grand Design will be revised accordingly.

[2] Declaration on Action for Human Rights 2024 (Oct. 2024)
[3] Declaration Calling for Reform of the Penal System Including Abolition of the Death Penalty (Oct. 2016), Basic Propositions on Abolition of the Death Penalty and on Introducing Alternative Punishment and Instituting a Judicial Proceeding System for Commutation (Oct. 2019)

2. Current Situation of Criminal Justice and the JFBA's Proposals

2-1 Interrogation

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

In the "Concluding Observations on the Second Periodic Report of Japan" adopted on May 29, 2013, the United Nations Committee against Torture stated that they were "seriously concerned" regarding the following: "The State party's justice system relies heavily on confessions in practice, which are often obtained while in detention in the *Daiyo Kangoku* (substitute prison) without a lawyer present. The Committee has received reports about ill-treatment while interrogated, such as beating, intimidation, sleep deprivation, and long periods of interrogations without breaks"; "It is not mandatory to have defense counsel present during all interrogations"; "The lack of means for verifying the proper conduct of interrogations of detainees, while in police custody"; "In particular the absence of strict time limits for the duration of consecutive interrogations," and recommended the following: "Establishing rules concerning the length of interrogations, with appropriate sanctions for non-compliance"; "Improving criminal investigation methods to end practices whereby confession is relied on as the primary and central element of proof in criminal prosecution"; "Implementing safeguards such as electronic recordings of the entire interrogation process and ensuring that recordings are made available for use in trials."[4]

The United Nations Human Rights Committee also stated the following in its "Concluding Observations on the Sixth Periodic Report of Japan" adopted on July 23, 2014: "[The] Committee expresses concern at the absence of strict regulations regarding the conduct of interrogations" and "regrets the limited scope of mandatory video recording of interrogations," and calls for the following be guaranteed: "That all suspects are guaranteed the right to counsel from the moment of apprehension and that defense counsel is present during interrogations"; "Legislative measures setting strict time limits for the duration and methods of interrogation, which should be entirely

[4] Pamphlet "Recommendations by the United Nations Committee against Torture to the Japanese Government—Towards Eradication of Inhuman Treatment of People Deprived of Their Liberty—" (Sept. 2013)

video-recorded"; "A complaint review mechanism that is independent of prefectural public safety commissions and has the authority to promptly, impartially and effectively investigate allegations of torture and ill-treatment during interrogation."[5]

The Committee also stated in its "Concluding Observations on the Seventh Periodic Report of Japan" adopted on October 28, 2022 that it is "concerned at reports […] that there continues to be, in practice, a lack of strict regulations regarding the conduct of interrogations and the limited scope of mandatory video recording of interrogations" and called for "ensuring that interrogations are entirely video-recorded, including prior to a formal arrest, and that due consideration is given to applying audiovisual recordings of interrogations in all criminal cases" and "making available a complaints review mechanism, independent of prefectural public safety commissions, with the authority to promptly, impartially and effectively investigate allegations of torture and ill-treatment during interrogation."[6]

2-1-1 Duration and number of interrogations

Interrogation usually takes place behind closed doors in what is called an interrogation room within the police station or the public prosecutor's office. A distinctive feature of the Japanese criminal justice is that interrogation is conducted over an extremely long period of time. Under the current law, there are no strict limitations regarding the duration or number of interrogations, except for the provision stipulating that when police officers conduct interrogations late at night or for more than eight hours a day, they shall obtain approval from the chief of police headquarters or the chief of the police station (Article 168 (3) of the Code of Conduct Concerning Criminal Investigation), and prolonged interrogations may be conducted multiple times over a long period of time. Such interrogation places extensive mental, physical, and financial strain on citizens who have been suspected of committing a criminal offence.

The JFBA proposes to "establish regulations on the continuous duration of interrogations, the number of hours per day, and the time of day during which they are conducted" on the grounds that prolonged interrogations or interrogations that extend into the late hours could make it difficult for suspects to provide accurate and

[5] Pamphlet "Improvements recommended by the Human Rights Committee—Based on consideration of Japan's Sixth Periodic Report" (Aug. 2015)

[6] Pamphlet "Seventh Periodic Report by the Government of Japan, October 2022: Concluding Observations of the United Nations Human Rights Committee Called for Reforms to Human Rights Policies" (Aug. 2023)

appropriate statements due to physical and mental fatigue and places the assurance of the suspects' free will of being interrogated at risk, as well as that investigative methods that exhaust suspects through lengthy interrogations, aiming at obtaining confessions or statements that conform to the investigators' scenario, carry a high risk of resulting in miscarriages of justice (Opinion concerning the Establishment of the New Criminal Justice System (No.1)).

2-1-2 Coerced confessions and statements

During interrogations, the Japanese criminal investigation agency does not conduct interviews from a neutral standpoint but pursues the suspects' admission with regard to the suspected criminal offence. This often leads to the coercion of false statements.

In some of the miscarriages of justice cases revealed in recent years, including the Shibushi case, the Himi case, the Ashikaga case, the Postal Fraud case involving a former Director-General of the Ministry of Health, Labor and Welfare, the Kitakyushu Nail Care case, the Fukawa case, the PC Remote Control Virus case, the Higashi-Sumiyoshi case, the Pressance case and the Hakamada case, it became clear that the criminal investigation agencies have coerced the suspects into making false confessions and statements during interrogations.

Some criminal investigation agencies occasionally assert that the function of interrogation is to encourage the suspect to show signs of self-reflection and remorse. Such an antiquated mindset shows how the criminal investigation agency underestimates the risk of causing miscarriages of justice. Even if a citizen who has not committed a crime (an innocent person) makes a truthful statement, the investigator, assuming that the person must have committed the crime, accuses the person of lying and of showing no sign of regret or remorse, and attempts to obtain admissions of guilt from that person.

The JFBA proposes to "fundamentally reform the current interrogation practice of keeping suspects detained in an interrogation room for long time and obtaining statements from them that match the investigation agency's belief" (Resolution Calling for Fundamentally Reforming the State of Interrogations and Achieving the Audio and Video Recording of the Entire Process of Interrogations in All Cases, as well as Establishing the Right to Have Defense Counsel Present at Interrogations).

2-1-3 Interrogation of suspects who are not under arrest or detention

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

2-1-4 Interrogation of suspects who are under arrest or detention

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

Considering the situation in which suspects are forced to make false confessions due to investigation agencies’s failure to recognize the suspects’ right to refuse interrogations despite the fact that the right to remain silent is guaranteed by the Constitution, coupled with prolonged and inquisitorial interrogations, the JFBA proposes to “clearly stipulate in the Code of Criminal Procedure that suspects under arrest or detention have no obligation to undergo interrogations” in order to prevent miscarriages of justice based

on forced false confessions (Opinion concerning the Establishment of the New Criminal Justice System (No.1)).

2-1-5 Denial of charged facts during interrogation and physical restraints

Citizens who have not committed a crime naturally deny the charge against them precisely because they have not committed any crime. However, this is used against them in judges' decisions on detention and bail. For citizens who have not committed a crime, a lack of knowledge of how long they are going to be held in custody if they continue their denial is a source of enormous emotional distress. This effectively turns into massive pressure, compel them to admit the charge alleged by the criminal investigation agencies.

The Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, which Japan ratified in 1999, prohibits "torture" which is defined as "any act by which severe pain or suffering, whether physical or mental, is intentionally inflicted on a person for such purposes as obtaining from him or a third person information or a confession, ... when such pain or suffering is inflicted by ... a public official or other person acting in an official capacity" (Article 1.1).

In the Postal Fraud case, it has become clear that the "accomplices" signed the written statements which contained false statements following the prosecution's scenario because they could no longer endure the fear and distress from not knowing how long they were going to be held in custody.

2-1-6 Written statements

Investigators make written statements during interrogations, but questions by the investigator and statements by the suspect are rarely transcribed accurately. Investigators make written statements by selecting the matters or expressions to be recorded, changing the nuance of the suspect's statements, and at times they record what the suspect had not stated at all. The written statements made in such a manner are still used as evidence to establish guilt in criminal trials as long as they have the suspects' signatures.

2-1-7 Coercion or inducement of statements to implicate others

Interrogations, in which written statements are made, are conducted not only on the suspect, but also on eyewitnesses, victims, other unsworn witnesses, as well as suspects

considered to be “accomplices”. Statements are prone to errors at each process of perception, recollection, expression, and description and thus are evidence that are liable to change, and confessions that implicate others are sometimes coerced or induced to align with the investigation agency’s narrative. Even if a citizen who has not committed a crime is able to continuously deny the suspicion held by the investigation agency, miscarriages of justice occur as a result of such coerced or induced statements of others. In the Postal Fraud case, it has come to light that while the ex-senior official continued to deny any charge of committing a criminal offence, many others that were involved were made to sign and seal on the written statements containing false statements that followed the prosecutor’s scenario. Similarly, in the Pressance case, the public prosecutor made more effort than necessary to have those concerned feel responsible, which caused strong motivation in them to make untrue statements to escape such responsibility, resulting in making them change their statements. With respect to the Pressance case, a decision was made on August 8, 2024 to submit the criminal case against the prosecutor, who had been in charge of interrogations of a subordinate of the acquitted former company president and was accused of assault and cruelty by specialized public employees (Article 195 (1) of the Penal Code), to the Osaka District Court. The summary of the indicted facts was that the prosecutor had committed acts of physical or mental cruelty against the suspect during the interrogations, such as berating and abusing the suspect unilaterally, often in a loud and harsh tone, for an extended period of time.[7]

2-1-8 Audio and video recording of the interrogation

With the amendment of the Code of Criminal Procedure in 2016, an audio and video recording system of the interrogation process was established. However, the cases subject to this system are limited to cases tried by *saiban-in* (lay judges) (“cases punishable by the death penalty, or life imprisonment with or without work” and “cases punishable by imprisonment with or without work with a limited term of one year or more involving crimes causing death to a person through an intentional criminal act”) and those in which public prosecutors conduct their own investigations (“cases other than those sent or referred by a judicial police officer”) during the interrogation of the detained (Code of Criminal Procedure Article 301-2 (4)). Such cases comprise less than

[7] Comment on the Decision of Submitting the Case of the Prosecutor Charged with Assault and Cruelty by Specialized Public Employees as the Defendant to Trial (September 6, 2024).

three percent of all criminal trials thus leaving mandatory audio and video recording inapplicable to most cases. In addition, the method of filming adopted by criminal investigation agencies is to film the suspect directly from the front, and it has been pointed out that the resulting images of the suspect facing the camera in most cases pose a risk of introducing bias regarding the voluntariness of his/her confession.

Considering that improper interrogations and written statements are primary causes of miscarriages of justice in Japan's criminal justice, the JFBA proposes to "expand the scope of cases covered by the interrogation audiovisual recording system to require the audio and video recording of the entire process of interrogations in all cases, including interrogations of suspects who are not under arrest or detention as well as interviews of witnesses" on the grounds that it is necessary for the prevention of miscarriages of justice to prevent improper interrogations, secure the rights of suspects and prevent false testimonial evidence from being produced, as well as to enable objective verification of the circumstances of interrogations and the progress of statements, and such necessity is not limited to specific cases or cases in which suspects are under arrest or detention (Opinion concerning the Establishment of the New Criminal Justice System (No.1); Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure; Resolution Calling for Fundamentally Reforming the State of Interrogations and Achieving the Audio and Video Recording of the Entire Process of Interrogations in All Cases, as well as Establishing the Right to Have Defense Counsel Present at Interrogations).

Further, in order to impartially evaluate the voluntariness and other factors of statements, recordings should not be made with inappropriate camera angles that could introduce bias. Thus, the JFBA proposes to "change the current method of filming the suspect directly from the front" (Opinion on Camera Angles, etc. When Recording Interrogations).

2-1-9 Exclusion of defense counsel from interrogation

The Constitution guarantees the right to the assistance of defense counsel (Articles 34 and 37 (3)). A citizen who has not committed a crime but is suspected of doing so requires the assistance of defense counsel most during interrogation. Further, since the Constitution also guarantees the right not to be compelled to testify against oneself (Article 38 (1)), it should be prohibited to compel a suspect to make statements during interrogation without the presence of defense counsel when the suspect has requested

such presence. However, in practice, even if the suspect or counsel requests the defense counsel's presence, it is customary for the criminal investigation agency to interrogate without it, thus preventing assistance by defense counsel in interrogations.

In order to substantially guarantee the right not to be compelled to testify against oneself, the JFBA proposes to "restrict the detention of suspects who are expressing their intention not to make statements in an interrogation room and establish the right of suspects to have defense counsel present at interrogations" (Resolution Calling for Fundamentally Reforming the State of Interrogations and Achieving the Audio and Video Recording of the Entire Process of Interrogations in All Cases, as well as Establishing the Right to Have Defense Counsel Present at Interrogations; Opinion Calling for the Establishment by Law of the Right to Have Counsel Present in Interrogations; Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure).

2-1-10 Interrogation of juveniles and persons with intellectual disabilities

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

The JFBA proposes that "interrogations of suspects with intellectual disabilities should be conducted in the presence of a neutral observer independent from the investigation agency who has a sufficient understanding of the nature, degree, and characteristics of the disability, in principle," that "prior to interrogation of suspects with intellectual disabilities, an expert should conduct a full assessment of the suspects' disability so that the interrogator and observer understand the characteristics of the disability as well as statements made by said suspects and take such characteristics into consideration when conducting the interrogation," and that "in order to secure eligible people throughout Japan who can take on the role of observer, those who are in a neutral position and have sufficient understanding of the characteristics of disabilities, a network of community-based volunteer observers should be developed, and personnel and material assistance should be provided to enable sufficient training and

development of qualified observers" (Opinion Concerning Legislating for the Observer's Presence at Interrogations of Intellectually-Challenged Suspects).

2-2 Arrest

Citizens suspected of committing a crime may be arrested by criminal investigation agencies. In 2023, the police or the public prosecutor's office arrested a total of 104,619 persons (excluding cases of negligent driving causing death or injury and violations of the Road Traffic Act).[8] Once arrested, suspects are taken into custody and kept in a police detention facility or detention house for a maximum of seventy two (72) hours. Until their release, they are deprived of liberty, cut off from the outside world with no access to telephones or the internet, and are placed in a situation where their lives are strictly controlled.

The JFBA proposes to "clearly stipulate in the Code of Criminal Procedure that suspects and the accused shall not be detained in principle (the principle of non-detention)" (Opinion concerning the Establishment of the New Criminal Justice System (No.1)).

2-2-1 Judicial review of arrest warrants

Arrests are made based on warrants that judges issue upon request from criminal investigation agencies, except in cases of flagrant offenders. Warrants are issued when there is sufficient probable cause to suspect an offence has been committed by a suspect, and there is a necessity for arrest (Code of Criminal Procedure, Article 199). However, citizens suspected of committing a crime are not allowed to rebut or refute allegations. Suspects can neither file an appeal against the arrest, nor can they review documents used to establish cause and necessity for arrest. In 2023, judges issued 84,841 arrest warrants (98.6%), while only 76 dismissals of arrest warrants were issued (0.1%) (the number of request withdrawals for arrest warrants by criminal investigation agencies

[8] Annual Report of Statistics on Prosecution 2023, "39. Statistics regarding arrested suspects and measures taken after arrest for processed cases within the jurisdictions of the Supreme Public Prosecutors Office, High Public Prosecutors Office, and District Public Prosecutors Office—excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act—"

was 1,150 persons (1.3%)).[9]

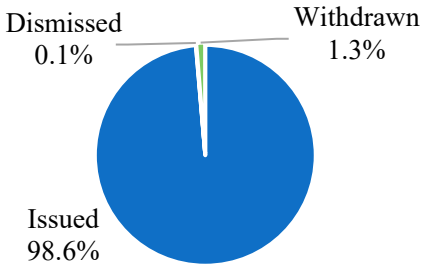
Fig. 2-1 Arrest warrants issued/dismissed/withdrawn (number of persons)

(2023, all courts)

	No. of persons	Proportion
Issued	84,841	98.6%
Dismissed	76	0.1%
Withdrawn	1,150	1.3%

Fig. 2-2 Arrest warrants issued/dismissed/withdrawn (proportion)

(2023, all courts)



With regard to inspection and copying of arrest warrant requests, the JFBA proposes to "make it obligatory to include a list of titles of attached materials in the arrest warrant request and submit a copy of such request and attached materials, which shall be preserved by the judge, and allow the suspect against whom an arrest warrant was executed or his/her counsel to inspect and copy the copy of such request" (Opinion Concerning Overall Augmentation of Records on Procedures in Which Courts Are Involved During Police Investigations), as well as to "develop a system of appeal against arrest (quasi-appeal)" to minimize the instances where innocent citizens are taken into custody (Opinion on the Reform of Detention and Bail Systems).

2-2-2 Arrest warrants

The Code of Criminal Procedure provides that if a suspect is arrested through an arrest warrant, the arrest warrant must be shown to the suspect (Article 201 (1)), but does not require that its copy be delivered to the suspect. It is not easy for an arrested citizen to accurately understand the alleged facts stated in the arrest warrant presented before him/her. This makes it difficult for suspects to communicate the alleged fact to their

[9] Annual Report of Judicial Statistics 2023 Criminal Cases Table 15 "Statistics regarding classification of outcomes of warrant cases and types of warrants—all courts and all high courts, district courts and summary courts"

defense counsel for defense activities to demonstrate their innocence and avoid detention.

The JFBA proposes to "require a public prosecutor or judicial police officer who has arrested a suspect through an arrest warrant or received a suspect arrested through an arrest warrant to immediately deliver a copy of the arrest warrant to the suspect" (Opinion on the Obligation to Deliver Documents in Criminal Procedure).

2-2-3 Inadequacy of the court-appointed defense counsel system

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

The United Nations Committee against Torture stated in its "Concluding Observations on the Second Periodic Report of Japan" adopted on May 29, 2013, that "the Committee deeply regrets that under this system, suspects can be detained in police cells for a period up to twenty three (23) days, with limited access to a lawyer especially during the first seventy two (72) hours of arrest and without the possibility of bail."[10]

As the Constitution provides that "no person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel" and the fact that it is difficult for arrested suspects to appropriately exercise their right of defense without advice from defense counsel, the JFBA proposes to "recognize that all arrested suspects shall have the right to request the

[10] See Note 4 above.

appointment of court-appointed defense counsel" in order to prevent miscarriages of justice (Opinion concerning the Establishment of the New Criminal Justice System (No.3); Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure).

Further, with respect to the instruction of matters concerning the appointment of defense counsel (Article 76 (2), Article 77 (2), Article 203 (3), Article 204 (2) and Article 207 (3) of the Code of Criminal Procedure), the JFBA proposes to provide that "in addition to the instruction that 'the accused may make a request for appointment of a defense counsel specifying an attorney, a legal professional corporation or a bar association, and the person to which the request must be made', it must be also instructed that 'such request for the appointment of defense counsel to a bar association may be made regardless of the personal financial resources of the suspect or the accused'" (Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure).

2-2-4 Interviews and communication with defense counsel

The first interview with counsel immediately after an arrest is the first opportunity for the suspect in custody to receive advice from defense counsel and constitutes the starting point of the constitutional guarantee, and thus it is particularly important for the suspect to have a prompt interview to prepare for his/her defense. However, many of those arrested are not able to "immediately" receive the assistance of counsel. Being pressured by the investigation agency to give statements without advice from defense counsel makes it difficult for suspects to exercise their legitimate rights and is causing miscarriages of justice due to false statements.

The JFBA proposes that "there should be a guarantee of the opportunity for an arrested suspect to obtain advice from a defense attorney before he/she undergoes an interrogation, and if such suspect has made such request, he/she should be able to meet such defense attorney prior to the interrogation" (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

In addition, the JFBA proposes to "enhance the right of access to counsel and communication, including the exchange of electronic data using online platforms" to ensure that suspects are able to receive the assistance of counsel "immediately" after being taken into custody (Opinion Calling for Digitalization of Criminal Procedure to Protect and Realize Citizens' Rights).

2-3 Detention of suspects

Citizens suspected of committing a crime may be detained based on a detention warrant issued by a judge upon request from a public prosecutor. Once detained, suspects have no choice but to face interrogation for ten (10) days as a general rule under the Code of Criminal Procedure, or up to twenty (20) days if the detention period is extended, while being deprived of liberty, access to the outside world, and the liberty to live without being strictly monitored.

With regard to detention of suspects, in the "Concluding Observations on the Second Periodic Report of Japan" adopted on May 29, 2013, the United Nations Committee against Torture stated that "[it] regrets that … suspects can be detained … for a period up to 23 days, … without the possibility of bail," "the lack of effective judicial control over pretrial detention in police cells and the lack of an independent and effective inspection and complaints mechanism are also a matter of serious concern," and "[it] regrets the position of the State party that the abolition or reform of the pretrial detention system is unnecessary."[11]

The United Nations Human Rights Committee also stated in its "Concluding Observations on the Sixth Periodic Report of Japan" adopted on July 2023, 2014 that "the Committee regrets that the State party continues to justify the use of the *Daiyo Kangoku* by citing the lack of available resources and the efficiency of the system for criminal investigations. The Committee remains concerned that the absence of an entitlement to bail or a right to State-appointed counsel prior to the indictment reinforces the risk of extracting forced confessions in *Daiyo Kangoku*," and calls for "alternatives to detention, such as bail, be duly considered during pre-indictment detention."[12]

Similarly, in its "Concluding Observations on the Seventh Periodic Report of Japan" adopted on October 28, 2022, it expressed concern about "the lack of entitlement to bail and of respect for the right to State-appointed counsel from the outset of deprivation of liberty, and that the State party has expressed that a pre-indictment bail system is unnecessary," "that individuals are held in pretrial detention for periods exceeding those prescribed in domestic law, with a high acceptance rate of requests for extension and re-extension of detention," and "the conditions of detention, especially the use of

[11] See Note 4 above.
[12] See Note 5 above.

prolonged solitary confinement and the lack of access to adequate medical services for detainees, the denial of procedural guarantees such as access to counsel and contact with family, and the denial of the right to vote," and calls for "ensuring that prescribed periods of pretrial detention are respected to prevent excessive periods of detention," "ensuring that non-custodial alternatives to detention such as bail, are duly considered during pre-indictment detention," and "reviewing the total length of permissible solitary confinement for remand detainees, even if it is used as a measure of last resort, and regularly evaluating the effects of solitary confinement, with a view to further reducing it and developing alternative measures where necessary. "[13]

As the alternative measure to detention, the JFBA proposes that "when there is a probable cause to suspect that the accused or suspect has committed a crime, and there is a probable cause to suspect that he/she may conceal or destroy evidence, or he/she has fled or there is a probable cause to suspect that he/she may flee, the court (judge) may issue against the accused or suspect an order restricting his/her residence, prohibiting contact with the victim or any other person deemed to have knowledge necessary for the trial of the case or their relatives, prohibiting entry into specific places, and/or any other order necessary to prevent the concealment or destruction of evidence or escape (order to restrict residence, etc.) for a specified period not exceeding two months," as well as that "when there is a probable cause to suspect that the accused or suspect has committed a crime, the court (judge) may detain such person only when he/she has violated an order to restrict residence, etc., or has failed to comply with such order and there is a probable cause to suspect that he/she may conceal or destroy evidence or there is a probable cause to suspect that he/she may flee" (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

2-3-1 Judicial reviews of detention warrants

Detention warrants are issued when sufficient probable cause exists to suspect that an offence has been committed by a suspect, "the accused has no fixed residence", "there is probable cause to suspect that the accused may conceal or destroy evidence", or "the accused has fled or there is probable cause to suspect that the accused may flee" (Code

[13] See Note 6 above.

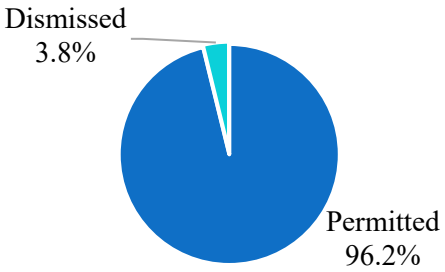
of Criminal Procedure, Article 207(1), 60(1)). When judges make decisions regarding detention, they hold a hearing to inform suspects of the charge against them and to hear their statements (hearing prior to detention) (the Code of Criminal Procedure Article 207(1), Article 61). However, such proceedings are held without counsel's presence. Suspects do not have the right to review the material that forms the grounds for the detention.

In 2023, the number of arrested suspects for whom judges issued detention warrants upon requests from the public prosecutors was 89,424 persons (96.2%), while judges dismissed detention requests for only 3,548 persons (3.8%) (excluding cases of negligent driving causing death or injury and violations of the Road Traffic Act).[14]

Fig. 3-1 Detention permitted/dismissed
(No. of persons)
(2023, all Public Prosecutor's Offices)

	No. of persons	Proportion
Permitted	89,424	96.2%
Dismissed	3,548	3.8%

Fig. 3-2 Detention permitted/dismissed
(Proportion)
(2023, all Public Prosecutor's Offices)



The JFBA proposes to expressly stipulate that, "for making judgments relating to detention, consideration must be given to the seriousness of the crime committed, and the degree of disadvantage which may be caused to such suspect or the accused in terms of his/her defense as well as social life resulting from not being released (proportionality principle)" (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

Further, with regard to judicial reviews of detention warrants, the JFBA proposes to "make it obligatory to include a list of titles of attached materials in the detention

[14] Annual Report of Statistics on Prosecution 2023 "39. Statistics regarding suspects arrested and measures taken after arrest for processed cases within the jurisdictions of the Supreme Public Prosecutors Office, High Public Prosecutors Office, and District Public Prosecutors Office—excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act—"

warrant request and submit a copy of such request and attached materials, which shall be preserved by the judge, and allow the suspect against whom a detention warrant was executed or his/her counsel to inspect and copy the copy of such request" (Opinion Concerning Overall Augmentation of Records on Procedures in Which Courts Are Involved During Police Investigations), as well as to "allow the defense counsel to attend judge's questioning prior to detention and provide their opinion" (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

2-3-2 Detention warrants

The Code of Criminal Procedure does not stipulate that a copy of the detention warrant must be automatically provided to suspects and their defense counsel. This, along with the fact that a copy of the arrest warrant is not provided, makes it difficult for suspects and their counsel to promptly grasp the alleged facts accurately and carry out defense activities to demonstrate their innocence.

The JFBA proposes that "when detaining a suspect or extending the detention period, the judge should deliver a copy of the detention warrant to the suspect, and if defense counsel is appointed for the suspect, deliver a copy of the detention warrant to the defense counsel" (Opinion on the Obligation to Deliver Documents in Criminal Procedure).

2-3-3 Reversal of the principle and exceptions in the extension of detention period

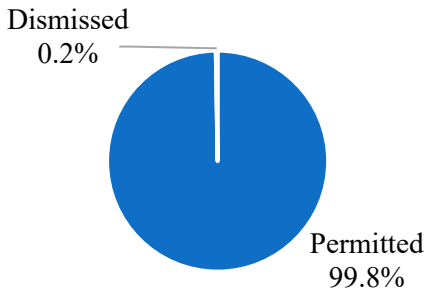
The Code of Criminal Procedure provides that the detention period for suspects be ten (10) days in principle, but when "unavoidable circumstances" exist, the detention period can be extended upon request from a public prosecutor. In 2023, of the total number of suspects detained (89,444), the extension of the detention period was requested for 62,235 persons (69.6%) (excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act). Upon receiving such requests, judges granted the extension of the detention period for 62,080 persons

(99.8%), while dismissing the request for only 155 persons (0.2%)[15], thus the principle and exceptions are reversed in practice.

Fig. 4-1 Extension of detention permitted/dismissed (no. of persons) (2023, all Public Prosecutor's Offices)

	No. of persons	Proportion
Permitted	62,080	99.8%
Dismissed	155	0.2%

Fig. 4-2 Extension of detention permitted/dismissed (proportion) (2023, all Public Prosecutor's Offices)



2-3-4 Detention of juveniles

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

On the other hand, situations arise where no attendant is appointed for juveniles under protective detention due to the fact that cases covered by the court-appointed attendant system is limited to those involving "crimes punishable by the death penalty, life imprisonment, or imprisonment for more than three years." The JFBA proposes to "immediately establish a system that allows a family court to appoint a court-appointed attendant for all juveniles who have been referred to a juvenile classification home and are under protective detention, if the family court deems it necessary or it is requested by such juveniles or their guardians," and further to "promptly consider establishing a system of mandatory appointment of a

[15] Annual Report of Statistics on Prosecution 2023 "40. Statistics regarding the number of suspects according to measures taken after detention, according to detention period and permission/dismissal of extension of detention period for processed cases within the jurisdictions of the Supreme Public Prosecutors Office, High Public Prosecutors Office, and District Public Prosecutors Office—excluding cases involving allegations of death or injury by automobiles through negligence and violations of the Road Traffic Act—"

court-appointed attendant for all juveniles who have been referred to a juvenile classification home and are under protective detention" (Opinion Calling for Early Realization of a Full-Scale Court-Appointed Attendee System).

2-3-5 Prolonged detention of suspects who deny charges

Detention, which keeps suspects in custody for ten (10) days or more, deprives suspects of liberty and access to the outside world. Having one's life strictly monitored, imposes a mental, physical and economic burden on citizens suspected of committing a crime. Furthermore, if citizens who have not committed a crime deny any allegation of committing a criminal offence because they have not done so, they are treated disadvantageously when judges decide on detention or extension of the detention period, due to fears of flight or concealment of evidence. Such practice functions as a means to force suspects to accept the criminal investigation agency's assumption that a crime has been committed in return for freedom, thus violating human rights— particularly of citizens who have not committed a crime.

The JFBA proposes to expressly stipulate that "for trials relating to detention, in light of the right of defense of suspects and accused, the following facts should not be considered unfavorable to such suspects or accused: i) that they have denied the charged or indicted facts against them, ii) that they have refused to be interrogated or make a statement, and iii) that they have refused to agree to provide evidence requested by prosecutors (prohibition of disadvantageous treatment due to denial or remaining silent)" (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

2-3-6 Filing of appeals and limitations on bail

Appeals (quasi-appeal) may be filed against a judicial decision for detention, but the Code of Criminal Procedure has a provision that provides that "an appeal against detention may not be filed on the grounds that there is no suspicion that a crime has been committed" (Article 420(3)). Proviso to Article 207(1) of the Code of Criminal Procedure provides that bail is not allowed until indicted.

The JFBA proposes to "delete Article 429 (2) of the Code of Criminal Procedure and clearly stipulate that an appeal against a detention decision by a judge may be filed on the grounds that there is no suspicion of criminal activity (i.e., there is no probable cause to suspect that a crime has been committed)" (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

In addition, it proposes to "delete the Proviso to Article 207 (1) of the Code of Criminal Procedure and make it possible to grant bail prior to the indictment" on the grounds that, in order to prevent the deprivation of freedom of innocent people and the use of physical restraint as a means to coerce confession, physical restraints should only be imposed when it is truly necessary to prevent the concealment of evidence or escape, and that physical restraint should be avoided if they can be prevented by requiring a payment of bail (Opinion concerning the Establishment of the New Criminal Justice System (No.3)).

2-3-7 Practice of disclosure of grounds for detention

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

2-3-8 Detention in Daiyo Kangoku (substitute prison) and limitations to defense counsel's interviews in detention house

Under the Code of Criminal Procedure, a detained suspect shall be taken into a detention house or other penal institution (Article 64). However, most detained suspects are taken into a police detention facility (*Daiyo Kangoku*, or substitute prison), where they have their lives monitored by the police and have no choice but to be interrogated. Hardly any other country allows police to detain citizens for such a lengthy period. Under the *Daiyo Kangoku* system, suspects are detained in a detention space within a police facility, and thus forced to undergo interrogations while their lives are under control of the police. Therefore, the JFBA proposes that "detained suspects should be held in a detention house which is not a police facility" (Declaration on Action for Human Rights 2024).

On the other hand, detention houses limit defense counsel's interviews during the evening and on holidays, creating situations in which suspects are unable to have sufficient interview time with defense counsel.

The JFBA proposes that "it should be made possible to have the defense counsel's first interview with suspects at any time in principle, including holidays and late at night," as well as that "it should be made possible to have subsequent interviews with suspects

and interviews with accuseds from 8:00 am to 10:00 pm in principle, including holidays" (JFBA's Proposal Aiming for Fundamental Reform of the Pretrial Detention System).

2-3-9 Violation of the right to confidential communication and interview

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

The JFBA proposes that "it should be made clear that an act by a public prosecutor or police officer of inquiring during the interrogation about the content of a suspect's interview with his/her defense counsel violates the suspect's right to interviews and confidential communication and hinders defense activities, and thus shall not be permitted" (Opinion concerning the Establishment of the Right to Interviews and Confidential Communication), as well as that "restrictions and inspections of photography and audio recording conducted inside interview rooms by defense counsel must be abolished, and notices restricting such acts should be immediately removed" (Opinion concerning photography (including Video Recording) and Audio Recording in the Interview Room).

2-3-10 Prohibition of visitations with persons other than counsel

Detained suspects may be prohibited by a court decision from having visitations or exchanging documents or other articles with persons other than counsel (prohibition of visitations). The prohibition of visitations isolates detained citizens, and also places a heavy mental burden. In 2023, the number of decisions prohibiting visitations was 41,325, with the rate of decisions prohibiting visitations (the proportion of the number of decisions prohibiting visitations to the number of detention warrants issued) being 43.3%.[16]

[16] Annual Report of Judicial Statistics 2023 Criminal Cases Table 15 "Statistics regarding classification of outcomes of warrant cases and types of warrants—all courts and all high courts, district courts and summary courts" and Table 17 "Number of new acceptances by type in criminal miscellaneous cases― all courts and the Supreme Court, all high, district and summary courts"

2-3-11 Limitations on the number of defense counsel

The Rules of Criminal Procedure stipulate that the number of defense counsels for a suspect must not exceed three persons unless the court grants permission due to special circumstances (Article 27 (1) of the Rules of Criminal Procedure). Further, in the case of court-appointed counsel, it is limited to one person, except where the judge deems it particularly necessary to add another counsel in a "case punishable by the death penalty or life imprisonment with or without work" (Article 37-5 of the Code of Criminal Procedure). Such restrictions on the number of defense counsels make it difficult for the suspect to have sufficient interviews with counsel and receive advice in complex cases. The JFBA proposes to "abolish the restriction on the number of defense counsels to the maximum of three" (Declaration on Action for Human Rights 2024), and to "amend Article 37-5 of the Code of Criminal Procedure to allow the appointment of as many court-appointed defense counsels as required without putting limitations on covered cases" (Opinion concerning the Multiple Appointment System of Court-Appointed Defense Counsels).

2-4 Prosecution

Citizens suspected of committing a crime may be prosecuted and may face a criminal trial if a public prosecutor deems it necessary to do so. In 2023, the total number of persons processed by the Public Prosecutor's Office was 639,432, out of which the number of persons indicted by the public prosecutor was 141,878 (22.2%), while 397,689 persons (62.2%) were not prosecuted (excluding cases involving alleged violations of the Road Traffic Act)[17]

2-4-1 Reasons for non-prosecution

Non-prosecution includes a case that "does not constitute a crime" (alleged facts of the crime do not fulfill the requirements of a crime, or it is clear from the evidence that there are reasons preventing the establishment of a crime), a case in which there is "no suspicion" (it is clear that the suspect is not the perpetrator of the alleged facts of the crime, or it is clear that there is no evidence to establish the crime), or a case in which

[17] Annual Report of Statistics on Prosecution 2023 "6. Number of accepted alleged cases, number of persons processed and pending by each Public Prosecutor's Office—excluding cases involving alleged violations of the Road Traffic Act—"

there is “insufficient suspicion” (there is insufficient evidence for the alleged facts of the crime to establish the crime), as well as a case of “suspended prosecution” (in circumstances where the alleged facts of the crime are clear, but the personality, age and circumstances of the suspect, the gravity and circumstances of the offence, and the situation after the crime do not necessitate prosecution). In 2023, out of non-prosecution decisions made by public prosecutors, 341,561 persons (85.9%) were given suspended prosecution, and 40,255 persons (10.1%) were cleared due to insufficient suspicion. Citizens who have been suspected of committing a crime by a criminal investigation agency, have been arrested and have been detained, but then are not prosecuted can receive criminal compensation only when the disposition falls under “does not constitute a crime” or “no suspicion,” as well as “when there are sufficient grounds to believe that the person did not commit the crime” (Regulations for Suspect’s Compensation, Article 4). There are no processes in place to dispute non-prosecution when citizens who have not committed a crime are found to come under “suspended prosecution” or “insufficient suspicion”.

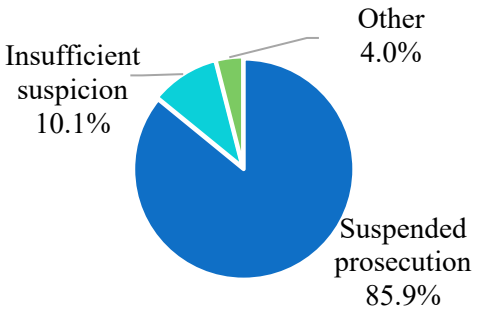
Fig. 5-1 Number of persons by type of non-prosecution

(2023, all Public Prosecutor's Offices)

	No. of persons	Proportion
Suspended prosecution	341,561	85.9%
Insufficient suspicion	40,255	10.1%
Other	15,873	4.0%

Fig. 5-2 Proportion by type of non-prosecution

(2023, all Public Prosecutor's Offices)



2-4-2 Non-prosecution of “accomplices”

In accomplice cases, there is a danger of the alleged accomplice giving false statements in line with the criminal investigation agency’s prepared scenario in order to pass on or mitigate one’s own liability. In criminal trials of conspiracy cases, “accomplices” who have avoided prosecution often give witness testimony as requested by the public prosecutor or alternatively, their records of statements may be requested as evidence by the public prosecutor, and their statements may form the basis for a conviction. By

offering non-prosecution in exchange for making an inculpatory statement, there is a great risk that alleged accomplices—citizens who have not committed a crime—will be implicated in the miscarriage of justice. In the Postal Fraud case involving a former Director-General of the Ministry of Health, Labor and Welfare, it has been revealed that multiple "accomplices" who avoided prosecution signed and sealed false statements that followed the scenario created by the public prosecutor.

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

2-5 Detention of the accused and bail

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

2-5-1 The system of revocation of detention has no substance

The Code of Criminal Procedure provides that when the grounds or the necessity for detention no longer exist, the detention must be revoked (Article 87). Being prosecuted means that the public prosecutor has collected enough evidence to bring the charge, and the investigation is temporarily concluded. Thus, the grounds and need for detention would have substantially changed. However, in practice, the court rarely revokes detention. In 2023, the number of the accused to whom a detention warrant was issued before final judgment was 41,857 persons, while the number of those who had their detention revoked in accordance with Article 87 of the Code of Criminal Procedure either by request or ex officio was only 186 persons (0.4%). Further, the Code of Criminal Procedure also states that when confinement through detention has been unduly long, the court must either revoke detention or grant bail (Article 91). However, in 2023, the number of persons for whom the court revoked detention based on this

Article was zero.[18]

Fig 6. Number of the accused for whom detention warrant was issued/detention was revoked

(2023, all courts)

			No. of persons	Proportion
The accused for whom detention warrant was issued before final judgement			41,857	-
The accused for whom detention was revoked before final judgement	Code of Criminal Procedure Art 87	Request	117	0.3%
		Ex officio	69	0.2%
	Code of Criminal Procedure Art 91		0	0.0%

2-5-2 Limitations on the detention period have no substance

The Code of Criminal Procedure stipulates that the period of detention is two months from the date of institution of prosecution, in principle, and "when it is especially necessary to continue the detention," it may be extended for additional one-month periods by "a ruling with a specific reason," but such extension is allowed only once, except in cases where an exception applies (Article 60 (2)). However, in practice, it is extremely rare for the accused to be released as a result of non-extension of detention. Thus, limitations on the period of detention have no substance.

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

2-5-3 Prohibition of visitations with those other than counsel

Prohibition of visitations with persons other than defense counsel may continue even after prosecution. In cases where the accused denies the indicted facts, it is not uncommon that the prohibition of visitations is continued, and this isolates innocent citizens and imposes significant psychological burden on them.

[18] Annual Report of Judicial Statistics 2023 Criminal Cases Table 16 "Number of persons by process related to detention/bail and before/after final judgment: All courts and the Supreme Court, all high courts, district courts and summary courts"

2-5-4 Reversal of the principle and exceptions in the practice of bail

According to Article 89 of the Code of Criminal Procedure, "the request for bail must be granted, except in the following circumstances," stating that the principle under the law is to grant bail. However, due to the court's operation of broadly construing "probable cause to suspect that the accused may conceal or destroy evidence" (item (iv)), the principle and exception under the law have been reversed in practice.

Considering that the provision of mandatory bail has lost substance because of Article 89 (iv) which stipulates exceptions of mandatory bail using the same wording as the requirements of detention (Article 60 (1) (ii)), causing the situation where the principle and exceptions are reversed, the JFBA proposes to "delete Article 89 (iv) of the Code of Criminal Procedure" (Opinion concerning the Establishment of the New Criminal Justice System (No.3); Opinion Calling for Eliminating Hostage Justice).

Further, the JFBA proposes to consider "an electronic monitoring system and a house arrest system that impose the minimum restrictions only when necessary as types of alternative measures that are less restrictive than custody" on the premise that hostage justice will be eliminated and a bail practice in which the accused is released in principle will be in place. (Opinion Calling for Eliminating Hostage Justice).

2-5-5 Prolonged detention of the accused who claims not guilty

In practice, the fact that the accused is denying any charge of committing a criminal offence is used to establish that there is a "probable cause to suspect that the accused may conceal or destroy evidence." This is used as grounds to dismiss requests for bail. As a result, this has created a situation where if an innocent citizen who has not committed a crime denies any charge of committing a criminal offence precisely because he/she has not committed it, such denial is used as grounds for long-term custody.

In the Postal Fraud case involving a former Director-General of the Ministry of Health, Labor and Welfare, of the four persons charged, three who had signed and sealed false statements in line with the public prosecutor's scenario were quickly granted bail after being indicted. Meanwhile, for the former Director-General, who continued to deny any charges of committing a criminal offence because she had not committed any crime, it took more than four months after the charge until bail was finally granted. During this time, the public prosecutor kept opposing to the bail arguing that there was a probable

cause to suspect that the accused may conceal or destroy evidence, and the court dismissed the request for bail for several times accepting such public prosecutor's arguments. In the Ohkawara Kakohki case, the public prosecutor submitted an opposition against bail, on the grounds that the accused persons were keeping silent, stating that there was a high risk that the accused would try to conceal or destroy evidence by coordinating their story with accomplices and employees of the accused company, and the request for bail was repeatedly dismissed. One of the accused appealed that he had fallen ill during the detention and had a blood transfusion in the detention house and that he was suffering from progressive stomach cancer and needed an operation, but the court did not grant him bail. He was eventually admitted to a hospital as a stay of execution of detention but died after that. Requests for bail by the other accused persons also continued to be dismissed on the grounds that they might coordinate their story, and it was about ten (10) months after the indictment that bail was granted to them. Similarly, in the Pressance case, requests for bail by the accused who claimed not guilty continued to be dismissed and it took two hundred and forty eight (248) days until bail was granted.

In 2023, the bail rate in the first instance at district courts was 33.7% in cases where the accused pleaded guilty (i.e. confession cases), while it was 25.8% in cases where the accused pleaded not guilty (i.e. denial cases) , which means that bail is exceptional in both situations. In terms of the bail rate by the time, the rate of bail granted prior to the first trial date was 26.5% in confession cases, while it was 11.7% in denial cases. In terms of the bail rate by the length of detention, the rate of bail granted within fifteen (15) days of the indictment was 18.7% in confession cases, while it was 6.6% in denial cases. When it comes to the rate of bail granted within one month of indictment, it was 23.4% in confession cases while it was 8.3% in denial cases. Thus, around 90% of the accused who pleads not guilty has not been released on bail for more than one month after the indictment and face the first trial date without bail.[19]

Such implementation of bail particularly violates the human rights of persons who have not committed a crime, hampers their preparation of the trial, and prevents a fair trial. Not only that, the prospect of lengthy custody due to the accused's denial of the criminal

[19] Judicial statistics provided by the Supreme Court to the JFBA, "The time when bail is granted for those who have been released on bail of the persons (finalized) in ordinary first instances (district courts) 2023" "Length of detention for those who have been released on bail of the persons (finalized) in ordinary first instances (district courts) 2023"

investigation agency's charge is used as a means of coercing false statements. In the 2016 amendments to the Code of Criminal Procedure, the Judicial Affairs Committees of both houses of the Diet adopted the additional resolution calling for extra consideration so that "dissemination efforts should be made to ensure that practice is in line with the purpose of the Code, which means that, in considering bail, the following factors should not be overvalued for unfairly disadvantageous treatment: 1) the accused does not make a statement admitting the charged facts, 2) the accused remains silent, or 3) the accused does not agree as per Article 326 of the Code of Criminal Procedure regarding evidence for examination requested by the public prosecutor."

The JFBA proposes to "expressly stipulate in the Code of Criminal Procedure that when making judicial decisions on bail, in light of the accused's right to a defense, the fact that they deny the commission of the alleged crime, refuse to undergo interrogation or make statements, or challenge the evidence tendered by the prosecution, must not be taken into consideration to the accused's disadvantage" (Opinion concerning the Establishment of the New Criminal Justice System (No.3); Opinion Calling for Eliminating Hostage Justice).

2-5-6 Handcuffs and waist ropes used on detained accuseds when entering and leaving the courtroom

When a detained accused appears on a trial date, he/she is brought into the courtroom wearing handcuffs and waist ropes, kept waiting that way until the presiding judge orders to undo them, and taken out of the courtroom also wearing handcuffs and waist ropes after the trial. In *saiban-in* (lay judge) trials, measures are implemented in practice to ensure that the handcuffs and waist ropes are not visible to the lay judges, but otherwise, the accused in the state of being handcuffed and waist-roped is exposed to the eyes of persons related to the trial and courtroom attendees. Such practice significantly infringes on the accused's personal rights to be presumed innocent.[20]

2-6 First instance

2-6-1 Insufficient disclosure of evidence

Citizens who have not committed a crime do not have any power to exercise the

[20] "Resolution Calling for the Cessation of Using Handcuffs and Waist Ropes on the Suspect and the Accused While Entering and Leaving the Courtroom in Criminal Trials" (October 4, 2024)

enforcement of the collection of evidence to establish their innocence for the upcoming criminal trial. On the other hand, the criminal investigation agency may search for and seize articles of evidence. It also has a large amount of evidence including those collected by exercising their enforcing powers such as taking people into custody. However, public prosecutors submit to the court only evidence that they deem necessary and may request the examination of such evidence in a trial. Under the current Code of Criminal Procedure, public prosecutors are also not obligated to disclose all evidence to the accused or the defense counsel.

The 2004 amendment of the Code of Criminal Procedure introduced the systems of pretrial and inter-trial arrangement proceedings for the purpose of arranging issues and evidence. In cases subject to these proceedings, public prosecutors are obligated to disclose evidence falling into the prescribed categories necessary for evaluating the probative value of the evidence in the case-in-chief (Categorized Evidence), and evidence deemed related to the allegations by the accused (Allegation-Related Evidence) upon request from the accused or the defense counsel. However, as part of the disclosure procedure, it is required that the accused or his/her defense counsel makes the request by clearly indicating sufficient particulars to identify the evidence requested to be disclosed and reasons for which such disclosure is necessary for the preparation of the defense. Consequently, the following process is repeated numerous times: (i) after receiving the disclosure of evidence for examination requested by the public prosecutor, the accused or the defense counsel files a request for the disclosure of categorized evidence by clearly indicating the aforesaid matters; (ii) the public prosecutor assesses and responds whether the requirements are met; (iii) the accused or the defense counsel reveals allegations planned to be put forth and files a request for the disclosure of allegation-related evidence by clearly indicating the aforesaid matters; and (iv) the public prosecutor assesses and responds whether the requirements are met. In addition, it may take several weeks to several months to copy evidence. As a result, it can take several months to several years for the accused or the defense counsel to receive the disclosure of evidence necessary for the preparation of the defense, resulting in a situation in which the right of the accused to a speedy trial is violated.

The 2016 amendment of the Code of Criminal Procedure has also made it obligatory to deliver a list of evidence stored by the public prosecutor upon request from the accused or the defense counsel. However, the headings in the list of documentary evidence delivered by the public prosecutor often state only the primary heading such as

"investigation report." It can hardly be said that the information required by defense counsel to identify the evidence is sufficiently described. In 2023, of the total 46,400 persons (finalized, i.e. number of persons included in all finalized cases within a particular fiscal year) in ordinary first instance cases (i.e. first instance cases excluding summary procedure cases), 1,004 persons (2.2%) were placed in pretrial arrangement proceedings, and 118 persons (0.3%) were placed in inter-trial arrangement proceedings.[21] With cases that are not placed in pretrial arrangement proceedings or inter-trial arrangement proceedings, there is no obligation to disclose evidence or to deliver a list. Operationally, the public prosecutor generally refuses to deliver the list of evidence.

Fig. 7 Number of accused placed in pretrial/inter-trial arrangement proceedings

(2023, total number of district and summary courts)

	No. of persons	Proportion
Total persons (finalized)	46,400	-
of which the accused was placed in pretrial arrangement proceedings	1,004	2.2%
of which the accused was placed in inter-trial arrangement proceedings	118	0.3%

Even if the criminal investigation agency is in possession of evidence that would establish the innocence of the accused, such evidence may not be disclosed to the accused or the defense counsel, resulting in miscarriages of justice. With each of the Himi case, the Fukawa case, the murder case of Tokyo Electric Power Company's female employee, the Osaka rape case with false testimony, the Higashi-Sumiyoshi case, the Koto Memorial Hospital case, and the Hakamada case, it has become clear that despite the existence of evidence pointing to innocence, such evidence has not been disclosed. Had all the evidence been disclosed to the accused or the defense counsel from the outset, it is highly likely that the erroneous convictions would not have occurred.

Considering that disclosure of evidence to the accused or the defense counsel should be

[21] Annual Report of Judicial Statistics 2023 Criminal Cases Table 39 "Total number of persons (finalized) in ordinary first instance cases: By implementation status of pretrial arrangement proceedings and inter-trial arrangement proceedings and by panel, single judge, and degree of confession: All district court and summary courts"

made not only for cases subject to pretrial arrangement proceedings, etc., but for all cases, and that all evidence should be disclosed, in principle, in order to avoid cases where punishment is inflicted based on factual errors as a result of evidence in favor of the accused being concealed, the JFBA proposes that "the public prosecutor should provide an opportunity for the accused and the defense counsel to inspect and copy all evidence prepared or obtained through the investigation process of the case soon after the institution of prosecution," that "the public prosecutor should be entitled to request a court decision to exempt the obligation to disclose specific evidence, or specify the timing or method of its disclosure or attach conditions thereto, if there is a concrete and realistic risk that the disclosure of such evidence would jeopardize vital national interests or the life or physical safety of individuals," and that "the court should be entitled to grant such exemption from the disclosure obligation only when the above-mentioned risks are recognized and it is deemed unnecessary to disclose such evidence for the preparation of the defense of the accused" (Opinion concerning the Establishment of the New Criminal Justice System (No.2)).

Further, even assuming the basic framework of the current evidence disclosure system, in light of the operational situation where the right to a speedy trial is being infringed, the JFBA proposes to revise the current system so that "upon a request from the accused or the defense counsel on the grounds that there is a dispute regarding the charged facts, the court must refer the case to pretrial proceedings before the first trial date," and "the public prosecutor must disclose evidence in principle, except for (i) evidence that is relevant neither to the probative value of the evidence for examination requested by the public prosecutor nor to the allegations of the accused, and (ii) evidence that is not deemed appropriate to disclose, considering the degree of necessity for disclosure for the preparation of the defense of the accused and the nature and extent of potential harm that may arise from such disclosure, for which the disclosure obligation shall be exempted" (Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure), and also to "realize the right to defense and the right to a speedy trial through the digitalization of evidence disclosure" (Opinion Calling for Digitalization of Criminal Procedure to Protect and Realize Citizens' Rights).

Furthermore, with regard to records of criminal investigation that form the basis for evidence disclosure, the JFBA proposes that "public prosecutors, public prosecutors'

assistant officers and judicial police officials must make “records of criminal investigations” (the origin of the investigation, the basic investigation policy and matters relating to the materials collected, etc.) of the entire process of criminal investigations and a list of such records, and when referring the case to the public prosecutor, judicial police officials must send the list of the records of criminal investigations” (Opinion Calling for Legislation of a Law Concerning Records of Criminal Investigations).

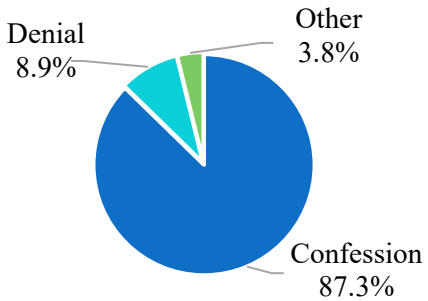
2-6-2 Proceedings that are not differentiated depending on whether there is a dispute

The current Code of Criminal Procedure does not differentiate case proceedings depending on whether the accused is pleading guilty or not guilty. The accused who has not committed a crime and plead not guilty, and those who have pleaded guilty and have received sentencing, go through the same criminal trial proceedings. In 2023, of the total 46,400 persons (finalized) in ordinary first instance cases, those who pleaded guilty comprised 40,503 persons (87.3%), and those who pleaded not guilty comprised 4,113 persons (8.9%).[22]

Fig. 8-1 The proportion of those who pleaded guilty vs not guilty
(2023, total number of district and summary courts)

	No. of persons	Proportion
Total persons (finalized)	46,400	-
Guilty plead	40,503	87.3%
Not guilty plead	4,113	8.9%
Other	1,784	3.8%

Fig. 8-2 The proportion of those who pleaded guilty vs not guilty
(2023, total number of district and summary courts)



2-6-3 Trials in which the determination of guilt or innocence and the sentencing are not separated

Under the current Code of Criminal Procedure, trials for guilty or not guilty decisions

[22] See No.21 above.

and those for sentencing are not clearly separated. For this reason, even when a citizen who has not committed a crime pleads not guilty, the "victim" attends the proceedings to present their opinions, and evidence regarding previous convictions is examined for sentencing.

The JFBA proposes to "introduce a system of separation of procedures, under which the procedures for determining the existence or non-existence of the indicted facts and procedures for sentencing are separated in cases where there is a dispute over indicted facts, in order to ensure that the existence or non-existence of the indicted facts is determined based only on relevant evidence, and assessment of sentencing is performed only when the accused has been found guilty" (Opinion concerning the Establishment of the New Criminal Justice System (No.2)).

2-6-4 Saiban-in (lay judge) trials

A panel comprising of three judges and six *saiban-in* (lay judges) appointed from the public makes judicial decisions on "cases punishable by the death penalty or life imprisonment with or without work," and "cases set out in Article 26(2)(ii) of the Court Act regarding crimes causing death to a person due to an intentional criminal act." Other cases are decided by one or three professional judges only. In 2023, of the total 46,400 persons (finalized) in ordinary first instance cases, the total number of persons (finalized) in *saiban-in* trials comprised 807 (1.7%).[23]

The JFBA proposes to "expand the scope of cases subject to the *saiban-in* (lay judge) system so that cases where indicted facts are disputed and a request has been made by the accused or the defense counsel will be handled by a panel with lay judges' participation" (Opinion on the Criminal Trial Procedures in Which Lay Judges Participate).

Further, in order to improve the *saiban-in* system so that the *saiban-in* can participate more proactively and substantively, the JFBA proposes that "a judge who presides over pretrial arrangement proceedings shall not be a member of the court in charge of the case," that "the presiding judge shall be required to explain to the *saiban-in* that judges and *saiban-in* stand on an equal footing in the 'fact finding',

[23] Annual Report of Judicial Statistics 2023 Criminal Cases Table 45 "Total number of persons (finalized) in ordinary first instance cases in *saiban-in* trials: By classification at reception and finalization: By all district courts within the jurisdiction of district courts"

'the application of laws and regulations', and 'sentencing'," that "the presiding judge shall be required to have a judge explain in open court 'decisions on interpretation of laws and regulations', 'decisions on court proceedings', and 'decisions other than those made with the participation of the *saiban-in'*," and that "any decision unfavorable for the accused in verdicts shall be based on the agreement of the majority of the member judges and the majority of the *saiban-in*, respectively" (Opinion for Improving the Saiban-in (Lay Judge) System So That the Saiban-in Can Participate More Proactively and Substantively).

2-6-5 Interpreters

In the event that a person facing a criminal trial does not understand Japanese, it is imperative to secure an accurate interpretation to guarantee their rights and to realize a fair trial. However, there exists no system prescribed by laws and regulations to assure the quality of interpretations, and the qualifications of the interpreters, to guarantee the status, and prevent misinterpretations. Multiple case examples have pointed out issues with the accuracy of interpretation and the eligibility of the interpreters.

The JFBA proposes to "prescribe by law a qualification and registry system for securing the quality of interpreters and a continual training system for interpreters to maintain and improve their abilities," and to "stipulate provisions on the remuneration system for the guarantee of status of interpreters; the principle of appointment of multiple interpreters to prevent misinterpretation; the obligation to provide opportunities for prior preparation; recording for after-the-fact verification, objections and expert examination; and the obligation of persons related to the trial and the court to give consideration" (Opinion Concerning Proposal for Legislation Regarding Court Interpreters).

2-6-6 Inducement of testimony by public prosecutors

Public prosecutors conduct detailed meetings with witnesses called "witness preparations" prior to the examination of witnesses in the court of trial. There have been instances where it was revealed that public prosecutors prepared notes on examination items with answers and did a read-through during witness tests, or let the witness take home the notes prepared by the public prosecutor. There has also been a case where audio recording data has revealed the fact that "witness preparations" were conducted over ten times to elicit a statement that differs from the witness's memory in accordance

with the scenario as depicted by the prosecution.[24]

2-6-7 Conviction based on witness statements

Witness statements are prone to errors in each of the processes of perception, recollection, expression, description, and statements are evidence that is subject to change. Statements by "eyewitnesses," "victims," and "accomplices" all carry the risks of producing miscarriages of justice. In Japanese criminal trials, even if there is no objective evidence supporting a statement, or even if the statement has changed, more often than not its credibility is affirmed and a guilty judgment is rendered based on such statement.

For example, in the Osaka rape case with false testimony, testimonies provided by the "eyewitness" and "victim" had no supporting objective evidence, and their statements had changed. Despite this, credibility was affirmed by the judge and formed the basis of a conviction. It was later revealed that the testimonies were both false.

2-6-8 Conviction based on witness statements

Article 320 of the Code of Criminal Procedure states that in principle, hearsay evidence (testimonial evidence by the other party that is not cross-examined) cannot be used as evidence. An exception to this principle is in regard to "a document which contains a statement given before a public prosecutor." "When the person has given testimony on the trial date or in the trial preparation that conflicts with or substantially differs from a previous statement," the previous statement may be used as evidence, "provided however, that this is limited to cases where the previous statement was made under special circumstances that afford a previous statement more credible than the statement given at the trial or in the trial preparation" (Latter part of Article 321(1)(ii)). In this regard, "special circumstances that afford a previous statement more credible" are in practice loosely recognized, and when a witness gives a testimony different from that in the written statement prepared by the public prosecutor, the latter is adopted based on this provision and forms the basis of a conviction. Even if a sworn witness in open court testifies to the effect that the accused did not commit the crime, or is impeached by the

[24] "Statement on the Improper Exercise of Prosecutorial Power in the so-called 'Case of Large-scale Vote-buying in the Upper House Election'" (August 2, 2023); "Statement on the Result of Inspection and Investigation by the Inspection Guidance Division of the Supreme Public Prosecutors' Office on the so-called 'Case of Large-scale Vote-buying in the Upper House Election'" (January 19, 2024)

defense counsel's cross-examination, it is not unusual for the accused to be convicted as a result of more weight being given to the content of the written statement prepared by the public prosecutor during interrogation.

Considering that written statements are the major cause of wrongful conviction, the JFBA proposes to tighten the requirements for admitting written statements as evidence and "delete the latter part of Article 321 (1) (ii)" (Opinion concerning the Establishment of the New Criminal Justice System (No.1)).

2-6-9 Recording media prepared by the method of forensic interviewing

The amended Code of Criminal Procedure which came into force on December 15, 2023 has newly established "special provisions concerning the admissibility of audio and video recording containing interviews with victims and other related persons."

The JFBA proposes to "limit the subject of such interview to those with particularly high necessity in light of the purpose of 'forensic interviewing', such as child victims and child witnesses," "stipulate provisions requiring that interviews be conducted by neutral experts well-versed in 'forensic interviewing'," "clearly stipulate 'measures' requiring the interviews be conducted according to the 'forensic interview' protocol (international evidence-based procedures for forensic interviewing)," "take measures to prevent contamination of the interviewee's memory at the stage prior to the 'forensic interview' and give due consideration when contacting the interviewee after the 'forensic interview' to ensure that such contact does not contravene the purpose of the 'forensic interview'," and "ensure that an opportunity is provided to examine in the course of the trial the appropriateness of the 'forensic interview' procedures, including the eligibility of the interviewee" (Opinion Concerning the Proposed Amendment of the Code of Criminal Procedure Regarding Admissibility of Recording Media Prepared by the Method of Forensic Interviewing).

2-6-10 Conviction based on a false confession

The accused's records of statements can also be used as evidence "when the statement contains an admission of a disadvantageous fact," unless "there is doubt about it being voluntary" (Code of Criminal Procedure, Article 322(1)). Even if the accused gives a statement denying any charge of committing a criminal offence on the trial date, the accused's record of confessions is adopted by virtue of this provision, and forms the

basis of a conviction.

In the Ashikaga case, the Fukawa case, the Kitakyushu nail care case, the Higashi-Sumiyoshi case, the Koto Memorial Hospital case, and the Hakamada case, the confession statements of the accused created during the investigation were admitted as evidence, based on which the accused were convicted, but it was later revealed that such confessions were all false.[25]

2-6-11 Statements by the accused

In criminal trials, judgements should be made to the benefit of the accused when there remains doubt. In order to convict the accused, in principle the public prosecutor must prove the indicted facts beyond a reasonable doubt. However, it is not necessarily easy for the innocent accused to have their statements believed. For example, when the testimony given by the witness requested by the public prosecutor conflicts with the accused's statement, the court often affirms the credibility of the former while denying the credibility of the latter and hands down a conviction.

In the judgment of the first instance in the Osaka rape case with false testimony , the court assessed that "the statement of denial by the accused does not even have enough credibility to shed any doubt on the statements made by the victim" and even criticized the innocent accused for "consistently giving unreasonable explanations, completely denying each crime, and showing no signs of remorse." The judgement of the first instance in the Higashi-Sumiyoshi case also affirmed the credibility of testimony by the investigator, while denying the credibility of the trial statement by the innocent accused

2-6-12 Conviction by majority rule

Japanese criminal trials permit conviction by majority rule. In a *saiban-in* (lay judge) trial, the opinions of both the judge and the *saiban-in* need to be included, but as long as they are included, a conviction can be handed down by majority rule. For example, even if four out of six *saiban-in* determined the innocence of the accused, if two *saiban-in* and three judges decide that the accused is guilty, the accused will be convicted. The same applies to the selection of the death penalty. In this regard, in the US, Canada and the UK where the jury system is implemented, a unanimous decision is required in

[25] Such false confessions are produced during interrogations (2-1) such as by means of detention of suspects (2-3) and detention of the accused (2-5). Therefore, the JFBA proposes to fundamentally reform such systems as previously described.

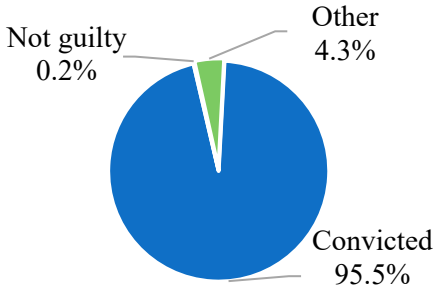
principle for a conviction, and in France and Germany where the "mixed jury" system is implemented, a two-thirds majority is required for a conviction.

In 2023, of the total 46,400 persons (finalized) in ordinary first instance cases, the total number of those convicted was 44,310 (95.5%), and that of those acquitted was 77 (0.2%).[26]

Fig. 9-1 Number of persons by classification at finalization
(2023, total number of district and summary courts)

	No. of persons	Proportion
Total persons (finalized)	46,400	-
Convicted	44,310	95.5%
Not guilty	77	0.2%
Other	2,013	4.3%

Fig. 9-2 Proportion by classification at finalization
(2023, total number of district and summary courts)



The JFBA proposes that "the requirement for a verdict of guilty should be based on the opinion of both a majority of judges and a majority of lay judges" on the grounds that: (i) to prevent wrongful conviction, it is necessary to ensure that the decision to convict is made carefully; (ii) the *saiban*-in (lay judge) system aims to realize better criminal trials in accordance with the principle of "presumption of innocence" by examining if it can be said without doubt that "the accused committed the crime as stated in the indictment," not only based on the common sense of judges but also based on the common sense of lay judges with diverse knowledge and experiences; and (iii) it can be said that the tenor of a double-checking system will be better achieved by requiring both the majority of judges and the majority of lay judges to decide that "there is no doubt" in order to convict the accused (Opinion on the Criminal Trial Procedures in Which Lay Judges Participate).

[26] Annual Report of Judicial Statistics 2023 Criminal Cases Table 21 "Total number of persons (finalized) in ordinary first instance cases: By classification at reception and finalization: By all district courts within the jurisdiction of district courts" and Table 22 "Total persons (finalized) in ordinary first instance cases: By classification at reception and finalization: By all summary courts within the jurisdiction of district courts"

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

When citizens who have not committed a crime are convicted in the court of first instance, they will appeal to the court of second instance to seek redress. In 2023, of the 4,580 accused persons who appealed to the court of second instance (excluding 13 persons where both parties appealed), 1,451 persons cited error of fact as the reason for the appeal[27], out of which the court of second instance reversed the first instance judgment for 111 persons (7.6%)[28]. And the court of second instance rendered its own judgment of acquittal for 16 persons[29].

2-7-1 Appeal against acquittal to the court of second instance and final appeal to the Supreme Court

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

In the murder case of Tokyo Electric Power Company's female employee, despite the accused being acquitted in the first instance, the public prosecutor appealed to the court of the second instance where the court quashed the judgement and handed down a guilty judgement. This resulted in a citizen who had not committed a crime serving a prison sentence of over seven years.

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[27] Annual Report of Judicial Statistics 2023 Criminal Cases Table 58 "Total number of persons (finalized) in appeal cases: By classification at reception according to indicted offence and reason for appeal: By all high courts within the jurisdiction of high courts"

[28] Annual Report of Judicial Statistics 2023 Criminal Cases Table 69 "Number of persons for whom the court reversed the judgment in appeal cases: By reason for appeal: By all high courts within the jurisdiction of high courts"

[29] Annual Report of Judicial Statistics 2023 Criminal Cases Table 72 "Number of persons for whom the court reversed the judgment and rendered its own decision in appeal cases: By classification at reception according to indicted offence and finalization: By all high courts within the jurisdiction of high courts"

In 2023, the total number of persons (finalized) for whom an appeal to the court of second instance was filed against an acquittal in the first instance was 18, of which 10 persons (55.6%) had their first instance judgment reversed, while 7 persons (38.9%) saw the court of second instance render its own decision to convict without remand.[30]

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

(2023, High Court)

	No. of persons	Proportion
Total persons (finalized)	18	-
Reversed	10	55.6%
Rendered own decision (convicted)	7	38.9%
Remanded/transferred	3	16.7%
Dismissed the appeal to the court of the second instance	7	38.9%
Dismissed the prosecution	1	5.6%

In order to ensure that an innocent citizen will not be held criminally liable again despite having been acquitted, the JFBA proposes "to prohibit public prosecutors from appealing on the basis of factual errors" (Opinion on the Prohibition of Prosecutor's Appeal Based on Factual Errors).

2-7-2 Detention of accused who are found not guilty

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

The JFBA proposes to "establish a new provision under Article 345 (2) to stipulate that 'when a judgment of acquittal is rendered, a new detention warrant may not

[30] Annual Report of Judicial Statistics 2023 Criminal Cases Table 63 "Total number of persons (finalized) in appeal cases: Comparison of first instance judgment and outcome of court of second instance: By all high courts"

be issued until the original judgment is reversed in the appellate court',” on the grounds that when a judgment of acquittal is rendered, the accused should be treated as innocent and should not be detained, at least until such judgment is reversed in the appellate court (Opinion Concerning Detention after Acquittal).

2-7-3 Operation of the Supreme Court

When citizens who have not committed a crime are convicted in the court of second instance and seek redress, they do so by making a final appeal to the Supreme Court. Grounds for a final appeal are limited to violations of the Constitution or conflicts with a Supreme Court precedent (Code of Criminal Procedure, Article 405). For errors of fact-finding, the court can only exercise discretionary quash (ibid. Article 411).

In 2023, the total number of persons (finalized) whose appeals from the court of second instance were heard before the Supreme Court was 1,591, of which the Supreme Court reversed the appeals for 3 persons (its own judgment of innocence was rendered for 1 person, and judgment to remand/transfer for 2 persons).[31]

2-8 Retrial

When citizens who have not committed a crime are convicted, the last remaining remedy is a retrial. A retrial is literally the final mechanism to save the innocent who may be on the verge of death, or in other words to prevent the ultimate human rights abuse. Upon request from a person convicted, the court will decide to commence a retrial when it finds that there are grounds for the request (Code of Criminal Procedure, Article 448(1)). However, there are strict requirements that must be met to commence a retrial.

In 2022, among the 252 persons who received a decision in retrial request cases, none of them were granted a retrial (0%).[32]

[31] Annual Report of Judicial Statistics 2023 Criminal Cases Table 80 “Total number of persons (finalized) in final appeal cases: By court of prior instance (first instance, second instance) by Penal Code offence, special law offence, and classification at finalization: Supreme Court”

[32] Criminal Affairs Bureau, General Secretariat, Supreme Court “Overview of Criminal Cases in 2022” (1) (Lawyers Association Journal (Volume 76, Issue 2), Page 275 (2024)

Fig. 11 Persons granted retrials

(2022, all courts)

	No. of persons	Proportion
No. of persons who received a decision on a request to commence retrial	252	-
Final decisions to commence retrial	0	0%

2-8-1 Inadequacy of evidence disclosure system

In retrial request proceedings, there are no statutory provisions for the disclosure of evidence. Even if a public prosecutor has evidence which indicates the innocence of a citizen who has been convicted, there is no obligation to disclose it. The disclosure of evidence is influenced by differences in the stance of the court before which retrial request proceedings are pending, and there are also cases where public prosecutors act insincerely, disregarding the court's decision or recommendation. In the Osaka rape case with false testimony, despite the court ordering the public prosecutor to deliver the list of evidence to the accused's defense counsel, the public prosecutor did not comply.

The JFBA proposes to "legislate the disclosure of evidence in retrial request proceedings, including orders to submit a list of evidence, orders to disclose evidence, orders to report the existence/non-existence of evidence, and the preservation and storage of evidence," "legislate rules regarding the inspection and copying of evidence outside retrial request proceedings, establishing the right to inspect and copy documented evidence and tangible evidence," and "legislate rules regarding the storage and preservation of evidence, establishing obligations to create and send records of the investigation and a list of such records, to create and send a list of evidence, to properly store evidence, and to store and preserve documented evidence and tangible evidence which have not been submitted to the court" (Opinion Calling for the Legislation of Rules Regarding Disclosure of Evidence in Retrial; Opinion on Amending the Code of Criminal Procedure and Other Acts Related to Criminal Retrial; Resolution Calling for the Immediate Amendment of Part IV of the Code of Criminal Procedure to Enable Victims Who Have Suffered Miscarriages of Justice to Be Rescued As Soon As Possible).

2-8-2 Inadequacy of procedural provisions in retrial request proceedings

Under the current law, the only provisions that stipulate procedures for retrial request

proceedings are Article 445 of the Code of Criminal Procedure and Article 286 of the Rules of Criminal Procedure, and it is left to the broad discretion of the court to determine how to handle a retrial request. As a result, "retrial disparities" exist, where the court's stance creates significant differences in how the proceedings are handled.

In order to ensure procedural guarantees for retrial applicants in the retrial request proceedings as well as to secure fair and proper judgments by courts, the JFBA proposes to "enact legislation for setting a date for retrial request proceedings, stating reasons for requesting a retrial, guaranteeing the right to request the examination of facts, allowing attendance at such examination of facts, stating opinions, making important procedures open to the public, allowing disqualification of or a challenge to a judge, and the court-appointed defense counsel system" (Opinion on Amending the Code of Criminal Procedure and Other Acts Related to Criminal Retrial; Resolution Calling for the Immediate Amendment of Part IV of the Code of Criminal Procedure to Enable Victims Who Have Suffered Miscarriages of Justice to Be Rescued As Soon As Possible).

2-8-3 Filing of appeals against decisions to commence a retrial

The Code of Criminal Procedure does not prohibit public prosecutors from filing an appeal against a decision to commence a retrial. For this reason, even if the court makes a decision to commence a retrial for a citizen who has not committed a crime, once the public prosecutor files an appeal, the commencement of the retrial may be delayed or even revoked. Despite that public prosecutors may rebut in a retrial, it has become routine for them to file an appeal against the decision to commence a retrial, and in particular, it is not uncommon in recent years to file a special appeal against decisions made in immediate appeal proceedings. Due to appeals by public prosecutors, citizens who have waited years to receive the decision to commence a retrial are exposed to the further burden of defense, spending many more years until redress as a result.

For the prompt relief of victims of miscarriages of justice, the JFBA proposes to "prohibit public prosecutors from appealing against decisions to commence a retrial" (Resolution Calling for Immediate Amendment of Part IV of the Code of Criminal Procedure to Urgently Rescue Victims Who Have Suffered a Miscarriage of Justice; Opinion on Amending the Code of Criminal Procedure and Other Acts Related to Criminal Retrial; Resolution Calling for the Immediate Amendment of Part IV of the Code of Criminal Procedure to Enable Victims Who Have Suffered Miscarriages of

Justice to Be Rescued As Soon As Possible).

2-8-4 Rescission of protective measures under the Juvenile Act

Regarding the disposition for rehabilitation of an adjudicated delinquent under the Juvenile Act, a revocation system is in place as a counterpart to retrials under the Code of Criminal Procedure (Article 27-2), but there are limitations on the avenues of redress after the disposition has been implemented, such as that revocation is not allowed in the case of the juvenile's death, and the application of revocation is limited to dispositions ending after April 1, 2001.

The JFBA proposes to "delete Article 2 (4) of the supplementary provisions of the 'Act to Partially Amend the Juvenile Act, Etc.' (Act No. 142 of 2000), which limits the application of the revocation system for dispositions for rehabilitation (Article 27-2 (2) of the Juvenile Act) to those ending after the date of enforcement of the Act (April 1, 2001)" (Opinion on the Review and Revision of the Revocation System for Dispositions for Rehabilitation of an Adjudicated Delinquent under the Juvenile Act).

3. Investigation into the causes of miscarriages of justice

In order to prevent miscarriages of justice, a thorough investigation into the causes of such convictions is essential. However, the investigation into their causes is woefully insufficient, despite a flurry of cases in recent years, such as the Shibushi case, the Himi case, the Ashikaga case, the Postal Fraud case involving a former Director-General of the Ministry of Health, Labor and Welfare, the Kitakyushu Nail Care case, the Fukawa case, the extortion email case via PC Remote Control, the murder case of Tokyo Electric Power Company's female employee, the Izumiotsu convenience store theft case, the Osaka rape case with false testimony , the Higashi-Sumiyoshi case, the Matsubase case, the Koto Memorial Hospital case, the Ohkawara Kakohki case, the Pressance case and the Hakamada case.

The JFBA proposes to "establish a third-party agency (commission to investigate the cause of miscarriages of justice) with authority to conduct investigations" to examine and determine the causes of errors in the process of criminal procedures of miscarriages of justice cases, such as during the investigation, prosecution and trial, and recommend improvements in the operation of relevant systems and legislation towards the prevention of miscarriages of justice" (Opinion Calling for Establishment of the Commission to Investigate the Cause of Miscarriages of Justice).

Fig. 12 List of Relevant opinions and other documents

Date	Opinion Papers
Sep. 16, 2005	JFBA's Proposal Aiming for Fundamental Reform of the Pretrial Detention System
Sept. 14, 2007	Opinion concerning detention/bail system reform
Jan. 20, 2011	Opinion calling for the establishment of the commission to investigate the causes of miscarriages of justice
	Opinion concerning photography (including video recording) and audio recording in the visitation room
Feb. 18, 2011	Opinion concerning the multiple appointment system of court-appointed defense counsels
Apr. 15, 2011	Opinion concerning the establishment of the right to confidential communication and interview
Dec. 15, 2011	Opinion concerning filming direction during video-recorded interrogations
Mar. 15, 2012	Opinion Paper on Criminal Trial Procedures in which *Saiban-in* Participate
June 14, 2012	Opinion concerning the Establishment of the New Criminal Justice System (No.1)
Sept. 13, 2012	Opinion concerning the Establishment of the New Criminal Justice System (No.2)
	Opinion concerning the Establishment of the New Criminal Justice System (No.3)
Sept. 14, 2012	Opinion Concerning Legislating for the Observer's Presence at Interrogations of Intellectually-Challenged Suspects
July 18, 2013	Opinion Concerning Proposal for Legislation Regarding Court Interpreters
May 8, 2014	Opinion Concerning Overall Augmentation of Records on Procedures in which Courts are Involved during Police Investigations
	Opinion Calling for Legislation of a Law Concerning Records of Criminal Investigations
Oct. 21, 2015	Opinion concerning detention after acquittal
Mar. 17, 2016	Opinion concerning the prohibition of public prosecutor's appeal to the court of second instance on grounds of errors of fact-finding
Nov. 15, 2016	Opinion on the Obligation to Deliver Documents in Criminal Procedure
Feb. 16, 2018	Opinion Calling for Early Realization of a Full-Scale Court-Appointed Attendee System
Apr. 13, 2018	Opinion Calling for the Establishment by Law of the Right to Have Counsel Present in Interrogations
May. 10, 2019	Opinion Requesting the Legislation of Rules Regarding Disclosure of Evidence in Retrial Request Proceedings
Oct. 4, 2019	Resolution Calling for the Immediate Amendment of Part IV of the Code of Criminal Procedure to Urgently Rescue Victims Who Have Suffered a Miscarriage of Justice
Nov. 17, 2020	Opinion Calling for the Elimination of Hostage Justice
Feb. 18, 2021	Opinion on the Review and Revision of the Revocation System for Dispositions for Rehabilitation of an Adjudicated Delinquent under the Juvenile Act
Jan. 20, 2022	Opinion on the Three-Year Review under Supplementary Provision 9 of the Code of Criminal Procedure

Jun. 17, 2022	Opinion for Improving the *Saiban-in* (Lay Judge) System so that the *Saiban-in* Can Participate More Proactively and Substantively
Mar. 16, 2023	Opinion Concerning the Proposed Amendment of the Code of Criminal Procedure Regarding Admissibility of Recording Media by the Method of Forensic Interviewing
Jun. 16, 2023	Resolution Calling for the Immediate Amendment of Part IV of the Code of Criminal Procedure to Enable Victims Who Have Suffered Miscarriages of Justice to Be Rescued As Soon As Possible
Jul. 13, 2023	Opinion on Amending the Code of Criminal Procedure and Other Acts Related to Criminal Retrial
	Opinion Calling for Digitalization of Criminal Procedure to Protect and Realize Citizens' Rights
Jun. 14, 2024	Resolution Calling for Fundamentally Reforming the State of Interrogations and Achieving the Audio and Video Recording of the Entire Process of Interrogations in All Cases, as well as Establishing the Right to Have Defense Counsel Present at Interrogations
Oct. 2024	Declaration on Action for Human Rights 2024