THE JAPANESE "PROSECUTORIAL JUSTICE" AND ITS LIMITED EXCLUSIONARY RULE

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I. INTRODUCTION

The basic structure of the Japanese criminal justice system is modeled after the Continental criminal justice system emphasizing substantial justice and truth-finding. It often draws admiring attention from the West because of its lower crime rate and higher clearance rate.[1] It is also viewed as "benevolent" due to the lenient disposition of trivial crimes (*bizai shobun*) by police, routine suspension of prosecution, suspended sentences and short sentences at trial.[2] Japanese police have been praised for the rarity of corruption and brutality and for the support and cooperation received from the public.[3] This phenomenon is often explained as a result of the unique traditional Japanese legal culture which emphasizes respect to authority and reintegration into the community.

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This article is based on the Part 5 of the author's J.S.D. dissertation (1997) at the University of California at Berkeley School of Law. Japanese names in this article are given in the Japanese name order, with the family name first. The names of the Japanese authors who have published in English are given as they are in their publications. This article cites the Japanese courts' cases in the U.S. style when the names of the parties are available. The names of the parties are not used in the Japanese citations. The author would like to thank his Japanese friends, Shinomiya Satoru, Esq., Harimoto Keiko and Yamato Megumi, who helped him to research the Japanese citations.

1. *See* A. DIDRICK CASTBERG, JAPANESE CRIMINAL JUSTICE 10-11, Figure 1.1 & 1.2 (1990).

2. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 342-56 (1992); JOHN OWEN HALEY, AUTHORITY WITHOUT POWER: LAW AND THE JAPANESE PARADOX 125-29 (1991)

3. DAVID H. BAYLEY, FORCES OF ORDER: POLICE BEHAVIOR IN JAPAN AND THE UNITED STATES 2-4 (1976).

Despite the praise from the West, however, this "heaven for a cop"[4] has recently been criticized from within the Japanese legal professional community because of its harsh institutional and cultural treatment of criminal suspects and defendants.[5] A leading Japanese criminal law scholar has criticized Japanese criminal trials as "regrettable" because of the dominant role of investigators in the criminal process.[6] A number of torture and physical violence cases have been revealed.[7] Public trust in the Japanese criminal justice system has also been shaken by the disclosure of a number of highly-publicized retrial cases in which individuals, mistakenly convicted of murders and wrongly sentenced to death, were acquitted after decades on death row.[8] As a result, fundamental reform of the system has been strongly recommended.[9]

This article explores the cultural and legal-institutional basis of Japanese criminal justice, popularly called "prosecutorial justice"(*kensatsukan shihō*), and examines how the Japanese Supreme Court has cooperated with the system. First, it begins by reviewing the traditional socio-cultural setting of the Japanese criminal justice system which is alien to the West. Second, it briefly examines the postwar constitutional change aimed at the de-inquisitorialization of the Japanese criminal justice system; it then reviews two competing theoretical understandings of its change. Third, it scrutinizes the main provisions of the Japanese Code of Criminal Procedure and the Police Duty Law which substantially restrict the constitutional attempt at strengthening adversarialism and systematically guarantee prosecutor dominance over

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4. *Id.* at 1.

5. *See* THE JAPAN CIVIL LIBERTIES UNION, CITIZEN'S HUMAN RIGHTS REPORTS NO. 1-5 (1983-85), reprinted in 20 LAW IN JAPAN 1 (1987).

6. Hirano Ryūichi, *Genkō Keiji Soshō No Shindan [Diagnosis of the Current Code of Criminal Procedure]*, *in* 4 DANDO SHIGEMATSU SENSEI KOKI SHUKUGA RONBUNSHŪ [COLLECTION OF LEARNED PAPERS FOR SEVENTIETH BIRTHDAY OF DANDO SHIGEMATSU] 407, 413 (1985). English summary of this article is Ryuichi Hirano, *Diagnosis of the Current Code of Criminal Procedure*, 22 LAW IN JAPAN 129 (Daniel H. Foote trans., 1989).

7. *See* Igarashi Futaba, *Crime, Confession and Control in Contemporary Japan*, 2 LAW IN CONTEXT 1 (1984).

8. *See* NIHON BENGOSHI RENGŌKAI HEN [JAPAN FEDERATION OF BAR ASSOCIATIONS, ED.], ZOKU SAISHIN [RETRIALS—CONTINUED] (1986).

9. *See Tokushū: Keiji Tetsuzuki no Kaikaku [Special Edition: Reform of Criminal Procedure]*, 61 HŌRITSU JIHŌ (1989); ODANAKA TOSHIKI, GENDAI SHIHŌ TO KEIJI SOSHŌ NO KAIKAKU KADAI [CONTEMPORARY JUSTICE SYSTEM AND REFORM TASK OF CRIMINAL PROCEDURE] (1995).

the individual at each step of the criminal process. Finally, it analyzes the Japanese Supreme Court's adoption of exclusionary rules in principle and its abstention from applying them in practice. This article will show that the high efficiency of Japanese "prosecutorial justice" is made possible by the grave sacrifice of the individual's constitutional rights, and that the Japanese Supreme court has neglected its role in administering prosecutorial justice.

II. TRADITIONAL SOCIO-CULTURAL SETTING OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

During the Meiji Restoration period (1868-1912), Japan adopted the Western civil law system to modernize its society. The basic Japanese legal system, including the Penal Code of 1907 and the Code of Criminal Procedure of 1922, was modeled after the Continental legal system and, in particular, the Prussian system.[10] Since the postwar reform propelled by the Supreme Commander of the Allied Powers (SCAP), the influence of American law has grown. In particular, the Constitution of 1947 and the Code of Criminal Procedure of 1948 were strongly inspired by American law.[11] However, Japan has maintained its own unique legal concepts which originated from nearly three centuries of Tokugawa Shogunate rule (1603-1868). Here I will briefly review two traditional Japanese concepts of law embraced and fostered by contemporary Japanese criminal justice.

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10. Although the French influence was initially strong in the early period of the adoption, the Prussian influence gradually replaced the French influence. "Familiarity with authoritarian forms of government administration, the Confucian tendency for obligation to one's group and respect for government authority, and the hierarchical nature of Japanese society greatly influenced the decision to adopt the European-style law codes and a German-style constitution with less emphasis on individual rights" (Percy R. Luney, Jr., *Introduction, in* JAPANESE CONSTITUTIONAL LAW ix (Percy R. Luney, Jr. & Kazuyuki Takahashi eds., 1993). Although the modern Japanese law has some French originated elements, the overall tone of the Japanese legal system has been very German. Even French-based provisions are interpreted in the light of German doctrine. *See* HIROSHI ODA, JAPANESE LAW 26-29 (1992); Aritsune Katsuta, *Japan: A Grey Legal Culture, in* STUDIES IN LEGAL SYSTEMS: MIXED AND MIXING 252 (Esin Örücü, et al. eds., 1996).

11. *See* Kenzo Takayanagi, *A Century of Innovation: The Development in Japanese Law, 1869-1961, in* LAW IN JAPAN: THE LEGAL ORDER IN AN CHANGING SOCIETY 12-15 (Arthur von Mehren ed., 1963); Yasuhiro Okudaira, *Forty Years of the Constitution and Its Various Influence: Japanese, American, and European, in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 6-13.

A. *Rights Subordinate to Group Primacy-Fragile and Unstable Rights*

It is widely accepted that the Japanese are subordinated to the group.[12] In contemporary Japanese society, the emphasis is put on the group rather than the individual, on duties instead of rights. John O. Haley states that "[t]he group and its welfare – from the family to the firm and the nation as a whole – is accorded influence at the expense of the individual."[13]

The Japanese Constitution also acknowledges group primacy in the "public welfare"(*kokyō no fukushi*) doctrine, which has "imprecise and elastic terms open to a range of interpretation."[14] Articles 12 and 13 of the Constitution provide that people "shall refrain from any abuse of [their] freedoms and rights" and "shall always be responsible for utilizing them for the public welfare" and that their right to life, liberty, and the pursuit of happiness is considered to be supreme "to the extent that it does not interfere with the public welfare."[15] The doctrine has "imprecise and elastic terms open to a range of interpretation"[16] including, for instance, "abuse" and "public welfare," and, as Lawrence W. Beer states, "[d]efinitions of the phrase have ranged from abstract references to public order, the collective good, or state policy, to specific criteria related to one category of court cases."[17]

In these social and legal surroundings, the individual's rights become fragile and unstable and it is very difficult to "take rights seriously."[18] The

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12. *See* CHIE NAKANE, JAPANESE SOCIETY (1970); Yosiyuki Noda, *The Character of the Japanese People and their Conception of Law*, *in* THE JAPANESE LEGAL SYSTEM 299 (Hideo Tanaka ed., 1976); EDWIN O. REISCHAUER, THE JAPANESE (1977).

13. John O. Haley, *Introduction: Legal vs. Social Control*, 17 LAW IN JAPAN 1, 3 (1984).

14. John M. Maki, *The Constitution of Japan: Pacificism, Popular Sovereignty, and Human Right*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 6. Lawrence W. Beer states, "[d]efinitions of the phrase have ranged from abstract references to public order, the collective good, or state policy, to specific criteria related to one category of court cases"(Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 224).

15. KENPŌ [THE CONSTITUTION OF JAPAN] arts. 12, 13.

16. John M. Maki, *The Constitution of Japan: Pacificism, Popular Sovereignty, and Human Right*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 6.

17. Lawrence W. Beer, *Freedom of Expression: The Continuing Revolution*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 224.

18. RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 149 (1977). Dworkin, a modern pillar of rights-based jurisprudence, states that "[t]he institution of rights . . . represents the majority's promise to the minorities that their dignity and equality will be respected," thus rights against the government are political trumps to "do something even when the majority thinks it would be wrong

individual's rights are viewed in relation to his duties to the group or the community, not "in terms of one individual's right vis-à-vis another individual or state power."[19] When the value of the group primacy conflicts with individual rights, the latter is supposed to yield.[20] The "predisposition to yield" is superior to the "predisposition to insist."[21]

B. Indispensability of Confession for Restoring Harmony

The emphasis on group primacy and social harmony has developed a strong mechanism for informal social control.[22] Hiroshi Wagatsuma and Arthur Rosett observed that "[i]n a society that emphasizes group membership as a basis for personal identity, it is important to maintain the sense of 'insideness' after a rupturing conflict."[23] Apology plays an important role as "a ceremony of restoration to mark the reestablishment

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to do it, and even when the majority would be worse off for having it done." *Id.* at 194, 205.

19. Lawrence W. Beer, *Constitutionalism and Rights in Japan and Korea*, *in* CONSTITUTIONALISM AND RIGHTS, *supra* note 14, at 225, 227. Rajendra Ramlogan argued that "[t]he Japanese are more comfortable with duties than rights" (Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 134 (1994)).

20. Dean J. Gibbons, *Law and the Group Ethos in Japan*, 3 INT'L LEGAL PERS. 98, 123 (1990).

21. Hahn, *supra* note 14, at 194. In addition, it is necessary to note that "rights [are] not perceived as rigidly as in the West; rather rights existed as vague and somewhat nebulous concepts" (Ramlogan, *supra* note 19, at 133). Takeyoshi Kawashima states that "for Japanese, the right is indeterminate, conceived as something situationally contingent" (TAKEYOSHI KAWASHIMA, NIHONJIN NO HŌISHIKI [LEGAL CONSCIOUSNESS OF THE JAPANESE] 138 (1967)). Kenneth L. Port also discussed that "[r]ather than being rigid, the Japanese perceive right and law as vague concepts which gain meaning only in a given situation" (Kenneth L. Port, *The Japanese International Law "Revolution": International Human Rights and Its Impact in Japan*, 28 STAN. J. INT'L L. 139, 166 (1991)).

22. For instance, *giri*, which is a whole series of rules based on propriety and "a source of shame," is emphasized over law (RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 454 (London, 1968)). Noda stated that "the idea of shame . . . will be the keystone to the system of Japanese civilization" (YOSIYUKI NODA, INTRODUCTION TO JAPANESE LAW 160 (A. Angelo trans., 1976)). *Giri* is observed "not so much because it correspond[s] to a series of moral values or strict duties but rather because social reprobation attach[es] to its non-observance." *Id.*

23. Hiroshi Wagatsuma & Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 L. & SOC'Y REV. 461, 466 (1986).

of harmony" or as "explicit acknowledgment of commitment to future behavior consonant with group values."[24]

Confession in the criminal process has the same role as apology has. Confessions are always sought by law enforcement authorities in every country. In Japan, however, it "go[es] beyond the establishment of culpability and become[s] the vehicle for restoring the harmony that may have been disrupted by the detainee."[25] John O. Haley sharply points out that:

> Confession, repentance, and absolution provide the underlying theme of the Japanese criminal process. At every stage, from initial police investigation through formal proceedings, an individual suspected of criminal conduct gains by confessing, apologizing, and throwing himself upon the mercy of the authorities.[26]

Unless the defendant confesses, the process of absolution and reassimilation into society cannot begin; as a consequence, the criminal justice system assumes that confessions must be gained at any cost.[27] Then the Japanese surrender to "psychological compulsion to confess";[28] while

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24. *Id.* at 466-67. Neither civil nor criminal defendants in the United States and Germany are called upon to express personal apology to those whom they have injured or to the society whose rules they have violated. *Id.* at 462, 464. They continued: "An apology in the Japanese cultural context thus is an indication of an individual's wish to maintain or restore a positive relationship with another person who has been harmed by the individual's acts. . . . The act of apologizing can be significant for its own sake as an acknowledgment of the authority of the hierarchical structure upon which social harmony is based. . . . [T]he apology is being offered and much greater emphasis on the expression of commitment to positively harmonious relationship in the future in which the mutual obligations of the social hierarchy will be observed." *Id.* at 478.

25. Ramlogan, *supra* note 20, at 137. Law enforcement authority roles are not limited to the formal tasks of apprehending, prosecuting, and adjudicating. "Rather, once personally convinced that a suspect is an offender, their concern for evidentiary proof of guilt shifts to a concern over the suspect's attitude and prospects for rehabilitation and reintegration into society, including acceptance of authority." John O. Haley, *Confession, Repentance and Absolution, in* MEDIATION AND CRIMINAL JUSTICE: VICTIMS, OFFENDERS AND COMMUNITY 202 (Martin Wright and Burt Galaway eds., 1989).

26. John O. Haley, *Sheathing the Sword of Justice in Japan: An Essay in Law without Sanctions*, 8 J. JAPANESE STUD. 265, 269 (1982).

27. Port, *supra* note 21, at 162-63 (footnote omitted).

28. BAYLEY, *supra* note 3, at 152.

29. *Id.* at 154.

law enforcement authorities enjoy "enormous moral authority"[29] over suspects and the accused. A suspect who refuses to confess is considered unrepentant, less correctable, and hardly escapes conviction and punishment;[30] a defendant who confesses often receives a "suspension of prosecution" (*kiso yūyo*) or more lenient punishment.[31]

III. POSTWAR CHANGE OF BASIC STRUCTURE OF THE JAPANESE CRIMINAL JUSTICE AND TWO COMPETING UNDERSTANDINGS

A. *Postwar Shift Toward De-inquisitorializing Criminal Justice*

Pre-war criminal justice is often defined as "inquisitorial procurator justice"[32] because of the procurator's leading role in the system. Procurators had broad discretion of "suspension of prosecution"[33] as well as extensive powers of arrest, detention, interrogation of suspects.[34]

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30. Haley, *supra* note 26, at 203. Not surprisingly, police, prosecutors, and judges are tempted to induce or coerce acknowledgment of guilt. "The more convinced the authorities become that the suspect is guilty, the more likely they are to resort to harsh and abusive measures." *Id.*

31. Under Article 248 of the CCP, Japanese prosecutors have discretionary power whether or not to institute prosecution. The Article reads: "In case it is unnecessary to prosecute according to the character, age and environment of an offender the weight and conditions of an offense as well as the circumstances after the offense, the public prosecution may not be instituted." Regarding discretionary prosecution in Japan, *see* Shigemitsu Dando, *System of Discretionary Prosecution in Japan*, 18 AM. J. COMP. L. 518 (1970); B. J. George, Jr., *Discretionary Authority of Public Prosecutors in Japan*, 17 LAW IN JAPAN 42 (1984); Marcia E. Goodman, *The Exercise and Control of Prosecutorial Discretion in Japan*, 5 UCLA PAC. BASIN L. J 16 (1986).

32. Odanaka Toshiki, *Sengo Kenji Shihō No Tenkai to Kenji Shihōron* [*Development of Postwar Criminal Justice and Theory of Criminal Justice*], *in* GENDAI HŌ SEMINAR [CONTEMPORARY LAW SEMINAR] 23-4 (1972. 8).

33. *Id.* art. 279. *See* Dando, *supra* note 31, at 518-521. Although the basic structure of the Japanese criminal justice system was modeled after the German system, the German principle of "compulsory prosecution" was not introduced. Because of the so-called "principle of legality" (*Legalitätsprinzip*) in the German Code of Criminal Procedure (*Strafprozessordung*) § 152 (II), German prosecutors (*Staatsanwalt*) are not given the discretion to decline to charge "felony" (*Verbrechen*). *See generally* Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 508 (1970); John H. Leingbein, *Controlling Prosecutorial Discretion in Germany*, 41 U. CHI. L. REV. 439 (1974); Thomas Weigend, *Continental Cure for American Ailments: European Criminal Procedure as a Model for Law Reform*, *in* 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 401 (1980).

34. Keisohō [The Code of Criminal Procedure], No. 75 of 1922, arts. 123, 255.

Japanese procurators were hierarchically equivalent to judges, though with more political power and higher in status than defense lawyers.[35]

The status of the judiciary and defense lawyers was very weak.[36] The judiciary was under the general supervision of the Ministry of Justice[37] and had no power to review the constitutionality of legislation passed by the Diet. The private bar association was also under the close supervision and control of the Ministry of Justice.[38]

Criminal procedural rights were nominal. The restriction on the "rights of the subject" was made constitutional by adopting a legal technique of "reservation by law" (*hōritsu no ryūho*),[39] which meant that

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35. Prosecutors sat on an elevated platform with judges in the courtroom, while the defense counsel sat at the floor level with accused. Yasuhei Taniguchi, *The Post-War Court System as Instrument for Social Change, in* INSTITUTIONS FOR CHANGE IN JAPANESE SOCIETY 22 (George DeVos ed., 1984). B. J. George sketches the criminal procedure before 1946:

> During the procedural phase of preliminary inquiry (*yoshin*), the public procurator, sitting with the inquiring (examining) judge, examined the suspect and any other witness and compiled a dossier that would be transmitted to the court if a decision to institute formal prosecution were reached. Trial consisted exclusively of a hearing on the charges confirmed by a public procurator, an examination of the accused in the absence of other witnesses, a reading of the protocols, and the taking of testimony of witnesses and expert witnesses whose statements were not embodied in a protocol reflecting the preliminary inquiry. No right of representation by counsel arose until a "suspect" had become an "accused person," which meant that counsel's role was limited to impeaching the data reviewed by the court during public trial proceedings and to making closing submissions concerning guilt and sanctions.

B. J. George, *Rights of the Criminally Accused, in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 292.

36. Haruo Abe, *Self-Incrimination—Japan and the United States*, 46 J. CRIM. L., CRIMINOL. & POLICE SC. 613, 618 (1956).

37. Percy R. Luney, Jr., *The Judiciary: Its Organization and Status in the Parliamentary System, in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 125. The Ministry of Justice controlled all budgetary and administrative matters of the judiciary, including the appointment, promotion, transfer, supervision, and dismissal of judges and court officials . *Id.*

38. *Id.* at 127. "Given the limited jurisdiction of the judicial system, the private practice of law consisted for the most part of representing small private clients in court by humbly submitting their pleas to the dominant judges and public prosecutors." *Id.*

39. For instance, arrest, detention, trial or punishment had to be "according to law" (MEIJI CONSTITUTION, art. 23); trial had to be conducted by judges, as determined by law. *Id.* art. 24; the houses of Japanese could not be entered or searched without consent "except in cases provided for by law." *Id.* art. 25; and secrecy of correspondence was to remain inviolate "except in instances mentioned in the law." *Id.* art. 26.

the rights could be enjoyed only "within the limits of the law." Since the Constitution imposed no limitation on the content of the law, any restriction of one's rights was allowed as long as it had a statutory basis.[40] It is also reported that "constant use of third-degree methods and long detentions"[41] by the police was usual, particularly against "political offenders."[42]

After World War II, Japan underwent radical change at the initiative of SCAP. This change was embodied in the present Constitution of Japan.[43] First, the Constitution clearly denies the sovereignty of the Emperor (*tennō*) and declares that the "sovereign power resides with the people."[44] Second, the status of the judiciary and defense counsel is elevated. The judiciary is an independent organ under the Supreme Court's leadership[45] and has "the power to determine the constitutionality of any law, order, regulation or official act."[46] Defense counsel are brought into a formal state of equality with public prosecutors.[47] Third, departing from the idea of legal positivism, the Constitution provides extensively fundamental human rights. To quote Matsuo Kōya, the Constitution requests a shift from "weak liberty"(*yowai jiyū*) reserved by statutory law to "strong liberty"(*tsuyoi jiyū*) superior to statutory law.[48] The Bill of Rights of the Japanese Constitution provides very detailed provisions

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40. Noriho Urabe, *Rule of Law and Due Process: A Comparative View of the United States and Japan*, in JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 175.

41. SUPREME COMMANDER FOR THE ALLIED POWERS, GOVERNMENT SECTION, POLITICAL REORIENTATION OF JAPAN, SEPT. 1945 TO SEPT. 1948, at 192.

42. Abe, *supra* note 36, at 618-20; Appleton, Richard B., *Reforms in Japanese Criminal Procedure Under Allied Occupation*, 24 WASH. L. REV. 401, 403-04 (1949); R. MITCHELL, THOUGHT CONTROL IN PRE-WAR JAPAN (1976).

43. *See* Robert E. Ward, *The Origins of the Present Japanese Constitution*, 50 AM. POL. SCI. REV. 980 (1956); KYOKO INOUYE, MACARTHER'S JAPANESE CONSTITUTION—A LINGUISTIC AND CULTURAL STUDY OF ITS MAKING (1991); KOSEKI SHOICHI, THE BIRTH OF JAPAN'S POSTWAR CONSTITUTION (Ray A. Moore ed. & trans. 1997). The process is called "Japan's American revolution" (KENNETH B. PYLE, THE MAKING OF MODERN JAPAN 151(1978)).

44. KENPŌ [THE CONSTITUTION OF JAPAN], preamble. The political system under the Meiji Constitution of 1890 was "a modernized version of an absolute monarchy." Okudaira, *supra* note 11, at 6. The godlike Emperor (*tennō*) was sovereign and the heart of the Meiji Constitution (*See* DAI NIPPON TEIKOKU KENPŌ [THE CONSTITUTION OF THE EMPIRE OF JAPAN], preamble).

45. *See* THE CONSTITUTION arts. 76-80.

46. *Id.* art. 81.

47. B. J. George, *Rights of the Criminally Accused*, *in* JAPANESE CONSTITUTIONAL LAW, *supra* note 10, at 292.

48. Matsuo Kōya, *Nin'i Sōsa Ni Okeru Yūkeiryoku No Kōshi [Exercises of Physical Force in Voluntary Investigation]*, *in* KEIJI SOSHŌHŌ HANREI HYAKUSEN [SELECTED ONE HUNDRED DECISIONS IN CRIMINAL PROCEDURE LAW] 6 (Matsuo Kōya & Inouye Masahito eds., 6th ed. 1992) [hereinafter HANREI HYAKUSEN].

regarding criminal procedural rights similar to the American counterparts.[49] They reflect the special concern of SCAP with the pre-war and wartime criminal justice systems' treatment of human rights.

The Constitution established a blueprint for "the second modernization of [criminal] procedure,"[50] which was to de-inquisitorialize the criminal justice system. Although it is true that the Constitution was not adopted voluntarily, it must not be considered simply a foreign transplantation. The values incorporated in the Constitution reflect the Japanese people's desire to guarantee their human rights which had been suppressed under the pre-war system.

B. Two Competing Standpoints of Japanese Criminal Procedure: Dando vs. Hirano

Following the adoption of the new Constitution, the Code of Criminal Procedure [hereinafter CCP][51] was enacted. It incorporated the cardinal elements of Anglo-American criminal process such as the judicial warrant requirement for compulsory measure and the restriction on the use of evidence.[52] However, the influence of Anglo-American law is limited. The CCP was a product of compromise between the Japanese government and the SCAP and it retains the traditional and inquisitorial features in many respects.[53] This hybrid characteristic of the CCP is the basis of a tense confrontation between two competing theories as to the nature of Japanese criminal procedure.

The first is Dando Shigemitsu's theory which was influenced by German criminal procedure theory.[54] He refuses to acknowledge that the

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49. Article 31 of the Constitution is the general provision restricting penal legislation and guaranteeing "due process" in criminal procedure. Articles 32 through 39 are specific provisions that stipulate minimum constitutional requirements for due process in criminal procedure.

50. DANDO SHIGEMITSU, JAPANESE CRIMINAL PROCEDURE 17 (B.J. George, Jr. trans., 1965).

51. KEISOHŌ [THE CODE OF CRIMINAL PROCEDURE], Law No. 131 of 1948. With regard to the historical background of the legislation of CCP, *see* MITSUI MAKOTO, 1 KEIJI SOSHŌHŌ 180-83 (1997).

52. DANDO, *supra* note 50, at 17. Regarding the influence of American Law on Japanese Law, *see* Tamiya Hiroshi, *Keiji Soshōhō No Tenkai to Eibeihō No Eikyō [Development of Criminal Procedure Law and Influence of Anglo-American Law]*, *in* 551 JURIST 155 (1974); Mitsui Makoto, *Keiji Soshōhō [Criminal Procedure Law]*, *in* 600 JURIST 256 (1975); Suzuki Yoshio, *Gaikoku Hō No Eikyō [Influence of Foreign Law]*, *in* 930 JURIST 40 (1989).

53. *See infra* chapter III.

54. Dando was a leading law scholar at the University of Tokyo, and was later involved in leading criminal procedure cases as a Japanese Supreme Court Justice. His theory has provided a conservative viewpoint for the majority opinion of the Japanese courts and law enforcement

basic value system of Japanese criminal procedure changed following the adoption of the new Constitution; although, he admits many elements of adversarialism have been adopted in the CCP. He understands that the nature of criminal procedure cannot help being inquisitorial or officially-controlled because the "effectuation of the right to punish is rightly enough a matter of the state,"[55] so that the newly-introduced adversary party system is simply one of "form," not "substance."[56] Also, the prosecutor is not an adversary party of the defendant but a neutral representative of the whole state including the defendant.[57]

Dando's rival is Hirano Ryūichi who is much influenced by American "constitutional criminal procedure."[58] He emphasizes that the shift from the Meiji Constitution and the old CCP to the Showa Constitution and the new CCP implicates a fundamental change in the objective and value of criminal procedure, from inquisitorialism to adversarialism, from a "principle of trust" to a "principle of distrust" in the state.[59] For Hirano, adversarialism is not simply a technique for truth-finding; rather, it is a perspective of a state regarding a sanction of punishment.[60] Adversarialism makes the defendant a "subject" in the criminal process and under adversarialism, the prosecutor and defendant are two equal "parts".[61] Thus he concludes the adversary party principle is not merely a "form" of criminal procedure but is its "nature" or "substance."[62] Furthermore he argues that the stage of investigation also should be "judicialized" or "adversarialized" (*sōsa no sihoka*)."[63]

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authorities. He argued that "the present-day need is for a law of criminal procedure, the chief concern of which is not to protect human rights, but to protect society." DANDO, *supra* note , at 29.

55. DANDO, *supra* note 50, at 82. In this context, he argues that the Anglo-American "arraignment" system, at least its ideal type, is against the nature of criminal procedure. *Id.* at 84.

56. *Id.* at 82.

57. *Id.* at 83. In this context, he argues the confrontation between prosecutor and defendant is not between two "parts" but between the "whole" and a "part." *Id.* In his theory, therefore, the Anglo-American concept of battle between state and individual in criminal process has no ground.

58. Hirano was a leading law scholar at the University of Tokyo and president of the University. His theory is influential among scholars and defense attorneys.

59. HIRANO RYŪICHI, KEIJI SOSHŌHŌ NO KISO RIRON [BASIC THEORY OF CRIMINAL PROCEDURE LAW] 4-5 (1964). Although he admits the new CCP has traditional-inquisitorial elements, he argues that their interpretation and application should be made under the adversary principle (HIRANO RYŪICHI, KEIJI SOSHŌHŌ GAISETSU [OUTLINE OF CRIMINAL PROCEDURE LAW] 11 (1968)).

60. HIRANO, KEIJI SOSHŌHŌ GAISETSU, *supra* note 59, at 11.

61. *Id.*

62. *Id.*

63. *Id.* at 13-14.

These two rival standpoints concern how to understand the postwar constitutional change in the context of criminal procedure. Dando maintains that, despite the constitutional change, there has been no fundamental change in the nature of criminal procedure; whereas Hirano argues that the fundamental principle of the Constitution has changed and criminal procedure should change correspondingly. The competition between these two theories is still tense in the Japanese criminal procedure jurisprudence. Although Hirano's perspective gets more support from scholars and defense attorneys, the Japanese Supreme Court and law enforcement authorities have adhered to Dando's theory. Aside from criminal procedure in theory, criminal procedure in practice has not changed much.

IV. RESTRICTION ON THE CONSTITUTIONAL REQUESTS IN THE CODE OF CRIMINAL PROCEDURE AND THE POLICY DUTY LAW

Chapter IV examines the main provisions of the CCP and the Police Duty Act,[64] which disturb the drastic turn in the Constitution and overshadow constitutional procedural rights. It also reviews the Japanese Supreme Court's lenient interpretation of them.

A. "Voluntary Accompaniment"(nin'i doko)

The Constitution provides a strict warrant requirement for arrest and one exception of flagrant offenders.[65] The CCP provides two categories of exceptions for the warrant requirements.[66] In addition to the warrantless arrest exceptions in the Constitution and the CCP, Japanese criminal

64. POLICE DUTY ACT, No. 163 (1954).

65. On this point, the Japanese arrest system is stricter than the American. The strictness stemmed from the SCAP's concern on the abuse of arrest under the prewar and wartime criminal justice system. Within the Anglo-American criminal justice system, arrest warrants are seldom used and not constitutionally required. *See U.S. v. Watson*, 423 U.S. 411 (1976); Police and Criminal Evidence Act of 1984 (U.K.) art. 25. A warrant is required only when a private home must be entered to arrest a suspect. *See Payton v. New York*, 445 U.S. 573 (1980).

66. The exceptions are the: (1) "flagrant offenders"(genkō hannin) exception in Article 212 of the CCP, which cover "(i) persons being pursued as an offender with hue and cry; (ii) persons carrying criminally acquired goods, weapons, or other objects which apparently appear to have been used for the offense; (iii) persons who bearing on their bodies or clothing conspicuous traces of the offense; and (iv) persons who flee when challenged"; and (2) "emergency arrests" (kinkyū taiho) exception in Article 210 of the CCP.

justice provides a more convenient way to avoid the warrant requirement: "Voluntary accompaniment" (*nin'i doko*). With Article 197 (1) and 198 (1) of CCP,[67] the police may ask a suspect to accompany them "voluntarily" for questioning. The Police Duty Act also provides the police with the authority to stop and question a suspect and request a detained individual to go "voluntarily" to a nearby police station.[68]

Since this "voluntary accompaniment" is not a formal arrest, constitutional restrictions on arrest do not attach. The Japanese Supreme Court has interpreted the system leniently enough "to allow police to put considerable pressure on suspects to "consent" to rather extensive questioning."[69]

First, long periods of interrogation incident to "voluntary accompaniment" are approved of. The Court has approved four half-day interrogations and non-stop all-night interrogation without arrest, saying it is "appropriate from the standpoint of socially accepted views."[70] Second, the Court has been lenient with respect to the use "physical force" incident to "voluntary accompaniment." In *Tanahashi v. Japan*,[71] a leading case on the scope of "compulsory measure" (*kyōsei shobun*), the Court held that the use of physical force does not necessarily constitute compulsion. Although the defendant was alleged to have "voluntarily" accompanied the police in this case, he was not allowed to leave the police station and the police exercised "physical force" to detain him.

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67. Article 197 (1) of the CCP provides that "[investigators] may conduct questioning necessary in order to attain the objectives of the investigation; provided, however, that compulsory measures may not be taken except in situations where there are special provisions in this law." Article 198 (1) of CCP provides that "[investigators] may, when it is necessary for conducting an investigation of an offense, call upon the suspect to appear and examine him."

68. POLICE DUTY ACT, arts. 2 (1) & (2).

69. *See* Daniel H. Foote, *Confessions and the Right to Silence in Japan*, 21 GA. J. INT'L & COMP. L. 415, 445 (1991).

70. 38 KEISHŪ 479, 487 (Sup.Ct., Feb. 29, 1984). *See also* 43 KEISHŪ 581 (Sup.Ct., July 4, 1989). This issue will be reviewed in *infra* texts accompanying notes 162-166.

71. 30 KEISHŪ 187 (Sup.Ct., March 16, 1976). This case is called the "*Gihu* Breath Examination Refusal Case." In this case, the suspect had been stopped by police, refused to take an alcohol examination by breath, and "voluntarily accompanied" police to the station. Within the police station, the suspect gave his license to the police, but continued to refuse the alcohol examination. No arrest had been made. When he tried to leave the station during interrogation, the police grabbed the suspect's wrist with both hands, followed by struggle between the two. The suspect was then arrested and charged with obstructing an officer in performance of official duties. *See also* 8 KEISHŪ 1137 (Sup.Ct., July 15, 1954); 8 Keishū 2435 (Sup.Ct., Dec. 27, 1954). For comment on the *Tanahashi* case, *see* Matsuo, *supra* note 48, at 6-7.

Under this system, the difference between arrest and "voluntary accompaniment" is blurry and law enforcement authorities can "shield themselves from potential constitutional scrutiny for overreaching their official powers."[72] In this context, "voluntary accompaniment" is another example of the Japanese "consensual myth."[73] Although it is observed that Japanese suspects cooperate "voluntarily" in their prosecution,[74] it would be more realistic to assume that individuals choose to cooperate taking into consideration the disadvantage that non-cooperation would bring.

B. Warrantless Search and Seizure

Article 35(1) of the Constitution is equivalent to the U.S. Fourth Amendment.[75] Article 220 (1) of the CCP provides an exception to the warrant requirement for searches, seizures and inspection incidental to a valid arrest. If a person has been arrested pursuant to a validly issued warrant, or if "emergency arrests" or "flagrant offender arrests" are made, the police may engage in search, seizure and inspection without the prior issue of a specific warrant.[76]

The Police Duty Law authorizes the police to stop and question suspicious persons when the police suspect that criminal activity is in

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72. David A. Suess, *Paternalism Versus Pugnacity: The Right to Counsel in Japan and the United States*, 72 IND. L. J. 291, 303 (1996).

73. *See* J. Mark Ramseyer, *The Costs of Consensual Myth: Antitrust Enforcement and Institutional Barriers to Litigation in Japan*, 94 YALE L.J. 604 (1985).

74. Foote, *supra* note 2, at 344-45. *See also* BAYLEY, *supra* note 3, at 146.

75. Article 35(1) reads: "The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the place to be searched and things to be seized."

76. KEISOHŌ art. 220 (1). The Japanese Supreme Court has expanded the scope of the "search incident arrest" exception. For instance, in *Arima v. Japan*, 15 KEISHŪ 915, 920 (Sup.Ct., June 7, 1961)(*translated in* HIROSHI ITOH & LAWRENCE W. BEER, THE CONSTITUTIONAL CASE LAW OF JAPAN: SELECTED SUPREME COURT DECISIONS: 1961-70 157-61 (1978)), the Court upheld the warrantless search in the absence of the defendant, later followed by his arrest. In this case, based on the statement of an arrestee that she purchased heroin from the defendant, four drug control officers visited the defendant's home to arrest him. The defendant was not at his home, so in the presence of the defendant's seventeen year old daughter, the officers searched his entire house without a warrant and discovered narcotics. Upon his return home, the defendant was arrested. The Court quashed the appeal court's decision and upheld the warrantless search . *Id.* at 159. *Arima* is similar to *Rawlings v. Kentucky*, 448 U.S. 98, 110 (1980), in which the U.S. Supreme Court approved a search incidental to arrest even though it occurred before the arrest.

progress.[77] Like *Terry*,[78] the "stop-and-question" does not require a warrant requirement. Unlike the "frisk" in *Terry*, however, the Japanese search incident to the stop-and-question is not limited to the search for weapons. The Act has no provision concerning the searches of "personal effects" (*shojihin*), and it has been an important question as to whether the search-and-seizure of personal effects incident to the stop-and-question are permissible.[79] In *Sakai v. Japan*,[80] a leading case concerning the warrantless search of personal effects outside a suspect's body,[81] the Japanese Supreme Court extended the scope of Article 2 of the Act to include searches of personal effects. In the case, the police misconduct was intentional and flagrant in that the suspects were in custody,[82] a search warrant could have been obtained, and the actual search took place almost two hours after a crime was reported.[83] However the Court held that the search was not restrained by the constitutional warrant requirement "upon considering the necessity and urgency of examining of the personal effects, and balancing the infringement of the legal right of an individual with and

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77. POLICE DUTY LAW, art. 2 (1). *See* WATANABE OSAMU, SHOKUMU SHITSUMON NO KENKYŪ [A STUDY OF QUESTIONING IN DUTY] (1985). Under Article 2 (1) of the Police Act and Article of 2(1) of the Police Duty Law, the police may also stop vehicles to prevent or investigate crimes.

78. *Terry v. Ohio*, 392 U.S. 1 (1968).

79. *See* Watanabe Osamu, *Shokumu Shitsumon Ni Tomonau Shojihin Kensa* [*Search of Personal Effects Incident to Stop-and-Question*], *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 52, at 50-51.

80. 32 KEISHŪ 670, 674-75 (Sup.Ct., June 20, 1978). This case is called the "*Heiko* Bank Robbery Case." For comment on this case, *see* Ikeda Osamu, *Shojihin Kensa* [*Search of Personal Effects*], *in* HANREI HYAKUSEN, *supra* note 48, at 10-11.

81. In cases where the personal effects searched and seized are attached to a suspect's body, for instance inside pocket or shoes, the Supreme Court, while noting that the search is illegal, admitted the illegal evidence relying on the so-called "theory of relative exclusion" *See* 32 KEISHŪ 1672 (Sup.Ct., Sept.7, 1978); 42 KEISHŪ 1051 (Sup.Ct., Sept. 16, 1988) (admitting the illegal evidences in the both cases). *See infra* Chapter V. A.

82. The conclusion of *Sakai* regarding the search of personal effects incident to stop-and-question seems to be similar to *United States v. Place*, 462 U.S. 696 (1983) where the U.S. Burger Court extended *Terry* to the seizures of personal effects. Considering that *Terry* is not applicable to the case under "custody" like *Sakai*, however, the conclusion of *Sakai* would not be approved by the U.S. Court.

83. The police stopped and questioned two bank robbery suspects with a bowling ball bag and briefcase. When they refused to answer, the police strongly urged them to get out of the car and took them to the police station. The suspects continued to remain silent and would not allow the bag to be opened. An hour or so thereafter, a policeman lost his patience and, without their consent, opened the bowling ball bag, and broke open the briefcase with a screwdriver. They discovered much currency and some wrappers with the name of the bank in question. Then the police arrested them and seized the evidences. The evidence was used against the defendants at trial. For comment on this case, *see* Ikeda Osamu, *Shojihin Kensa* [*Search of Personal Effects*], *in* HANREI HYAKUSEN, *supra* note 48, at 10-11.

the public interest which should be protected."[84] In brief, *Sakai* provides legitimacy to the police practice without any statutory basis and shows that the Japanese Supreme Court does not seriously intend to deter police misconduct.

C. *Lengthy Pre-indictment Detention for Interrogation*

1. Detention Up to 23 Days of Arrestee

In Japan, criminal suspects are subject to a very lengthy pre-indictment detention and interrogation in contrast to other industrial countries.[85] In addition to the period secured by "voluntary accompaniment," law enforcement authorities have up to 23 days to detain a suspect before they must prosecute a valid arrest pursuant to a warrant under the CCP.[86] It is also necessary to note that there is no provision in Japanese law for release on bail during the pre-indictment stage of detention.[87]

Police are entitled to detain a suspect for up to 48 hours before they must refer him to a prosecutor or release him.[88] The prosecutor then has 24 additional hours either to release the suspect, file an indictment, or to request from a judge an extension of the detention for 10 more days.[89] At the end of the ten days of detention, prosecutors may request an additional 10 days before they must either prosecute or release the suspect.[90] In practice, the police refer over 90% of suspects they arrest for Penal Code

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84. 32 KEISHŪ at 688.

85. In the United States, arrested suspects are entitled to post-arrest probable cause hearing within forty-eight hours. *See Gernstein v. Pugh*, 420 U.S. 103 (1975); *County of Riverside v. McLaughlin*, 500 U.S. 44 (1991). In England, under the Police and Criminal Evidence Act of 1984, police can detain suspects for up to a maximum of ninety-six hours. Police And Criminal Evidence Act, arts. 41(1), 42(1), 43(12). In Germany, arrested suspects must be released or brought before a magistrate by the end of the day following the arrest. §128 (1) STPO.

86. *See* KEISOHŌ art. 199 (1).

87. Article 88 (1) of CCP provides for a request for bail to be made after formal indictment. The rate of bail of the accused persons is not high. *See Citizen's Human Rights Report No. 5: Present Conditions of the Bail System in Japan Violate the International Covenant on Civil and Political Rights*, 20 LAW IN JAPAN 54, 67-68, tables 1 &2 (1987); Watanabe Yasuo, *Hoshaku No Seido No Unyō [Operation of Bail System]*, *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 51, at 159, tables 1 & 2.

88. KEISOHŌ art. 203 (1).

89. *Id.* art. 205 (1).

90. *Id.* art. 208 (2). Regarding certain crimes, such as insurrection and riot, the judge may further extend the period for an additional five days. *Id.* art. 208 (2).

offenses to prosecutors and the prosecutors request detention for approximately 85% of those suspects (with an additional ten days of detention for about one-third of these).[91] The courts grant prosecutors requests for a detention warrant (whether for the initial ten days or the extension) over 99.7% of the time.[92]

During this very lengthy period of detention, suspects are usually held in a so-called "substitute confinement cell" (*daiyō kangoku* or *ryūchijō*),[93] which is a holding cell within a police station. The detention of suspects in the "substitute confinement cell" has long been criticized because suspects are under the investigator's complete control and are always available for questioning at any time during the period of detention.[94]

2. Arrest on Separate Crimes" (*bekken taiho*)—Police Tactic to Extend Detention

Besides the "voluntary accompaniment," the Japanese police have contrived a "hidden trick"[95] to extend the detention of the arrestee: "[a]rrest on separate crimes" (*bekken taiho*).[96] It is a technique in which the police extend the period of detention for their initial investigation of a serious crime by first obtaining an arrest warrant for relatively minor crimes. During the period of interrogation given by the arrest warrant on the minor crimes (*bekken*), the police may continue interrogating the suspect regarding the initially pursued crime (*honken*). In a notorious case, *Murakami v. Japan*,[97] the suspect was arrested on a total of fourteen different crimes and the total period of detention lasted nearly three years. In brief, *bekken taiho* is "the simplest device for obtaining custody of a

91. Foote, *supra* note 2, at 335.

92. *Id.* at 336.

93. Literally "substitute prison." It is not officially a "prison" under the administration of the Ministry of Justice. It was authorized by the Prison Law of 1908 to alleviate overcrowding problems in Japanese prisons. The use of the "substitute confinement cell" was challenged in the Japanese Supreme Court; the Court held it was not illegal. 18 KEISHŪ 127 (Sup.Ct., April 9, 1964).

94. Takeo Ishimatsu, *Are Criminal Defendants in Japan Truly Receiving Trials by Judges?*, 22 LAW IN JAPAN 143, 148 (1989).

95. *Id.* at 147.

96. Literally "arrest for a separate incident." *See* Kawaide Toshihiro, *Bekken Taiho / Kāryū To Yozai Torshirabe [Arrest and Detention on Separate Crimes and Investigation on the Remaining Crimes]*, *in* 111 HŌKYŌ (1994).

97. 17 KEISHŪ 1795 (Sup.Ct., Oct. 17, 1963). *See* Matsuoka, *Shiratori Jiken [The Shiratori Case]*, *in* KEIJI SAISHIN NO KENKYŪ [RESEARCH ON CRIMINAL RETRIALS] 357 (K. Kamo ed. 1980).

suspect—and eliciting the desired confession—when there is insufficient evidence for arrest on the crime in chief" and "a key means of circumventing the warrant requirement and the right to silence."[98]

Although a number of inferior courts have held *bekken taiho* illegal,[99] the Supreme Court has legitimized this technique. In *Hirasawa v. Japan*,[100] the first case regarding *bekken taiho*, the Supreme Court upheld a suspect's confession elicited during *bekken taiho*. In this case, although the suspect was indicted and detained for forgery of private documents and fraud, he was consecutively interrogated fifty times for a separate robbery murder case. The Court stated that it could not find that the prosecution pursued the former forgery and fraud case for the latter robbery and murder case.

Ishikawa v. Japan[101] is a more recent case. In this case, the suspect was first arrested and detained for three crimes (*bekken*), attempted extortion against a missing high school girl, battery against another and theft of property of a third person. During the detention, the suspect was interrogated for the robbery, rape and murder of the first victim (*honken*), to which he continued to deny guilt. At the end of the detention period allowed for by the three *bekken*, the suspect was indicted for the latter two *bekken* and released on bail. The police then arrested him on the *honken* charges and continued to interrogate him for the *honken* to which he finally confessed. The Court provided the standard upon which to decide the legality of *bekken taiho*; it concluded that *bekken taiho* is not allowed when "it is aimed to, for the purpose of interrogation of *honken* lack of evidence, make use of the detention of the person by borrowing the name of *bekken taiho* equipped with evidences."[102] However, upon considering the correlation between the *honken* and attempted extortion, the Court did not find such an aim and upheld the suspect's confession.

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98. Foote, *supra* note 69, at 440-42. Gotō Akira stated: "The typical process of mistrial of serious crimes in Japan is as follows: Arrest and detention on separate crimes, detention in substitute confinement cell, false confessions elicited from intense interrogation, and guilty verdict based on the false confessions." Gotō Akira, *Bekken Taiho, Bekken Kōryū [Arrest and Detention on Separate Crimes]*, *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 51, at 60.

99. *See id. at* 61.

100. 9 KEISHŪ 663 (Sup.Ct., April 6, 1955). This case is popularly called "the *Teigin* Murder Case."

101. 31 KEISHŪ 821 (Sup.Ct., August 9, 1977). This case is popularly called "the *Sayama* Murder Case." *See also* 897 HANREI JIHO 114 (Sup.Ct., July 3, 1978).

102. *Id.*

D. Restriction on Suspects' Rights in Interrogation

1. Serious Restriction of the Right to Silence

First of all, it is necessary to note that, in Japan, a warning of the right to silence is given only once at the very beginning of questioning; it is not repeated at the start of subsequent interrogation sessions during the suspect's detention.[103] Second, the right to silence is overshadowed by Article 198 (1) of the CCP which is interpreted to impose on suspects under arrest or in detention a "duty to submit to questioning" (*torishirabe junin gimu*).[104] To read Article 198 (1) literally, the suspect's rights to refuse to appear for questioning and to leave apply only to those not under arrest or in detention. In actual practice, therefore, if suspects under arrest or in detention invoke their rights to silence, they are not allowed to leave the interrogation room; rather, they must be present for and listen to questioning. This is in striking contrast to *Miranda* which makes it clear that suspects have an absolute right to silence and all questioning must cease immediately when a suspect invokes his right to remain silent or right to counsel.[105] The majority of academics have criticized that the "duty to submit to questioning" substantially forces suspects to answer despite the constitutional guarantee of the right to silence.[106] Law enforcement authorities have strongly adhered to the literal interpretation and the Supreme Court has not made a decision on this issue.

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103. Foote, *supra* note 69, at 436.

104. Article 198(1) provides that "except in cases where the suspect is under arrest or in detention, the suspect may refuse to appear or, having appeared, may leave at any time" KEISOHŌ art. 198 (1). This article was a product of the "tug of war" in the postwar legislative process of the CCP between the Japanese government and the SCAP; the Japanese government proposed granting the investigative authority to summon and interrogate at any time without mentioning a right to refuse. SCAP proposed to add a provision that the suspect "has the right to refuse to answer, and, if not under arrest, may withdraw at any time." Then the present provision was made. *See* MATSUO KŌYA, 1 KEIJI SOSHŌHŌ 62 (4th ed., 1996); Sakamaki Tadashi, *Taiho / Kōryū Chū No Higisha No Torishirabe Junin Gimu [Suspects' Duty to Submit to Questioning under Arrest or Detention]*, *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 51, at 56).

105. *Miranda v. State of Arizona*, 384 U.S. 436, 444-45 (1966).

106. Hirano Ryuichi argued that Article 198 (1) was intended "only to bring attention that acknowledging that suspects may refuse to appear and leave did not deny the validity of the arrest or detention itself." HIRANO RYŪICHI, KEIJI SOSHŌHŌ 84 (1958).

2. Restrictions on the Right to Counsel: "Prosecutorial Designation"

Under Article 34 of the Constitution and Article 203 of the CCP, at the time of arrest, the police are required to inform the suspect of his or her right to retain an attorney.[107] Article 39 (1) of CCP guarantees suspects the right to retain and meet with counsel without a guard and to exchange documents and things.[108] However, these guarantees are highly restricted by other provisions of the CCP and police practice.

Compared to the right to counsel in Anglo-American countries, the right in Japan is nominal, particularly at the pre-indictment stage. First, like other Continental criminal justice systems,[109] the Japanese criminal justice system is not equipped with a public defender system. Court-appointed counsel are available only for the accused (*hikokunin*) after indictment; suspects (*higisha*) before the institution of prosecution, who are financially poor or otherwise unable to retain counsel, are not entitled to the right to counsel at public expense. Also, private counsel retained upon a suspect's formal arrest are not permitted to attend interrogation sessions.[110] In addition, the right to counsel does not attach to the interrogation incident to "voluntary accompaniment"; rather, it only attaches after formal arrest. It is also reported that the defense attorney is allowed to visit his client no more than three times during the pre-indictment stage, and the duration of each visit is limited to between fifteen and twenty minutes.[111]

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107. KENPŌ art. 34; KEISOHŌ art. 203.

108. Article 39 (1) provides: "A defendant or criminal suspect in custody may, without any official being present, meet with his attorney, or with a person who may become his attorney.. [and] may receive things or written materials therefrom."

109. *See* § 141(1) STPO. *See also* KLEINKNECHT/MEYER-GOBNER, STRAFPROZESSORDNUNG § 163, no. 16. (43 ed. 1997); Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solution?*, 18 B.C. INT'L & COMP. L. REV. 317, 334 (1995).

110. In the course of preparing the Constitution and the CCP, SCAP's recommendation to include the right to presence of counsel during interrogation as part of the right to counsel was not adopted. *See* Mitsui Makoto, *Sekken Kotsuken / Bengonin Taichiaiken [Right to Communicate with Counsel/Presence of Counsel]*, 155 HŌGAKU KYUSHITSU 101, 106 (1993); Jean Choi Desombre, *Comparing the Notions of the Japanese and the U.S. Criminal Justice System: An Examination of Pretrial Rights of the Criminally Accused in Japan and the United States*, 14 UCLA PAC. BASIN L.J. 103, 111-12 (1995).

111. BAYLEY, *supra* note 3, at 151-52 (1968); CITIZENS' HUMAN RIGHTS REPORT NO. 4, *supra* note 5, at 57-8; *see* Inouye Masahito, *Higisha to bengonin no sekken kōtsū [Meeting and Communication Between Suspect and Counsel]*, *in* HANREI HYAKUSEN, *supra* note 47, at 45.

Second, the CCP has a unique system that limits a suspect's right to meet with counsel, even when the suspect is informed of the right to counsel and retains counsel.[112] The "prosecutorial designation" system, which is not available in other Continental law systems, is provided for in Article 39 (3) of CCP:

> Prosecutor, clerk to a prosecutor or police official may . . . designate the date, place and time of the interview [between the suspect and his counsel] . . . when necessary for the purpose of the investigation and to the extent the suspect's right to prepare his defense is not unjustifiably restricted.[113]

The designation system prior to April 1988 was called "general designation" (*ippanteki shitei*). According to the language of Article 39(3), the designation should be an exception. However, it is reported that in practice, the prohibition of visits is the general rule and the allowance of visits is the exception.[114] The Japanese Bar Association adopted a

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112. "Prosecutorial designation" is not applicable to the accused (*hikokunin*)'s right to meet with his counsel. For distinction between suspects from accused persons in Japanese law, *see supra* note 51.

113. The legitimacy of this power is supported by its legislative history. Under the Code of Criminal Procedure of 1922, the right to meet with counsel was given only to accused persons and the meeting was attended by a guard. SCAP insisted on guaranteeing the suspect the right to meet with counsel. In response, the Japanese government proposed to grant the prosecutor the power to designate the time, place and duration of the meeting. The two sides agreed on the final version as Article 39 stands, which made the meetings confidential but retained the prosecutorial designation. *See* Mitsui Makoto, *Sekken Kōtsū Mondai No Tenkai [Development of the Issue of Communication with Counsel]*, 54 HŌRITSU ZIHŌ 8, 12-14 (1982); Desombre, *supra* note 110, at 113-14.

114. CITIZENS' HUMAN RIGHTS REPORT NO. 4, *supra* note 5, at 56-57. *See also* HIRANO, *supra* note 59, at 105. Under the "general designation" system, a prosecutor, if he recognized the necessity for an attorney's visit with a criminal suspect, prepared a "general designation form" (*ippanteki shitei shō*), and then distributed certified copies to the suspect and the head of the facility where the suspect was held. If counsel requested a visit with the suspect and the prosecutor decided to allow the request, the prosecutor prepared a "specific designation form" (*gutaiteki shitei shō*)" or the "interview ticket," which stipulated the date and time of visit. If counsel did not take the ticket to the detention facilities, access was denied. This system has been strongly criticized that, under the system, "the right to meet with his [suspect's] counsel [was] subject to a blanket restriction initially and then to a discretionary approval by the prosecutor." Desombre, *supra* note 110, at 114. *See also* Hiroshi Tamiya, *On the Designation of Communication with Counsel*, 4 LAW IN JAPAN 87 (1970); *Citizens' Human Rights Report No. 4: Concerning Unconstitutional Violations of the Rights of Persons Accused of Crime to Contact and Communicate with Legal Counsel*, 20 LAW IN JAPAN 29, 57 (1987). Samples of the designation forms are available in Mitsui Makoto & Inouye Masahito eds., HANREI KYŌZAI KEIJI SOSHŌHŌ [CASEBOOK OF CRIMINAL PROCEDURE LAW] 199 (2d ed. 1996) [hereinafter HANREI KYŌZAI].

resolution against the general designation[115] and many lower courts have ruled that the general designation practice cannot be justified under Article 39(3) of the Code; rather, only a specific designation based on justifiable needs of investigation is legitimately enforceable.[116]

In response to criticism and challenges, the Ministry of Justice modified the system. Under the modified designation system, a prosecutor sends a designation notice to the head of the detention facilities, but not to either the suspect or defense counsel. [117] The Ministry argues that the designation practice is then simply an internal communication between law enforcement authorities,[118] so it is free from interlocutory appeal (*jun-kokoku*) by the suspect or counsel. However, as Jean Choi Desombre observed, "except for the change in the legal name-calling of the general designation, the essential mechanism of the designation remains the same."[119]

The Japanese Supreme Court has repeatedly upheld the designation system. In the recent case of *Asai v. Japan*,[120] the Court found that the "method of designation [in this case] was apparently a lack of rationality and illegal, and violated the duty of attention which the investigation authority had to observe, ... [T]he prosecutor was apparently negligent."[121] In this case, following the prosecutor's instruction, the police officer rejected Asai's request to meet with his client because Asai did not have the designation form. Although Asai explained that he could meet with his client without the designation form since it took more than two hours to get the form, considering the distance from the police station to the prosecutor's office, and the client was not presently under interrogation, the police officer did not accept his request. Although interrogation was scheduled in the police station at that date, it was not under process at the time of Asai's request, nor did it take place during the whole day. Asai

115. Yamanaka Toshio, *Higisha To Bengonin No Sekken Kōtsū* [*Communication Between Suspect and Counsel*], *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 51, at 74.

116. The first case by lower court holding that the general designation is not lawful is 9 Kakyu Keishū 375 (Tottori District Ct., March 7, 1967).

117. A sample is available *in* HANREI KYŌZAI, *supra* note 111, at 200.

118. TAMIYA HIROSHI, KEIJI SOSHŌHŌ[CRIMINAL PROCEDURE LAW] 149 (1997); Yamanaka, *supra* note 115, at 75-76. In *Wakamatsu v. Japan*, 1390 HANJI 33 (Sup.Ct., May 31, 1991), the Supreme Court upheld the designation regarding it as "an internal communication document for processing of cases between the investigation authorities which itself does not have any legal effect to either suspect or the counsel." *Id.*

119. Desombre, *supra* note 110, at 117-18.

120. 45 Minshū 919 (Sup.Ct., May 10, 1991). For comment on this case, *see* Inouye, *supra* note 48, at 40-5.

121. *Id.*

sued the government for civil damages on the ground that it illegally prevented him from meeting with his client. The lower courts held in favor of Asai. The Supreme Court quashed the lower court's decision, holding that the phrase, "necessary for the purpose of investigation" in Article 39 (3) of the CCP included a situation in which an interrogation was scheduled in the near future but not currently taking place and the designation itself in the case was not illegal.[122]

E. Conclusion

Chapter IV has shown that the new perspective in the Japanese Constitution for de-inquisitorializing criminal justice system is substantially restricted by the CCP; that the imbalance between the rights of individuals and the power of the law enforcement authorities is institutionalized heavily in favor of the latter, particularly with regard to pre-indictment detention and interrogation; and that law enforcement authorities entertain wide discretion which the judiciary is reluctant to regulate.

Although it has been argued that this imbalance may be offset by the "benevolence" of the system,[123] it is necessary to note that such a "benevolence" is exercised within the context of this prosecutor-dominating structure and only for those who completely submit themselves to the criminal justice system. The benevolent discretion is not afforded to those who "dare" to appeal and exercise their "rights". The "benevolence" is limited and biased.

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122. In this case, following prosecutor's instruction, police officer rejected Asai's request to meet with his client because Asai did not have the designation form. Although Asai explained that he could meet with his client without the designation form since it took more than two hours to get the form, considering the distance from the police station to the prosecutor's office, and the client was not presently under interrogation, the police officer did not accept his request. Although interrogation was scheduled in the police station at that date, it was not under process at the time of Asai's request, nor did it take place during the whole day. Asai sued the government for civil damages on the ground that it illegally prevented him from meeting with his client. The lower courts held in favor of Asai.

123. Foote, *supra* note 2, at 342-59.

V. THE JAPANESE SUPREME COURT'S LIMITED EXCLUSIONARY RULES

A. *Physical Evidences in Search and Seizure—"Theory of Relative Exclusion"*

1. Japan v. Hashimoto

It was not until 1978 that the Japanese Supreme Court accepted the exclusionary rule in principle.[124] After a majority of academics argued for the adoption of an exclusionary rule[125] and lower courts began to exclude tainted evidence,[126] the Supreme Court made a "legislative" decision in *Japan v. Hashimoto*[127] to establish a Japanese exclusionary rule known as the "theory of relative exclusion" (*sōtaiteki haijyo ron*). In *Hashimoto*, a police officer stopped the defendant's car and began to question the defendant then suspected of soliciting prostitution. Based upon the suspect's attitude and complexion, the police officer also suspected that the defendant might be a drug addict. The officer asked him to get out of the car and reveal his personal effects. Although the defendant at first refused, he showed the officer the contents of his right pocket on the arrival of more officers. An officer then frisked the defendant's jacket and trousers pockets and felt that there was "something hard, but not dangerous"[128] in the pocket. The defendant did not show the officer what was in his left pocket. Then, without the defendant's consent, the officer thrust his hand

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124. Until 1978, there was only one decision by the Supreme Court with regard to the exclusion of illegally obtained evidence. 15 Keiji Saibanshū 349, 350 (Dec. 13, 1949). The Court stated the rationale underlying the inclusion of illegally obtained evidence: "Even though the procedure of seizure was illegal, the value as evidence does not change because the procedure did not affect the quality and shape of the substance itself. Therefore it belongs to the court's exclusive discretion whether the evidence should be admitted or excluded." *Id.*

125. For instance, *see* Hirano Ryūichi, *Shōko Haijo Niyoru Sōsa No Yokusei* [*Deterrence of Investigation by Exclusion of Evidences*], *in* 7 KEIHŌ ZASSHI (1957).

126. The first case 3 KEISAI TOKUHŌ 631 (Osaka High Ct. June 19, 1956). In the Supreme Court's review of the same case, the exclusionary rule was first recognized in minority opinion of the Supreme Court

127. Judgment of Sept. 7, 1978, Saikōsai [Supreme Court], 32 Keishū 1672 (Sup.Ct., Sept. 7, 1978). This case is called the "Osaka Tennō Temple Drug Seizure Case. " Its English translation is in LAWRENCE W. BEER & HIROSHI ITOH, THE CONSTITUTIONAL CASE LAW OF JAPAN, 1970 THROUGH 1990 427-34 (1996). *See generally* INOUYE MASAHITO, KEIJI SOSHŌ NI OKERU SHŌKO HAIJO [EXCLUSION OF ILLEGALLY OBTAINED EVIDENCE IN CRIMINAL PROCEDURE] (1985), chapter 3.

128. Unlike *Terry*, stop-and-question in the Police Duty Law is not limited to search for weapons. If this case took place in the United States, the evidence would be excluded. *See Minnesota v. Dickerson*, 113 S. Ct. 2130 (1993).

into the inside pocket of the defendant, found an illegal drug in a plastic bag, and arrested him. The district and appeals courts excluded the narcotics as illegally obtained evidence and acquitted the defendant. But the Court rejected the lower courts' decision to exclude the evidence. The Court submitted the two rationales of exclusionary rule:

> Since neither the Constitution nor the Code of Criminal Procedure provides any regulations concerning illegally seized objects it would be proper to solve the above problem by interpreting the Code of Criminal Procedure. . . . Even if the material for evidence were obtained through an illegal procedure, the substance itself would not change its shape or quality, nor would its value as evidence per se or its shape change. It would not inappropriate for the Court to reject immediately material as evidence simply because it was seized illegally. On other hand, the factfinding should be carried out under adequate procedures that secure the individual's human rights. . . . [W]hen serious violations of the law have taken place in the process of seizing evidence, the principle of the warrant which embraces the principles of Article 35 of the Constitution and Article 218, paragraph 1 of the Code of Criminal Procedure could be jeopardized. Using illegally seized material as evidence would be harmful from the standpoint of controlling illegal searches in the future, and should be rejected as evidence for the case.[129]

Hashimoto made it clear that the exclusionary rule in search and seizure is a principle in the CCP, not in the Constitution, because, unlike the exclusion of illegally obtained confessions, the exclusion has no specific provision in the Constitution.[130] It also submitted two rationales

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129. BEER & ITOH, *supra* note 127, at 433 (The author translated the original text himself considering Beer and Itoh's translation). *Hashimoto* clearly rejected the mandatory exclusionary rule for which Hirano Ryuichi had argued. HIRANO, *supra* note 106, at 240. He also adopted Dando's discretionary exclusionary rule based on the individual balancing test between two interests of collecting evidence and guaranteeing human rights "in light of the objective of preventing the improper gathering of evidence," which Dando Shigemitsu advocated. DANDO, *supra* note 50, at 195. Dando was then Supreme Court Justice and belonged to the panel of *Hashitomo.*

130. Critics have argued, however, that, despite the absence of specific provision regarding the exclusionary rule, the rule is constitutionally required upon considering the historical meaning of the legislation of Article 35 of the Constitution and the warrant requirement in CCP; that, like Article 38 (1) of guaranteeing the privilege against self-incrimination is accompanied with Article 38 (2) of exclusion of illegally obtained confessions, Article 35 of the Constitution also needs to be

for the exclusion of illegal obtained evidence: the gravity of police illegality and deterrence of future police misconduct.[131]

Hashimoto found that the officer's conduct "seriously violated the privacy of the individual" and that he "exceeded the limit allowed for examining personal effects incidental to an official interrogation."[132] However, *Hashimoto* concluded that the evidence should be admitted, suggesting a basis for the admission of the illegally obtained evidence:

> In a situation in which the requisites for an official interrogation existed, and the necessity and the urgent conditions for examining the personal effects were recognized, and the defendant did not make a clear response as to whether or not he would comply with the officer's request, the officer exceeded only a little bit the limits of law, within which the officer would be allowed to act in examining the personal effects. From the beginning, the officer had no intention to neglect any law or regulation connected with principles requiring the warrant, nor was there any evidence of use of physical force by the officer.[133]

Hashimoto established a basic system of a Japanese exclusionary rule and its rationales. Despite its rhetoric, however, *Hashimoto* shows that the Court does not seriously intend to deter police misconduct and it is ready to "relativize" the exclusionary rule. First, *Hashimoto* demands a very high level of gravity of police misconduct for the exclusion of illegally obtained evidence. Even a "serious violation of the privacy of the individual"[134]

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interpreted to have the same rule to secure Article 35. Mitsui Makoto, *Shojihin Kensa No Genkai To Ihōshūshū Shōko No Haijo* [*Limit of Search of Personal Effects and Exclusion of Illegally Obtained Evidences*], *in* 680 JURIST 107, 108 (1978); Tamiya Hiroshi, *Ihōshūshū Shōko No Haijo Hōsoku* [*Exclusionary Rule of Illegally Obtained Evidences*], in 3 LAW SCHOOL 40, 44 (1978); TAMIYA, *supra* note 118, at 401-02.

131. *Hashimoto*' rationales come from the U.S. Burger Court's understanding of the Fourth Amendment exclusionary rule. Different from the Warren Court, the Burger Court clearly dismissed the idea that a defendant had a constitutional right to the exclusion, and mainly relied on the "deterrence" rationale for the exclusionary rules. *See United States v. Calandra*, 414 U.S. 338, 347-48 (1974); Alderman v. United States, 394 U.S. 165, 174 (1969); United States v. Janis, 428 U.S. 433, 446 (1976). The German exclusionary rule does not rely on the "deterrence" rationale. *See* Richard S. Frase & Thomas Weigend, *German Criminal Justice as a Guide to American Law Reform: Similar Problems, Better Solution?*, 18 B. C. INT'L & COMP. L. REV. 317, 336 (1995).

132. BEER & ITOH, *supra* note 126, at 432.

133. *Id.* at 432.

134. *Id.* at 432.

could not pass the "gravity of illegality" test. Second, the Court was very lenient in deciding whether the police misconduct was necessary and urgent. Although the defendant was surrounded by police officers and did not attempt to flee, the Court recognized the necessity and urgency of the search. The officer's good intention was also readily assumed. Third, if the right to silence was taken seriously, the fact that the defendant did not respond to the officer's request cannot be relevant to the issue.

2. Development of the Theory of Relative Exclusion

After *Hashimoto*, a few Japanese lower courts held that the dual test of the "relative exclusion" was met and the evidence was accordingly excluded.[135] However a majority of the lower courts have reached the *Hashimoto* conclusion:[136] the police misconduct is illegal, but the illegality is neither grave nor inappropriate for deterrence and the evidence should therefore not be excluded.

Of the four Supreme Court cases concerning the exclusion of evidence after *Hashimoto*, none excluded evidence illegally obtained. In *Yoshikawa v. Japan*,[137] a police officer entered the suspect's bedroom without the suspect's consent, urged the suspect to accompany him "voluntarily" to the police station, detained him in the station ignoring his request to leave, and with his consent, drew a urine sample. The Court found that this procedure was illegal and exceeded the limits of a "voluntary investigation." Reiterating *Hashimoto*'s rationale for admission of the illegally obtained evidence,[138] however, the Court reached the same conclusion as *Hashimoto*. In *Kuroki v. Japan*,[139] police officers forcefully searched, without the suspect's consent, the upper clothes and the shoes of

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135. *See, e.g.*, 998 HANJI 126 (Osaka High Ct., Jan. 23, 1981); 1104 HANJI 152 (Sapporo High Ct., Dec. 16, 1982); 1189 HANJI 153 (Osaka High Ct., Nov. 26, 1985); 1219 HANJI 143 (Osaka District Ct., May 8, 1986); 1261 HANJI 138 (Tokyo District Ct., Nov. 25, 1987).

136. *See* Nagaoka Tetsuji, *Ihōni shūshūshita shōko [Illegally Obtained Evidences]*, *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 52, at 222, 224. Most of the evidence at issue in these lower courts' cases were illegal drugs and the searches and seizures took place incident to stop-and-question or voluntary accompaniment.

137. 40 KEISHŪ 215 (Sup.Ct., Apr. 25, 1986).

138. *See supra* text accompanying note 149.

139. 42 KEISHŪ 1051 (Sup.Ct., Sept. 16, 1988). This case is popularly called the "*Asakusa* Road Drug Seizure Case." Regarding the comment on this case, *see* Mitsui Makoto, *Ihōshūshūshōko no shōko nōryoku [Evidentiary Qualification of Illegally Obtained Evidence]*, *in* HANREIHYAKUSEN, *supra* note 48, at 128.

a drug suspect who ran away after stop-and-question, and, with his consent, drew a urine sample. Although the Court found that this procedure was illegal, based on *Hashimoto*, it again rejected the defendant's argument to exclude the evidence.

In *Kobayashi v. Japan*,[140] police officers stopped a drug suspect's automobile and asked him to "voluntarily" accompany them to the police station. The suspect rejected the request and insisted on driving his car. Then the police removed the suspect's car key and detained him in his car for six and a half hours. After getting a warrant to extract a urine sample, they searched his car and body, brought him to a hospital and ordered a doctor to take a urine sample. Although the Court found the detention of the suspect illegal, it rejected the defendant's argument to exclude the urine sample.

In *Sekita v. Japan*,[141] a police officer stopped the suspect's automobile and questioned him as to whether or not he was driving whilst asleep or drunk. After the officer checked the suspect's criminal records for possession of illegal narcotics by radio, he attempted to persuade the suspect into allowing him to searching both the suspect's personal effects and the inside of his car.. Though the suspect refused, the officer searched the inside of the car and seized an illegal drug; he examined the suspect's urine and arrested him. The Court found that the search within the car exceeded the limits of a search of personal effects incident to questioning and was thus illegal; however, it admitted the urine test based on the "relative exclusion" theory.

This series of decisions show that the Japanese Supreme Court is not ready to activate the exclusionary rule. They show that either the Court's recognition of the illegality of police misconduct is on an abstract level, or the Court demands a very high level of gravity of police misconduct for the exclusion of illegally obtained evidence. Even intrusion into an individual's bedroom without his consent could not pass its "gravity of illegality" test.[142] The "deterrence" rationale of the relative exclusion also does not have its own gauge. Although the deterrence rationale is mentioned in all of the decisions, as Mitsui Makoto criticizes, it is merely

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140. 48 KEISHŌ 420 (Sup.Ct., Sept. 16, 1994). This case is popularly called the "*Aizu-Wakamatsu* Extraction of Urine Case."

141. 49 KEISHŌ 703 (Sup.Ct., May 30, 1995). This case is popularly called the "*Daiichi Keihin* Road Questioning Case."

142. In *Payton v. New York*, the U.S. Burger Court held that, if there are no exigent circumstances, the police may not enter a private home to make a warrantless arrest. 445 U.S. 573, 575 (1980).

"trite and rhetoric" and overshadowed by the "gravity of illegality" rationale.[143] As a result, it is very unlikely for the Court to disapprove of an illegal police investigation.

B. Confessions Obtained Illegally in Interrogation

Unlike the exclusionary rule in search and seizure situations, the Constitution and the CCP provide explicit legal provisions regarding the exclusion of an "involuntary confession." Article 38 (2) of the Constitution provides for the exclusion of "confessions made under compulsion, torture or threat, or after prolonged arrest or detention." Article 319 (1) of the CCP excludes "confessions whose voluntariness is doubtful."[144]

There are three competing theories in Japan that explain the grounds for the exclusion of confessions.[145] The first is the exclusion of falsity theory (*kyogi haiyo*), which emphasizes the precision of truth-finding and decides on the exclusion of involuntary confessions according to the falsity or reliability of the confession. This has been the Japanese Supreme Court's traditional theory. The second is called "theory of the protection of human rights" (*jinken yōgo*), which goes beyond the "reliability" test by relying on the defendant's right to silence. The theory argues that the exclusion of an illegally obtained confession, even though voluntary, is necessary to protect the defendant's human rights in interrogation. The third is the "theory of the exclusion of illegality" (*ihō haijyo*) which is now supported by a majority of academics. This theory highlights the law enforcement authority's misconduct and argues that the exclusion of illegally obtained confessions is necessary to secure due process in every aspect of criminal procedure. According to this theory, confessions enumerated in Article 38 (2) of the Constitution are examples of illegally obtained confessions and their scope is not confined to the "voluntary test," so illegal detention or the violation of the right to counsel may also be grounds for exclusion.[146]

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143. Mitsui, *supra* note 151, at 131.

144. Before the advent of the "theory of exclusion of illegality," it was generally accepted that the scope of the two Articles is identical, and confessions in Article 38 (2) of the Constitution are typical examples of the "involuntary confession" in Article 319 (1) of the CCP. *See* 24 KEISHŪ 1670 (Sup.Ct., Nov. 25, 1970).

145. Tada Tatsuya, *Jihaku no nin'ijsei to sono risshō* [*Voluntariness of Confession and Its Establishment*], *in* KEIJI SOSHŌ NO SŌTEN, *supra* note 52, at 198-99; TAMIYA, *supra* note 130, at 347-50.

146. MATSUO, *supra* note 103, at 42.

The Japanese Supreme Court has not accepted the "theory of exclusion of illegality," nor has it applied the "voluntariness test" actively, so the Article 38 (2) of the Constitution and Article 319 (1) of the CCP does not have a strong bite.

1. Limited Exclusion of "Involuntary" Confessions

The Japanese Supreme Court has excluded confessions "made under compulsion, torture or threat."[147] Exclusion of such confessions is a minimum requirement of criminal procedure in a democratic society. However, in other cases of "involuntary" confessions made after prolonged arrest or detention, or confessions made upon promise and inducement, the Court has demonstrated an inconsistent position.

First, the Supreme Court has inconsistently excluded the confession obtained "after prolonged arrest or detention." The Court has excluded the confession of a larceny suspect obtained after 109 days of detention where the validity of the grounds for the detention was doubtful and the suspect denied committing the crime from the beginning.[148] It excluded a confession of extortion where the suspect was a girl under 16 years old and her confession was obtained after seven months in detention.[149] However, the Court also upheld a confession obtained after a detention of more than six months where the detention was based on valid reasons and the suspect confessed in the beginning of the interrogation.[150] The Court also admitted a confession obtained after a 160 day detention where many witnesses adverse to the defendants existed and the defendants tried to hide their relationship each other.[151]

Second, the Japanese Supreme Court has not consistently excluded other "involuntary" confessions made from promise or inducement. In *Ogura v. Japan*,[152] the Court admitted confessions made by a suspect who was handcuffed during an interrogation by a prosecutor for violating the Election Law. Although the Court stated that handcuffing the suspect would pressure the suspect in some degree and would then raise doubts as to the voluntariness of the confession, it admitted the voluntariness of the confession, noting that the questioning took place in a "calm atmosphere

147. 11 KEISHŪ 1882 (Sup.Ct., July 19, 1957).
148. 2 KEISHŪ 944 (Sup.Ct., July 19, 1948).
149. 6 KEISHŪ 769 (Sup.Ct., May 14, 1952).
150. 2 KEISHŪ 17 (Sup.Ct., Feb. 6, 1948).
151. 4 KEISHŪ 1562 (Sup.Ct., Aug. 9, 1950).
152. 17 KEISHŪ 1703 (Sup.Ct., Sept. 13, 1963).

from the beginning to the end."[153] In *Okayama v. Japan*,[154] however, the Court quashed the Appeal Court's decision and excluded a confession as involuntary obtained through deceit. In this case, the suspect and his wife were interrogated for illegally possessing a handgun. Although the defendant's wife confessed that she was the sole culprit in the crime, the prosecutor deliberately deceived the defendant by telling that the defendant's wife had confessed that he was also involved and obtained the defendant's self-incriminating statement.

This inconsistency of the Court's position results from the Court's adherence to the reliability of the confessions without serious caution of obtaining confessions by prolonged arrest, detention, promises or inducement. As a result, the line between voluntary and involunatry confessions is blurry and a clear direction cannot be given to the police practice. Hirano Ryuichi states:

> [O]n occasion, especially in cases that have been remanded for errors in the factfinding, courts suddenly angrily declare that the confession was "not voluntary." Yet the manner of questioning in such cases is not markedly different from that in cases of "voluntary" confessions. When the contents of the confession comport with other evidence and are accurate, questioning is not called into question. When the contents of the confessions do not comport with other evidences, however, questioning of the very same sort suddenly becomes improper. . . . In any event, . . reliance is placed on the contents of the confession alone. This tends to lead to the view that, so long as the results are appropriate, anything goes. Under those circumstance investigation methods will not improve.[155]

Although the Japanese Supreme Court has maintained the "voluntariness" test to exclude confession, it has not consistently excluded "involuntary" confessions. As a consequence, the rule does not have a strong bite.[156]

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153. *Id.*

154. 24 KEISHŪ 1670 (Sup.Ct., Nov. 25, 1970).

155. Hirano, *supra* note 6, at 417.

156. *See* McNabb v. U.S., 318 U.S. 332, 341 (1943) (preventing the federal use of confessions obtained during lengthy custody); Mallory v. U.S., 354 U.S. 449, 455 (1957) (same as *McNabb*); Rogers v. Richmond, 365 U.S. 534 (1961) (excluding a confession obtained by pretending to arrest the defendant's sick wife); Spano v. New York, 360 U.S. 315 (1959) (excluding a confession obtained after an uninterrupted overnight eight hours of questioning, on the ground that it was

2. Inclusion of Confessions Obtained in Another Illegal Procedure

The reluctance in excluding an "involuntary" confession also expands into other areas. In two early cases, *Shirogane v. Japan*[157] and *Ishiguro v. Japan*,[158] the Japanese Supreme Court held that the failure to inform a suspect of his right to silence before interrogation is not illegal. It held that the Article 38 did not stipulate the duty to warn a suspect of the right to silence before interrogation; a failure to warn of such a right itself could not make confessions involuntary. Although a District Court recently excluded a confession given in the absence of a warning of the right to counsel and to silence,[159] it is doubtful that the Supreme Court would follow this decision.

The Court has also admitted confessions given under restriction of the right to counsel. In *Hongo v. Japan*,[160] the Court upheld the suspect's confession as voluntary although the period of his meeting with his counsel was "designated" for only two or three minutes. In a more recent case, *Iimura v. Japan*, the Court upheld a confession as voluntary, rejecting the suspect's argument that his right to counsel was violated because the prosecutor had not once allowed the suspect to meet with his counsel pursuant to his prosecutorial designation power.[161]

The Court has also upheld confessions made after illegal detention. Confessions obtained incident to a "voluntary accompaniment" have been an important issue. *Haibara v. Japan* is a leading case.[162] In this case, the police asked Haibara, a suspect in the murder of a bar hostess, to "voluntarily" accompany them to the police station with them. After the police interrogated Haibara for four and a half days, moving him in several places, and prohibiting him from contacting anyone other than the police, they obtained a confession. No arrest had been made until that time. The police could not find any other corroborating evidence sufficient for

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involuntary).

157. 4 KEISHŪ 2359 (Sup.Ct., Nov. 21, 1950).

158. 7 KEISHŌ 841 (Sup.Ct., Ap. 14, 1953).

159. 760 HANREI TIMES 261 (Urawa District Ct., Mar. 25, 1991).

160. 7 KEISHŪ 1474 (Sup.Ct., July 10, 1953).

161. *See* Judgment of July 10, 1978, *supra* note 136.

162. 38 KEISHŪ 479 (Sup.Ct., Feb. 29, 1984). This case is popularly called the "Takanawa Green Mansion Hostess Murder Case." Regarding comment on this case, *see* Asada Kazushige, *Shukuhaku Wo Tomonau Torishirabe [Investigation Accompanying with Lodging]*, *in* HANREI HYAKUSEN, *supra* note 48, at 16-7.

arrest,[163] so Haibara was released. But two and a half months later, the police eventually arrested him. Haibara confessed after three more days of questioning and was indicted after another seventeen days of interrogation. Finally the defendant was convicted. The issue in *Haibara* was whether the defendant's confession in the original questioning should be excluded. The Court upheld the conviction stating that the first interrogation was "appropriate from the standpoint of socially accepted views upon considering the concrete circumstances."[164] In a more recent case, *Miyauchi v. Japan*,[165] the Supreme Court upheld the defendant's conviction, stating that the elicitation of a confession during a non-stop all night interrogation incident to the "voluntary accompaniment" did not deviate from the scope of a "socially accepted voluntary investigation."

As Justices Kinoshita and Ohashi stated in *Haibara*'s minority opinions, however, it is quite difficult to imagine that the defendants determined their own will freely because strong visible or invisible pressure from the investigators was put on the suspect.[166] The Court's interpretation of "socially accepted view" is quite biased in favor of law enforcement authorities.

C. Conclusion - Judicial "Cooperation," Not Judicial "Control"

As shown in its interpretation of the CCP and its application of the exclusionary rules, the Japanese Supreme Court has not actively protected the constitutional procedural rights of suspects and accused persons. Though it acknowledges the exclusionary rule in principle, it has been extremely reluctant to take it seriously in practice, referring to the "appropriateness under concrete circumstances"[167] or a "balancing with public interest."[168] For this reason, it is said that "today is not the age of

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163. Article 38 (3) of the Constitution and Article 199 of the CCP provide that "no person shall be convicted or punished in cases where the only proof against him is his own confession."

164. 38 KEISHŪ 479, 487 (Sup.Ct., Feb. 29, 1984).

165. 43 KEISHŪ 581 (Sup.Ct., July 4, 1989). This case is called the "Hiratsuka Waitress Murder Case." Regarding the comment on this case, *see* Tada Tatsuya, *Chōjikan no torishirabe* [*Long time Investigation*], *in* HANREI HYAKUSEN, *supra* note 48, at 18-9.

166. 38 KEISHŪ 479, 492-93 (Sup.Ct., Feb. 29, 1984).

167. *Id.* at 487.

168. 32 Keishū 670, 688 (Sup.Ct., June 20, 1978).

judicial control but that of judicial cooperation."[169] Nathaniel Nathanson's observation made thirty two years ago is still valid:

> [I]t is obvious that the Supreme Court has not been in the forefront of the fight for the realization of civil liberties in Japan. While it has generally paid lip service to the principles of Chapter III (Rights and Duties of the People) of the Constitution, it has not struck any resounding blows for their effective implementation.[170]

VI. CONCLUSION - UNFINISHED "REVOLUTION" UNDER "PROSECUTORIAL JUSTICE"

The imbalance between the powers of individuals and those of law enforcement authorities weighs heavily in favor of the latter. Matsuo Kōya, a leading Japanese criminal law scholar, argues that, although the "outer layer" of postwar Japanese criminal justice was formed after American law, its "base layer" has maintained its own "magnetic structure" which has slenderized the "outer layer."[171] Within the "base layer" there is located the "minute justice" (*seimitsu shihō*), which is a "pseudo-adversarial system" characterized by a "(i) thorough investigation by both prosecutors and police officers and (ii) minute grasping of truth of the cases."[172] According to Matsuo, the "minute justice" is a product of the Japanese legal culture itself.

It is controversial whether the "minute justice" is a product of the Japanese "legal culture" originating from the Japanese national mentality or a product of the systematic policy pursued by police, prosecutors and

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169. Shimomura Kō'o, *Keiji Saiban Ha Kono Mama I'inoka [Is Criminal Trial like this All Right?]*, KEIJI SAIBAN NO GENDAI TEKI TENKAI [CONTEMPORARY DEVELOPMENT OF CRIMINAL TRIAL] 79 (1988) (emphasis added).

170. Nathaniel L. Nathanson, *Human Rights in Japan Through the Looking Glass of the Supreme Court Opinion*, 11 HOW. L.J. 316, 323 (1965).

171. Matsuo Kōya, *Keiji soshōhō no kiso riron [Basic Theory of Criminal Procedure Law]*, *in* 3 KOKKA TO SIMIN [STATE AND CITIZEN] 446-47 (1989); Matsuo Kōya, *Keiji soshō no kadai [Task of Criminal Procedure]*, *in* KEIJI SOSHŌHŌ NO SŌTEN, *supra* note 52, at 8-9. *Can't find original citation to the supra note.*

172. *Id.*

courts to weaken the defendants' rights and defense attorneys' power.[173] However it is generally accepted that the phenomenon of the "minute justice" itself has been stabilized and institutionalized.

With the cultural and legal settings favoring law enforcement authorities, the Japanese criminal justice system is often characterized as "prosecutorial justice" (*kensatsukan shihō*) because of the dominating role of the prosecutor in the criminal process.[174] The Japanese prosecutor not only assumes a "quasi-judicial authority" like that of a German prosecutor,[175] but also enjoys the broad discretionary power of a U.S. district attorney.[176] More than 40% of the suspects handled by prosecutors are disposed of by prosecutors, not by judges. Among those prosecuted, almost 30% are disposed of by summary decision based solely on the dossier made by investigators.[177] The summary decision results in a 100% guilty rate.[178] About 60% of the accused are disposed of without ever seeing a judge in court.[179]

In contrast, the roles of judge and defense attorney are limited. Observing that "criminal trials and in particular the fact finding that lies at the heart of trials are conducted in closed rooms by investigators," a former Japanese judge identified the Japanese criminal trial as a "trial by

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173. Odanaka Toshiki, *Keiso kaikaku rongi no kisoteki shiten [Basic Viewpoint of Debate for the Criminal Procedure Reform]*, *in* 2 HIRANO RYŪCHI SENSEI KOKI SHUKUGA RONBUNSHŪ [COLLECTION OF LEARNED PAPERS FOR SEVENTIETH BIRTHDAY OF HIRANO RYŪCHI] 250 (1991).

174. Hirano, *supra* note 6, at 409. Odanaka prefers the description of "police justice" (*keisatsu shihō*), observing the recent weakening of the prosecutors' power in comparison with the police power. Odanaka, *supra* note 32, at 251.

175. German criminal procedure jurisprudence does not considers the prosecutor "an adversary party of the defendant but a neutral representative of the state" (Thomas Weigend, *Continental Cure for American Ailments: European Criminal Procedure as a Model for Law Reform*, *in* 2 CRIME AND JUSTICE: AN ANNUAL REVIEW OF RESEARCH 395 (1980). *See also* ROXIN, *supra* note 125, at 50; Thomas Volkmann-Schluck, *Continental European Criminal Procedures: True or Illusive Model?*, 9 AM. J. CRIM. L. 1, 12 (1981)). The German prosecutor is also considered "guardian of the law" or "the most objective public official in the world" (Hans-Heinrich Jescheck, *The Discretionary Powers of the Prosecuting Attorney in West Germany*, 18 AM. J. COMP. L. 510 (1970)).

176. A. Didrick Castberg commented: Their [Japanese prosecutors'] clearly constituted authority to indict or to suspend prosecution and to control access of the defendant to his attorney, and their ability to control virtually all aspects of the investigation of the offense, amounts to quasi-judicial authority, and in fact prosecution in Japan are considered equal to judges in most respects. Their discretion is rarely challenged and even more rarely curtailed, while their authority is generally accepted by Japanese society. CASTBERG, *supra* note 1, at 72-73

177. Masayuki Murayama, *Post War Trends in the Administration of Japanese Criminal Justice: Lenient but Intolerant or Something Else?*, *in* INT'L CENTER FOR COMPARATIVE LAW AND POLITICS, THE UNIVERSITY OF TOKYO, DUTCH AND JAPANESE LAWS COMPARED 225, 245 (1993).

178. *Id.* at 246.

179. *Id.*

investigators" (*sōsa saiban*).[180] In these surroundings, defense attorneys play the role of "suggesting to the defendant how best to make restitution and to show remorse" and "persuading the judge to impose a lenient sentence" largely outside the guilt-determination phase.[181] They are observed to arrive at the perception that "contesting cases, rather than simply confessing and showing remorse, can result in harsher penalties."[182]

The high efficiency of the Japanese "prosecutorial justice" or "minute justice" system is made possible by the grave sacrifice of the individual's constitutional rights. The post-war Constitution's new vision has been overshadowed by a number of traditional-inquisitorial elements in the CCP and harsh and cunning police practice. The Supreme Court has interpreted the provisions and practices in favor of law enforcement authorities. Although the Court has accepted an exclusionary rule in principle, the rule has been given a very limited role.

The "criminal procedure revolution" is undoubtedly not finished in Japan. Although the 1947 Constitution provided a vision for the "criminal procedure revolution" to de-inquisitorialize the Japanese criminal justice system, the socio-political force which propels the "revolution" has not developed to a level which could replace the traditional view. At least in the field of criminal procedure, as René David and John E. C. Brierley point out, "the question is still very much open whether behind this facade of westernisation Japan really has undergone any kind of significant transformation and whether it has accepted the idea of justice and law such as understood in the West."[183]

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180. Ishimatsu, *supra* note 94, at 143, 145

181. CASTBERG, *supra* note 1, at 79.

182. Foote, *supra* note 2, at 338.

183. RENÉ DAVID & JOHN E. C. BRIERLEY, MAJOR LEGAL SYSTEMS IN THE WORLD TODAY 456 (London, 1968).