

Japan: 2016 Criminal Justice System Reform

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Japan: 2016 Criminal Justice System Reform

Sayuri Umeda
Foreign Law Specialist

SUMMARY Japan made reforms to its criminal justice system in June 2016 by amending its Criminal Procedure Code and other laws. The reform that received the most discussion by Japan's Judicial System Committee was the introduction of the mandatory video recording of interrogations. Another reform that was introduced was bargaining between the defendant and the prosecutor. New crimes were also added to the list of those in which suspects' communications may be intercepted. In addition, the scope of evidence that must be disclosed in trials was expanded, and new measures to protect witnesses and victims were introduced.

I. Overview

The Japanese criminal justice system has been criticized for heavily relying on confessions of the accused. Once the police detain a suspect, police officers reportedly go to great lengths to obtain a confession. The suspect may be subjected to lengthy interrogation until he/she confesses.¹ After a scandal involving prosecutors fabricating evidence in a 2010 case, the Ministry of Justice (MOJ) established a commission to investigate the Public Prosecutor's Office.² Further, the MOJ in 2011 established a special subcommittee under the Judicial System Committee for the purpose of discussing reforms to the criminal justice system. The subcommittee was tasked with

- reviewing the practices in previous criminal investigations and trials suspected of relying excessively on interrogation and confessions,
- discussing the introduction of a system for video recording interrogations, and
- discussing other criminal justice system reforms.³

The subcommittee submitted a report to the Judicial System Committee,⁴ which the Committee approved and submitted to the Minister of Justice in 2014.⁵ On the basis of this report, the MOJ

¹ *Keiji Shiho no kaikaku [Reform of Criminal Justice]*, JAPAN FEDERATION OF BAR ASSOCIATIONS, <http://www.nichi-benren.or.jp/activity/criminal.html> (last visited Oct. 20, 2016), archived at <https://perma.cc/5NYX-FWR3>.

² *Kensasu no arikata kento kaigi [Investigative Commission on the State of the Prosecutor's Office]*, MOJ, http://www.moj.go.jp/kentou/jimu/kentou01_00001.html (last visited Oct. 20, 2016), archived at <https://perma.cc/5QZL-RDTM>.

³ Minutes of First Meeting of the Special Subcommittee on the Criminal Justice System in the New Era (June 29, 2011), at 1, <http://www.moj.go.jp/content/000077447.pdf> (in Japanese), archived at <https://perma.cc/64UV-7D6F>.

⁴ MOJ, WHITE PAPER ON CRIME 2014, pt. 2, ch. 6, sec. 8 (2014), http://hakusyo1.moj.go.jp/jp/61/nfm/n61_2_2_6_0_8.html (in Japanese), archived at <https://perma.cc/F5UA-38SE>.

⁵ *Judicial System Committee 173d Meeting* (Sept. 18, 2014), MOJ, <http://www.moj.go.jp/shingi1/shingi03500024.html> (in Japanese), archived at <https://perma.cc/2GPT-MNVM>.

drafted a bill to amend several laws, including the Criminal Procedure Code⁶ and the Act on Communications Interception During Criminal Investigations.⁷ The bill was passed by the Diet and promulgated on June 3, 2016.⁸

The five major reforms introduced by the Act and explained in this report are

- mandatory video recording of interrogations in certain types of crimes,
- introduction of bargaining between the defendant and the prosecutor,
- widening the scope of wiretapping as an investigative tool,
- expansion of the scope of evidence that must be disclosed in trials, and
- victim protection.⁹

The amended laws enter into force at different times: within twenty days, six months, two years, or three years from the promulgation date.¹⁰

II. Video Recording of Interrogations

A. Background

Under Japan's Criminal Procedure Code, involuntary confessions cannot be admitted into evidence at trial¹¹. A written statement of the accused containing the admission of a disadvantageous fact and his/her signature and seal cannot be used as evidence if there is doubt about whether the admission was voluntary.¹²

It has sometimes been argued in court proceedings that police officers or public prosecutors have led or forced suspects to include certain contents in written declarations. Suspects' written statements are not actually written by the suspects themselves, but by police officers or public prosecutors during the interrogation, after which the suspects sign the statements.¹³ When the

⁶ CRIMINAL PROCEDURE CODE, Act No. 131 of 1948.

⁷ Act on Communications Interception During Criminal Investigations, Act No. 137 of 1999.

⁸ Act to Amend Parts of Criminal Procedure Code and Other Acts, Act No. 54 of 2016.

⁹ Akira Goto, 刑訴法等改正案の全体像 [Overview of Bill to Amend Criminal Procedure Code and Other Laws], 88-1 HORITSU JIHO 4, 4 (Jan. 2016).

¹⁰ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1.

¹¹ CRIMINAL PROCEDURE CODE art. 319, para. 1.

¹² *Id.* art. 322, para. 1.

¹³ Norimitsu Yamamoto, 供述調書作成過程の検証に録音録画が有効な理由 [Reasons Why Audio or Video Recording Is Effective in Examining Procedures for Obtaining Written Statements], ASAHI JUDICIARY (July 25, 2012), <http://judiciary.asahi.com/outlook/2012072000012.html>, archived at <https://perma.cc/HN7M-8KL5>.

voluntariness of admissions is argued at trial, both the accused and investigators describe how the admissions were obtained.¹⁴

A video recording of the interrogation during which the suspect's written statement was made may be the best evidence of the voluntariness of the statement.¹⁵ To clearly prove that a suspect's statement was voluntarily given, prosecutors established a test program in July 2006 to video record some interrogations or parts of interrogations.¹⁶ This program also served as part of the preparation for introducing the lay judge trial system,¹⁷ as prosecutors thought that showing video recordings would help lay judges decide whether written statements were made voluntarily.¹⁸ The National Police Agency also introduced a similar test program in 2008.¹⁹ Both agencies eventually expanded the programs.²⁰

The video recording of interrogations was one of the principal criminal justice reform issues discussed by the Judicial System Committee.

B. New System

The 2016 amendment makes it mandatory for police officers and prosecutors to video record interrogations in cases that

- involve crimes punishable by death or imprisonment for an indefinite period, or

¹⁴ 取調べの可視化を求める決議 [Resolution Seeking the Recording of Interrogations], CHUBU FEDERATION OF BAR ASSOCIATIONS (Oct. 15, 2004), http://www.chubenren.jp/news/h16_02torisirabe.html, archived at <https://perma.cc/994H-Z6BA>.

¹⁵ *Id.*

¹⁶ 検察取り調べの録音・録画、1年半で170件 [Prosecutors' Investigations Video Recorded 170 Times During One-and-a-Half-Year Period], YOMIURI ONLINE (Jan. 28, 2008) (on file with author).

¹⁷ Lay judges are selected from the general public. In certain serious cases, six lay judges, in addition to three judges, participate in deliberations, reach a verdict, and decide on a sentence. The authority for decisions relating to questions of law and legal proceedings is vested with judges. (Masaki Takasugi, Assistant Judge, Chiba District and Family Court, Japan, Address at the 2005 Australian Network for Japanese Law (ANJeL) Conference "Japanese Law on Trial": The New Lay-Judge System in Japan: A Comparison with the Jury System in NSW (Feb. 23, 2005), at 2 & 4, available at <https://sydney.edu.au/law/anjel/documents/23Feb2005Conf/takasugi2005.pdf>, archived at <https://perma.cc/5BQB-Y4WY>.

¹⁸ SUPREME PUBLIC PROSECUTORS OFFICE, 取調べの録音・録画の試行についての検証結果 [RESULTS OF EXAMINING TRIALS OF SOUND AND VIDEO RECORDINGS OF INTERROGATIONS] 1 (Feb. 2009), <http://www.moj.go.jp/content/000076305.pdf>, archived at <https://perma.cc/KFD4-VVPD>.

¹⁹ 警察も取り調べ録画、警視庁など来年度から試験導入へ [Police Will Also Record Interrogations, National Police Agency Will Introduce a Test Program Next Year], YOMIURI NEWSPAPER (Mar. 15, 2008) (on file with author).

²⁰ 長末亮 [RYO NAGASUE], 取調べ可視化の現状と議論 [THE CURRENT SITUATION AND DISCUSSIONS ON THE RECORDING OF INTERROGATIONS], Issue Brief No. 825, at 4 (May 13, 2014), http://dl.ndl.go.jp/view/download/digidepo_8654405_po_0825.pdf?contentNo=1, archived at <https://perma.cc/7WEE-Q6FW>.

- involve crimes punishable by imprisonment for a year or more and in which a victim has died because of an intentional criminal act, and
- are investigated by prosecutors without the involvement of the police.²¹

The first two categories of cases are subject to lay judge trials.²² Mandatory video recording is limited to the interrogations of suspects who are detained or under arrest.²³ The video recording is examined if a prosecutor requests the examination of the suspect's written statement and the accused or his/her counsel objects to the request because the voluntariness of the statement is in question.²⁴

The video recording the interrogation can be waived if

- video recording devices are broken,
- the suspect refuses to allow his/her statement to be video recorded, or the interrogator reasonably determines the suspect will not make a full statement if the interrogation is video recorded,
- a gang member is involved in the case (and is therefore likely to be targeted for retaliation from the gang), or
- the interrogator reasonably determines that the suspect will not talk if the interrogation is video recorded because the suspect is afraid of retaliation against him/herself and his/her family by relevant persons in the case.²⁵

Mandatory video recording will be implemented by June 2, 2019 (within three years from June 3, 2016, the promulgation date of the Act to Amend Parts of Criminal Procedure Code and Other Acts).²⁶

C. Criticism

The new video recording system has been criticized as being inadequate to prevent police or prosecutorial abuse, with some calling for the video recording of interrogations in more or all cases. Under the amended law, interrogations will be video recorded in only 3% of the nation's criminal cases.²⁷

²¹ CRIMINAL PROCEDURE CODE, *amended by* Act No. 54 of 2016, art. 301-2, para. 1.

²² Act on Criminal Trials with Participation of Lay Judges, Act No. 63 of 2004, *amended by* Act No. 54 of 2016, art. 2, para. 1.

²³ CRIMINAL PROCEDURE CODE, *amended by* Act No. 54 of 2016, art. 301-2, para. 1.

²⁴ *Id.* art. 301-2, paras. 1 & 4.

²⁵ *Id.* art. 301-2, para. 4; Minutes of Judiciary Committee, House of Councillors, No. 7, 190th Diet (Apr. 14, 2016), (statement of Ryoko Tani) at 26, <http://kokkai.ndl.go.jp/SENTAKU/sangiin/190/0003/19004140003007.pdf>, archived at <https://perma.cc/DJV9-C4CF>.

²⁶ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1.

²⁷ Minutes of Judiciary Committee, House of Councillors, *supra* note 25, at 26.

Critics have also pointed out loopholes in the amendments. Because mandatory video recording is limited to the interrogations of detained or arrested suspects, investigators have no obligation to video record statements made by people being questioned voluntarily prior to arrest. In addition, during the course of interrogations regarding crimes not subject to mandatory video recordings, investigators may ask questions concerning suspects' possible involvement in separate crimes that are subject to mandatory video recordings.²⁸ However, some scholars view the amendment positively. One felt it important that, by this amendment, lawmakers had affirmed the importance of video recording the entire interrogation even though this would be done only in certain cases.²⁹

III. Introduction of Bargaining Agreements

A. Bargaining Between Prosecutor and Suspect/Defendant

Plea bargaining or other agreements between a prosecutor and a suspect or defendant and his/her counsel are not provided for under current law. Under the amended Criminal Procedure Code, a prosecutor may make an agreement with a suspect or defendant to drop charges, charge the suspect with a less serious crime, seek lesser punishments, or seek a summary judgment in exchange for information or evidence related to another person's case. Such an agreement will be allowed when the suspect is being investigated or the defendant is being charged with particular crimes, such as embezzlement, bribery, organized interference with the execution of a judgment, organized fraud, violations of the antimonopoly law and tax laws, violations of the firearms control law and explosives control law, narcotics trafficking, and destruction of evidence.³⁰ Murder and burglary are not included in such crimes. The suspect or defendant must agree to do one or more of the following:

- State the truth during the investigation;
- State the truth as a witness at another person's trial; and/or
- Provide evidence or cooperate in other ways for the collection of evidence by prosecutors or police officers.³¹

The agreement must be written and signed by the prosecutor, the suspect or defendant, and his/her counsel.³²

²⁸ Editorial, *Problematic Criminal Justice Reforms*, JAPANTIMES (June 1, 2016), <http://www.japantimes.co.jp/opinion/2016/06/01/editorials/problematic-criminal-justice-reforms>, archived at <https://perma.cc/5LWU-QB3Y>.

²⁹ Akira Goto, *刑訴法改正と取調べの録音・録画制度* [Criminal Procedure Code Amendment and Sound and Video Recording of Interrogations], 88-1 HORITSU JIHO 12, 17 (Jan. 2016).

³⁰ CRIMINAL PROCEDURE CODE, amended by Act No. 54 of 2016, art. 350-2, para. 2.

³¹ *Id.* art. 350-2, para. 1.

³² *Id.* art. 350-3, para. 2.

The prosecutor in the other person's trial must request that the written agreement be examined by the court at the start of that trial.³³

If the court does not approve or follow the prosecutor's action as stated in the agreement, the defendant may cancel the agreement. If it turns out the information provided by the suspect or defendant is not true, the prosecutor will cancel the agreement.³⁴

This part of the amendment will be enforced within two years from the promulgation date.³⁵

B. Exempting Witnesses from Criminal Charges

The amended Criminal Procedure Code contains a provision that exempts a witness from a criminal charge when the witness provides critical information on another person's case. A prosecutor makes such an agreement with a witness and asks the court to approve the agreement.³⁶ The court must approve such an arrangement if the witness would incriminate him/herself by providing such information.³⁷

This part of the amendment will enter into force within two years from the promulgation date.³⁸

IV. Expanded Scope of Crimes Subject to Wiretapping

The 2016 amendment also applies to the Act on Communications Interception During Criminal Investigations.³⁹ The amendment expands the scope of criminal cases in which investigators may employ wiretapping as an investigative tool. Currently, investigators are allowed to intercept suspects' communications while investigating four kinds of crimes: the sale and possession of narcotics, violations of firearms control laws, murders by crime syndicates, and the large-scale smuggling of people.⁴⁰ The amendment adds a new list of crimes in which suspects' communications may be intercepted. These crimes include the use of explosives, arson, murder, bodily harm, the confinement of people, the kidnapping of a minor, human trafficking, robbery, fraud, and violations of the law against child prostitution and child pornography.⁴¹ To intercept

³³ *Id.* art. 350-7, para. 1.

³⁴ *Id.* art. 350-10.

³⁵ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1, item 3.

³⁶ CRIMINAL PROCEDURE CODE, *amended by* Act No. 54 of 2016, art. 157-2, para. 1.

³⁷ *Id.* art. 157-2, para. 2.

³⁸ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1, item 3.

³⁹ Act on Communications Interception During Criminal Investigations, Act No. 137 of 1999, *amended by* Act No. 54 of 2016.

⁴⁰ Act on Communications Interception During Criminal Investigations, Act No. 137 of 1999, *amended by* Act No. 74 of 2011, art. 3 & Annexed Table.

⁴¹ Act on Communications Interception During Criminal Investigations, Act No. 137 of 1999, *amended by* Act No. 54 of 2016, Annexed Table II.

communications, investigators must suspect that these crimes are being committed by a group consisting of persons who act in accordance with assigned roles.⁴²

This part of the amendment will enter into force within six months from the promulgation date.⁴³

Under the current law, communications interception requires the presence of someone from the telecommunications company that manages the communications facility where the interception takes place.⁴⁴ The amendment adds other methods of interception in which such a person's presence is not necessary.

This part of the amendment will enter into force within three years from the promulgation date.⁴⁵

One such method involves the encryption and temporary storage of communications by a communications company. Upon request, the court may provide encryption and decryption keys to the telecommunications company and investigators.⁴⁶ The investigators then order the telecommunications company to encrypt the communications during the period specified by the investigators in accordance with the warrant and store the information.⁴⁷ The investigators are not allowed to enter the site of the interception.⁴⁸ After the interception is completed, the investigators order the telecommunications company to decrypt the encrypted communications by using the key provided by the court and reproduce the relevant part of communications at the site of interception in the presence of the investigators.⁴⁹

A second method involves the investigators' ordering the telecommunications company to encrypt and transfer the intercepted communications to the investigators' computer at the site of the interception in accordance with the requirements under the amended Act. The investigators then send the intercepted communications from their computer at the site of interception to a second location.⁵⁰ The encrypted intercepted communications are examined in real time or stored temporarily until they are examined.⁵¹ The investigators decrypt the communication by using the key that was provided by the court.⁵²

⁴² *Id.* art. 3, para. 1, item 1.

⁴³ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1, item 2.

⁴⁴ Act on Communications Interception During Criminal Investigations, Act No. 137 of 1999, *amended by* Act No. 74 of 2011, art. 12.

⁴⁵ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1.

⁴⁶ Act on Communications Interception During Criminal Investigations, Act No. 137 of 1999, *amended by* Act No. 54 of 2016, arts. 9 & 20.

⁴⁷ *Id.* art. 20, para. 1.

⁴⁸ *Id.* art. 20, para. 5.

⁴⁹ *Id.* art. 21, para. 1.

⁵⁰ *Id.* art. 23, para. 1.

⁵¹ *Id.*

⁵² *Id.*

V. Expanded Scope of Evidence to Be Disclosed

During the pretrial procedure, after the prosecutor presents the facts to be proved, the prosecutor requests that the evidence be examined. At the same time, the prosecutor must enable the defendant's counsel to review the statements or physical evidence to be used and disclose information on the witnesses who will be summoned.⁵³ Defense counsel may request that certain other types of potential evidence that are important in assessing the credibility of the prosecutor's evidence be disclosed. Such evidence includes statements of the defendant and witnesses, and the report of the examination of evidence.⁵⁴ Under the current law, there is no way for defense counsel to know what other evidence the prosecutor may have. The amendment obligates the prosecutor to send a list of all the evidence he/she has to the defense counsel upon the defense counsel's request.⁵⁵ In addition, the amendment adds new types of potential evidence that defense counsel can request, such as the administrative record of interrogations and searches.⁵⁶

This part of the amendment will enter into force within six months from the promulgation date.⁵⁷

VI. Victim Protection

When requesting the examination of “witnesses, expert witnesses, interpreters or translators (witnesses, etc.)” at trial, the prosecution and the defense must give their opponent an opportunity to know the names and addresses of such persons in advance.⁵⁸ When a potential witness is afraid of revenge by the defendant, he/she would not want to testify at the trial. Under the amended law, the prosecutor may disclose the names and addresses of such persons only to the defendant's counsel and only under the condition that counsel will not share the information with the defendant when there is a fear that the defendant or other persons who are connected with the defendant would physically harm, intimidate, or harass the witness and/or the witness's family, or harm their assets.⁵⁹ Alternatively, the prosecutor may provide the defendant or his/her counsel with fictitious names and contact information (but not actual addresses) of witnesses, etc.⁶⁰

When requesting the examination of evidence, the public prosecutor must give the accused or his/her counsel an opportunity to inspect the evidence in advance. When the names and addresses of witnesses, etc., are written on documentary or material evidence, the amended law enables the prosecutor to take the same protective measures mentioned above if the fear of

⁵³ CRIMINAL PROCEDURE CODE, *amended by* Act No. 54 of 2016, arts. 316-13 & 316-14.

⁵⁴ *Id.* art. 316-15, para. 1

⁵⁵ *Id.* art. 316-14, para. 2.

⁵⁶ *Id.* art. 316-15, para. 3.

⁵⁷ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1, item 2.

⁵⁸ CRIMINAL PROCEDURE CODE, *amended by* Act No. 54 of 2016, art. 299.

⁵⁹ *Id.* art. 299-4, para. 1.

⁶⁰ *Id.* art. 299-4, para. 2.

potential harm exists.⁶¹ However, the defendant or his/her counsel may argue that such measures interfere with the defendant's ability to defend him/herself and, therefore, the court should cancel such measures.⁶²

This part of the amendment will enter into force within six months from the promulgation date.⁶³

⁶¹ *Id.* art. 299-4, paras. 3 & 4.

⁶² *Id.* arts. 299-4 & 299-5.

⁶³ Act to Amend Parts of Criminal Procedure Code and Other Acts, Supp. Provisions, art. 1, item 2.