

The Role of Lawyers and the quality of legal aid
-The expansion of criminal legal aid in Japan and the International
Human Rights Standards-

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1 Introduction - A Right to defense counsel in Japan -

Significant changes have been made to both civil and criminal legal aid in Japan through the implementation of the Comprehensive Legal Support Act 2004.

Before the amendment of Code of Criminal Procedures (CCP) and the establishment of Japan Legal Support Center (JLSC) in 2006, the scope of court appointed defense counsel had been limited only after indictment stage for about 60 years. This meant the indigent suspects actually had no right to counsel and might have been detained in the police station and interrogated for as long as 23 days without counsel.

To establish the public defense system which covers pre-indictment stage had been considered a top priority issue by the Japan Federation of Bar Associations (JFBA) for long time.

This paper provides the background and context to current situation of criminal legal aid in Japan. It details the initiatives for enhancing the court-appointed defense system by the JFBA and the utilization of the internationally recognized norms relating to human rights.

2 Brief history of legal aid in Japan

1946 New Constitutional Law was enforced. Indigent defendants have a right to counsel at the government's expense under the constitution and the code of criminal procedure, but suspects not.

1952 The Japan legal Aid Association (JLAA), a private organization sponsored mainly by the JFBA was established.

1958 A subsidy from the Ministry of Justice for civil legal aid was delivered to the JLAA. But the amount had been remained very low for long time.

- 1989 The JFBA proposed the enhancement of criminal defense at pre-indictment stage in the 32rd annual Human Rights meeting of the JFBA.
- 1990 The JFBA established the Criminal Defense Center.
- 1990 The Oita and Fukuoka bar associations started to offer duty attorney¹.
- 1992 The JFBA and all local bar associations started to offer duty attorney.
- 1992 The JFBA started to offer criminal legal aid for suspects through the JLAA at the JFBA's expense.
- 1999 The statement is released by the Chairman of the Judicial Reform Council, demanding improvement in the legal aid system.
- 2000 The Civil Legal Aid Act was enacted and became effective. (Criminal legal aid system was not changed. Instead, the JFBA continued to offer criminal legal aid for suspects at the JFBA's expense.)
- 2001 The statement is released by the Justice Reform Council, including fundamental reform in the legal aid system.
- 2004 The Comprehensive Legal Support Act was enacted.
- 2006 The JLSC was established and commenced its services. The JLSC took over the civil legal aid from JLAA and services related to court-appointed defense counsel for defendants from the courts. Court-appointed counsel for suspects charged with certain felony case started.²
- 2008 The JLSC started Court-appointed counsel for victims.
- 2009 The scope of court-appointed counsel for suspects was expanded to certain misdemeanor cases.³

2 Back ground and the activities of JFBA

The JFBA and local bar associations has played a central role in Japanese legal aid system. Because both in civil and criminal legal aid the services had been provided by solely private practitioners for long time. Even after the JLSC was established and it introduced staff attorneys, most of legal aid cases are handled

¹ The system was modeled on the duty solicitor system in the United Kingdom

² By the amendment of CCP in 2006, court-appointed defense counsel for suspects started for indigent suspect who have been detained and charged with an offence punishable with the death penalty, or imprisonment for life or a minimum period of one year or more.

³ By the amendment of CCP in 2009, the coverage of court-appointed defense counsel for suspect expanded to those who have been detained and charged with an offence punishable with the death penalty, or imprisonment for life or a maximum period of three years or more

by attorneys in private practice.

To become qualified to practice as an attorney, judge, or prosecutor, one must complete a law school curriculum, pass the bar examination, and complete a one-year apprenticeship at the Legal Training and Research Institute of the Supreme Court. The new system requiring graduation from law school as a qualification for the bar examination commenced in April 2004. Under the old system, anyone could take the bar examination, but this system ended in 2010.

The JFBA has currently about 35,000 members including 230 JLSC staff attorneys. It is compulsory for all Japanese practicing lawyers ("*Bengoshi*") to be members of the JFBA. There are 52 local associations set up in principle in each District Court jurisdiction, through which lawyers join the JFBA.

Article 1 of the Attorney Act declares that 'a lawyer is entrusted with the mission to protect fundamental human rights and to realize social justice.' All lawyers are expected to work for this mission, and the JFBA and each local bar association are also working to accomplish this mission.

The JFBA established the JLAA to provide civil legal aid services in 1952, and the local bar associations fully supported the organization's activities, providing office space and staff members. But for long time Japanese legal aid system had been (or has been) quite insufficient in both in scale and depth.

In criminal legal aid system, before JLSC was established and the CCP was amended in 2006, there had been a big difference between before and after the indictment. Only after the indictment, state funded counsels had been appointed for indigent people through the court-appointed defense counsel system. Before the indictment, there had been no public defense system for indigent suspects.

Article 34 of the Constitution of Japan states:

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

Article 30 of the Code of Criminal Procedures (CCP) states:

The accused or the suspect may appoint counsel at any time

But the article 36 of CCP (before the amendment in 2006) stated:

*When **the accused** is unable to appoint counsel because of indigency or other reasons, the court shall appoint counsel for the accused upon his/her request; provided, however, that this shall not apply when counsel has been appointed by a person other than the accused.*

In 1978 the President of the JFBA consulted the Court-appointed Defense Counsel Committee on the system for the court-appointed defense counsel for suspect. In the final report submitted in 1985 the Committee emphasized the need for the new legislation for public defense system on the condition that the bar associations be poised to respond to the expansion of public defense. At that time the JFBA itself had to admit that it could not bear the burden because there were still many areas with few criminal legal aid lawyers and moreover with no lawyers or only one lawyer.

In 1987 the JFBA held the first symposium on court-appointed defense counsel to discuss the new public criminal defense system. After that the JFBA held the symposium every year. Many lawyers and academics gathered from all around the nation and discussed the future of criminal defense system.

In 1980's four convicted death rows were acquitted in retrials after pleading their innocence for many years.⁴ These fights were fully supported by JFBA's Human Rights Protection Committee (HRPC).

The HRPC seeks relief for people declared guilty through faulty court proceedings when they are in fact innocent. The Retrial Committee, working under the HRPC, had sought relief in these miscarriages of justice and had indeed proven innocence in retrials.

Many people recognized that one of the main reasons of miscarriages of justice

⁴ In the Menda Case Sakae Menda was granted re-trial at which he was acquitted on July 15, 1983, in the Saitagawa case, Shigeyoshi Taniguchi was acquitted on March 12, 1984, in the Matsuyama Case, Yukio Saito was acquitted on July 11, 1984, and in the Shimada case, Masao Akahori was acquitted on January 31 1989, and these persons had once been sentenced to death by the Supreme Court.

is the lack of defense counsel at the pre-indictment stage. The JFBA decided to take the strategy to enhance the criminal legal aid to suspects on its own budget and transform the system into the public defense system in the near future.

In 1992 the JFBA and all local bar associations started to offer duty attorney and criminal legal aid for suspects.

The duty attorney system has been maintained and operated up until now, in order to effectively guarantee the right of suspects to attorneys. When requested by a suspect, the duty attorney promptly visits the place at which the suspect is under arrest or detention and interviews him/her, regardless of nationality or visa status. If the suspect is a foreign national, an interpreter accompanies. The first consultation with a duty attorney and interpretation fee is free of charge.

The criminal legal aid for suspects had been operated by the JLAA. No government subsidy was provided for the system, so the JFBA and the local bar associations mainly funded for this system. The JFBA collected a special membership fee from their members to make the subsidy in addition to a regular membership fee. Also the important funding source was atonement donation by suspects and defendants. This donation was made to express their deep remorse and heartfelt apology.⁵

Through these activities the JFBA started to study and utilize the internationally recognized norms relating to human rights.

3 Development of international human rights standards in criminal legal aid

The International Covenant on Civil and Political Rights (ICCPR) is a key international human rights treaty, providing a range of protections for civil and political rights. Japan ratified the ICCPR in 1979.

Article 14 paragraph 3 and (d) of ICCPR states:

everyone shall be entitled to the following minimum guarantees, in full equality: (d) To be tried in his presence, and to defend himself in person or

⁵ In 1994 JLAA's business expenses for legal aid for suspect and juveniles was approximately 190 million yen. In the same year the amount of government subsidy for civil legal aid was 222 million yen and atonement donation was 313 million yen.

through legal assistance of his own choosing; to be informed, if he does not have legal assistance, of this right; and to have legal assistance assigned to him, in any case where the interests of justice so require, and without payment by him in any such case if he does not have sufficient means to pay for it

Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment (1988) defined "Detained person" as any person deprived of personal liberty except as a result of conviction for an offence.

Principle 17(2) states:

If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.

Basic Principles on the Role of Lawyers adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba in 1990 states:

- 1. All persons are entitled to call upon the assistance of a lawyer of their choice to protect and establish their rights and to defend them in all stages of criminal proceedings.*
- 5. Governments shall ensure that all persons are immediately informed by the competent authority of their right to be assisted by a lawyer of their own choice upon arrest or detention or when charged with a criminal offence.*
- 6. Any such persons who do not have a lawyer shall, in all cases in which the interests of justice so require, be entitled to have a lawyer of experience and competence commensurate with the nature of the offence assigned to them in order to provide effective legal assistance, without payment by them if they lack sufficient means to pay for such services.*
- 7. Governments shall further ensure that all persons arrested or detained, with or without criminal charge, shall have prompt access to a lawyer, and in any case not later than forty-eight hours from the time of arrest or detention.*

In the early 1980s ICCPR and other internationally recognized norms relating to

human rights had not been brought to the attention among the Japanese lawyers.

In the late 1980s the problems of Japanese criminal procedures had been drawn to the attention of the international community, through the initiatives of a number of Japanese attorneys who attended or submitted documentation to various United Nations bodies dealing with human rights. Communications had also been submitted to the Human Rights Committee, which, in 1988, reviewed Japan's Second Periodic Report (CCPR/C/42/ Add.4 and Corrections) and under Article 40 of the International Covenant on Civil and Political rights⁶.

The JFBA produced alternative report in 1993 and 1998 which focus heavily on criminal procedure. Through the regular process of government report and alternative report, the Japanese government has been forced into a dialogue, not only with the international experts on the HRC but also domestically with the home NGOs.⁷

In the alternative report by the JFBA to the Fourth Periodic Report of the government of Japan⁸, presented in accordance with the ICCPR, the JFBA proposes the establishment of a system of state-appointed attorneys for suspects before their indictment as follows:

According to article 14 paragraph 3(d) of the Covenant, however, all suspects under criminal charge are entitled to have legal assistance assigned by the state in any case where the interests of justice so require, hence the requirement of the appointment of counsel by the state is not limited to the post-indictment stage. Especially in a country like Japan where the suspect's statement in the interrogation phase decides the case for all practical purposes, the requirement of a fair trial must be made effective from the time of the arrest. Furthermore, since article 9 paragraph 4 of the Covenant guarantees anyone deprived of liberty the right of recourse to a court for the remedy of a habeas corpus action, and the assistance of an attorney is indispensable for such an action, then a person must be

⁶ Karen Parker and Etienne Jaudel , Police Cell Detention In Japan: The Daiyo Kangoku System(1989), Association of Humanitarian lawyers

<http://standpointjapan.com/jaudel-parker-report.html#recommendations>

⁷ Ian Neary, Human Rights in Japan, South Korea and Taiwan (2002), Routledge, p.53

⁸http://www.nichibenren.or.jp/activity/international/library/human_rights/liberty_report-4th_jfba_en.html

guaranteed the right of access to counsel as soon as he is deprived of liberty. Therefore, a suspect deprived of his liberty has the right to the assistance of an attorney in the double sense and, if the suspect is not wealthy enough, the state must appoint counsel at its expense. Hence, the lack of the institution of state-appointed counsel for the pre-indictment phase obviously violates article 9 paragraph 4 and article 14 paragraph 3(d) of the Covenant.

In the concluding observations of the Human Rights Committee adopted in November 1998, following is the one of the principal subjects of concern and recommendations.⁹

The Committee is deeply concerned that the guarantees contained in articles 9, 10 and 14 are not fully complied with in pre-trial detention in that pre-trial detention may continue for as long as 23 days under police control and is not promptly and effectively brought under judicial control; the suspect is not entitled to bail during the 23-day period; there are no rules regulating the time and length of interrogation; there is no State-appointed counsel to advise and assist the suspect in custody; there are serious restrictions on access to defense counsel under article 39(3) of the Code of Criminal Procedure; and the interrogation does not take place in the presence of the counsel engaged by the suspect. The Committee strongly recommends that the pre-trial detention system in Japan should be reformed with immediate effect to bring it in conformity with articles 9, 10 and 14 of the Covenant.

In fact these activities by the JFBA and human rights NGOs deepened discussions on the public defense system in Japan. But to change the government's attitude which seemed reluctant to accord the internationally recognized norms relating to human rights, the JFBA had to wait until the discussion on overall justice system reform started in late 1990s.

⁹ The Human Rights Committee considered fourth periodic report of Japan (CCPR/C/115/Add.13 and Corr. 1) at its 1714th to 1717th meetings (CCPR/SR.1714-1717), held on 28 and 29 October 1998, and adopted the concluding observations at its 1726th and 1727th meetings (CCPR/C/SR.1726-1727), held on 5 November 1998.
http://www.nichibenren.or.jp/activity/international/library/human_rights/liberty_report-4th_observation_en.html

4 Justice Reform in Japan

In the 1990s, Japan was experiencing a drastic structural change in the society and economy. The society was shifting from an “ex ante regulation society”, where activities of individuals and corporations were controlled through the government-led ante regulations or guides, to an “ex post facto check society”, where each individual would act at one’s will at one’s own responsibility and any resulting disputes would be resolved by law through legal processes. The society also rapidly internationalized. Along with such a social change, “dispute resolution by law” had come to play more important role than ever before.

Under such circumstances, reform of the justice system initiated with the aim of “establishing an easy to use and accessible, proper and prompt, and reliable judicial system” (the “Justice System Reform”). In June 2001, recommendations of the Judicial Reform Council (JRC) ¹⁰were published.

In the recommendations JRC stated as follows:

Criminal justice is further strongly required to properly check the violations of the rules and to effectively sanction such violations through fair procedures in order to support a free and fair society in the coming age. In order to have criminal justice in Japan meet the expectations of the people and secure their trust hereafter, it is necessary to establish an appropriate system, perceiving the demands of the times and of society, paying attention to the above-mentioned purposes of criminal justice, checking the current problems of related systems in a composed and fair manner, and respecting the ideal of the guarantee of human rights set forth in the Constitution, including the guarantee of the defense rights of the suspects and the defendants.

JRC also stated in the section of the “Establishment of Public Defense System for Suspects and Defendants” as follows:

- *A public defense system for suspects should be introduced, and a continuous defense structure covering both the suspect stage and the defendant stage should be established.*

¹⁰ The Judicial Reform Council is a deliberative body established under the Cabinet in July 1999. Its statutory mission is to consider fundamental measures necessary for judicial reform and judicial infrastructure arrangement by defining the role of judicature in Japan in the 21st century.

<http://japan.kantei.go.jp/judiciary/2001/0612report.html>

- *The organization that manages the public defense system should be fair and independent, and public money should be introduced for operation of the system through a proper mechanism.*
- *While it is appropriate that technically the courts appoint and remove the defense counsel as in the case of the current court-appointed defense counsel system for the defendant, the above-mentioned organization should be responsible for the other services concerning administration of the system.*
- *The above-mentioned organization should take responsibility for the administration of the system vis-a-vis the people, and should establish a system that can offer thorough defense activity nationwide. In particular, it is critical to establish a structure that can support the effective implementation of the new popular participation system in the trial proceedings.*

In 2002 the “Plan for Promotion of Justice Reform¹¹”, which later became a guideline of the reform, was published. The major issues addressed in the plan included:

- *Expansion of civil legal aid,*
- *Increase in the number of judicial access points and providing comprehensive legal information through promotion of networks among related authorities, and*
- *Development of a public defending system for suspects and defendants (by establishing a fair and neutral entity operated by public funds).*
- *In light of the above, the Comprehensive Legal Support Plan was introduced, in effort to make available for people anywhere in the country all information or services necessary to resolve any legal problems, civil or criminal.*

This Comprehensive Legal Support Plan is embodied in the Comprehensive Legal Support Act (approved on May 26, 2004 and promulgated on June 2, 2004), with the JLSC designated as the central organization to provide comprehensive legal support.

¹¹ <http://www.kantei.go.jp/jp/singi/sihou/keikaku/020319keikaku.html>(only in Japanese)

5 Expansion of criminal legal aid

Under the current criminal justice system in Japan, if defense counsel cannot be retained due to a person's financial difficulties or other reasons, defense counsel will be appointed at such person's request or by authority of the court if he or she is detained in connection with a criminal case (a suspect, including a minor) or is indicted (a defendant).

As entrusted by the state, upon a court's request, the JLSC will select candidates for defense counsel from a list of attorneys registered with the JLSC. The JLSC enters into contracts with such attorneys and is responsible for making payments of fees and expenses for the court-appointed defense counsels. For juvenile cases, the family court handles the cases, and if the court determines the case meets the criteria for certain serious cases, an official attendant will be appointed for the juvenile. The JLSC provides services with respect to such official attendant in the similar matter with court-appointed defense counsel.

In principle, a notification from JLSC to the court of a nomination of defense counsel within 24 hours is desired. In practice, more than 95% of the nominations have been notified within 24 hours of such a request and were promptly followed up with direct contact with the suspect by appointed counsel. Counsel nominations can be made any day including weekends and holidays.

In 2009, the scope of cases for which a court-appointed counsel may be appointed for a suspect was expanded, and consequently, the number of applicable cases increased by approximately 10 times. In addition, since the *saiban-in* (lay judge) system was introduced, further expansion of services was sought for.

Of the total criminal matters in 2011, the court appointed defense counsel for 75.4% of the suspects, 85.6% of the defendants at district court, and 95.3% of the defendants at summary court.¹² Services relating to court-appointed defense counsel are provided exclusively by the JLSC.

¹² Based on 2011 data published by the Supreme Court

6 Quality assurance and the role of lawyers

Quality assurance and assessment of legal services have proceeded most effectively in England and Wales, Scotland, and the Netherlands, and South Africa and parts of Canada followed suit.

In Japan quality is rising on the agenda. The JLSC is required to proceed with its operation and provision of services to meet the goals of the Mid-term plan and the annual plan with improvement of service quality and efficiency.

Currently the JLSC does not have audit or peer review system, but has contract and monitoring system.

(1) Lists of legal aid lawyers by bar associations

Practicing lawyers must be a member of both the local bar association and the JFBA. Every local bar association has the committees on criminal defense, rights of children and crime victims.

The criminal defense committee of bar association is responsible for the operation of duty attorney system, the matter concerning court-appointed attorney system, training and the activity relating to the reform of criminal procedures.

Before entering into legal aid contract with the JLSC, attorneys must be enrolled in the lists (criminal, juvenile or crime victim support), made by the local bar association. Currently bar association is responsible for making the respective lists.

(2) Contract

In order to handle legal aid cases, attorneys have to enter into a contract with the JLSC. The JLSC has established the Rules for the Handling of Legal Affairs to be handled by contract attorneys (RHLA).

The RHLA contains matters concerning the criteria for the handling of legal affairs by contract attorneys. If contract attorneys violate their duties, the contract may be cancelled or suspended for certain period after the decision of the Judging Committee of JLSC.

The RHLA also contains the standards of handling cases, for example in criminal cases:

- 14 *A contract attorney for court-appointed defense counsel shall strive to provide at all times the best defense to a suspect, a defendant or a juvenile to protect such person's interests and legal rights in light of their rights to a defense being guaranteed.*
- 15 *A contract attorney for court-appointed defense counsel shall endeavor to secure necessary interview opportunities with suspects, defendants and juveniles and their release from physical confinement.*
- 16 *A contract attorney for court-appointed defense counsel shall provide suspects, defendants and juveniles with the necessary explanations and advice regarding the right to remain silent and other rights to a defense, endeavoring to take necessary measures against unlawful or undue restrictions of the right of a suspect, defendant and juvenile to a defense and the right of the criminal counsel to a defense.*

These standards of handling cases are basically similar to that of the Basic Rules on the Duties of Practicing Attorneys (formerly the Code of Ethics) of JFBA and conform to the UN Basic Principles on the Role of Lawyers.

(3) Monitoring criminal legal aid cases

For court-appointed defense counsel's cases, every police station is equipped with "Interview Note". It was introduced in 2009 by JLSC to record the date and the time of the interview, the name of the defense counsel and the suspect. It was carbon copied, one for defense counsel and the other for police station.

A court appointed defense counsel for suspect must submit the conclusion report with "Interview Note", so as to JLSC can monitor the activity of the counsel.

After indictment, the JLSC makes "Trial communication Memo" and submit it to the court. This was introduced to record the date and the time for every trial of court-appointed defense counsel for defendant. After the conclusion of the case, courts submit the "Memo" to JLSC. JLSC calculate the remuneration of the court appointed defense counsel by the report of the defense counsel, and JLSC uses the "Memo" as a reference.

For persons under arrest, prompt access to a lawyer is very important. JLSC set

the criteria in the Mid-term plan that the JLSC district office shall notify the candidate of defense counsel to the court within 24 hours. The defense counsel is required to visit the police station on the day or next day of the appointment. It means that most of the court-appointed defense counsels for suspect are to visit the police station and interview the suspect within 48 hours from the request.

If the court defense counsel for suspect does not visit the suspect or visit way late, the JLSC reports the fact to the local bar association. In such cases the criminal defense committee of the bar association makes the research on the cases. If the committee judges the attorney is not competent for criminal defense, the committee takes his/her name from the candidates list.

(4) Training and education

Training and education to the legal aid lawyers plays an important role in maintaining and improving the quality. All the district offices of JLSC hold the training seminar or workshop for both civil and criminal legal aid lawyers at least once a year. For court-appointed attorneys many of the training seminar are hold in cooperation with the criminal defense committee of the bar association.

The JFBA is enhancing training programs for attorneys in order to maintain the quality legal services and to adequately respond to the legal needs. Specific training programs are ethical training, training for newly-registered attorneys and training to improve practical skills. These training programs include the legal aid procedure and practical skills in court appointed defense counsel.

For staff attorneys the JLSC established the Support Office for Staff Attorneys and the Research Office for the Skill of Defense in Lay Judge Trial. Senior attorneys who have the experience and expertise in civil and criminal legal aid are stationed in the two offices and contacted from staff attorneys all around the nation. The offices also hold the fulfilling training seminars periodically for staff attorneys.

Through these processes, the quality of services provided by staff attorneys is improving. JLSC staff attorneys are also expected to help to improve the skills of lawyers in private practice especially in lay judge trial.

7 Conclusion

This year in 2014 we celebrate the 10th anniversary of Legal Aid Foundation and

8th anniversary of JLSC.

In these eight years the JLSC has been heavily involved in responding the expansion of legal aid services. In 2006 it started to offer legal information service and the support for crime victims. It also experienced the increase of civil legal aid cases, expansion of the court-appointed defense counsel to the pre-indictment stage. Furthermore in 2009 court-appointed defense counsel for the suspect increased tenfold in number.

We still have plans in the future to continue our expansion. The plans include enhancing the services for elderly or mentally/physically challenged person, to prolong the support for the Great Earthquake Victims and to expand the legal aid to crime victims who may be seriously damaged by domestic violence, stalking or child abuse.

Ensuring quality legal services is one of the largest missions of the JLSC. But we are still at the stage of studying tools and approaches developed in other countries. This International Forum is a wonderful experience to be with the co-leagues from all around the world.

We hope to share the experience of quality assurance and assessment with participants of this International Forum.