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Keywords

Prisoners, Criminal Law, Criminal Procedure, Exclusionary Rule, States

CAUGHT BETWEEN HOPE AND DESPAIR: AN ANALYSIS OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

Melissa Clack*

INTRODUCTION

While handcuffed, shackled, forced to excrete in their own clothes, personally bathed by the warden, sleep deprived, food deprived, bribed with cigarettes or food, and, in some cases, “accidentally” killed, a suspect in Japan is interrogated and the world is beginning to acknowledge that such procedures amount to a violation of human rights.¹ Adopted December 10, 1948, the Universal Declaration of Human Rights was the first international statement to use the term “human rights” and to recognize the right to be free from torture, arbitrary arrest, as well as the right to be presumed innocent until proven guilty.² Although the International community has concluded that suspects³ should be commonly afforded particular rights, there are many disparities from country to country as to what rights are actually guaranteed.⁴ Overall, industrialized nations afford more rights than do developing countries, with one exception.⁵ Japan, unlike most

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1. See e.g., Amnesty International, *Japan: No Advance on Human Rights*, December 8, 2000 [hereinafter referred to as *No Advance on Human Rights*]; BAYLEY, *infra* note 5; Kitamura, *infra* note 10; Svan, *infra* note 63; See *Japanese Warders Plead Innocent in Death of Inmate*, Agence France-Presse (March 11, 2003).

2. See United Nations Universal Declaration of Human Rights, GA Res 217 A (III), adopted Dec 10, 1948; Hurst Hannum, *The Status and Future of the Customary International Law of Human Rights: The Status of The Universal Declaration Of Human Rights In National And International Law*, 25 GA. J. INT'L & COMP. L 287, 289 (1996).

3. “Suspects” and “the accused” are both used in the analyzing the Japanese criminal justice system. Although there are legal differences between these two groups, which will be important in analyzing several of the international treaties regarding the rights of each, it is more important to note that neither “suspects” nor “the accused” have yet been to trial, convicted, or sentenced. The primary focus of this paper is on pre-trial procedures. Therefore, both “suspects” and “the accused” are relevant groups.

4. See M. Cherif Bassiouni, *Human Rights in the Context of Criminal Justice: Identifying International Procedural Protections And Equivalent Protections in National Constitutions*, 3 DUKE J. COMP. & INT'L L. 235, 252-53 (1993) (comparing national constitutions with respect to the rights of suspects).

5. See BAYLEY, DAVID H., *FORCES OF ORDER: POLICING MODERN JAPAN* ix (University of

industrialized nations, does not afford many of the same rights that Americans take for granted such as the rights to bail, to remain silent, and to counsel.⁶ In fact, the Japanese legal system has come under grave attack by many human rights activists, including Amnesty International.⁷ Although the Japanese criminal justice system still needs serious reform to provide greater protection to its accused, Japan should nevertheless also be lauded for its efforts thus far. Many activists often overlook the strides Japan has made toward reformation when demeaning Japan for the abundant abuse found within its criminal justice system. Furthermore, any analysis of the Japanese criminal justice system should consider the unique culture of Japan.⁸ Imposing American or Western standards on the Japanese system would be futile because Japanese and Western cultures sharply conflict. If any reformation is to take place, it must fit within the Japanese culture and way of life.

The foregoing analysis is a study of the Japanese criminal justice system and the rights of suspects and the accused. The main focus of the analysis is centered on the lack of rights afforded suspects in Japan and the resulting human rights violations found within the Japanese criminal justice system. Part II explores the history of Japan and the development of Japanese law. Although Western culture has greatly influenced the Japanese legal system, Japan has developed a unique criminal justice system based on its unique culture. Part III analyzes the Japanese legal system as well as the rights afforded its criminal suspects. As a point of comparison, Japan is then compared to the American system and the rights afforded suspects in America. While Part IV is an appraisal of the Japanese system, Part V considers the rights of suspects and the accused in the International arena as well as the International reaction to the Japanese system. Part V also considers the founding of the International Criminal Court and how it may affect the recognition of acceptable practices. The International Criminal Court is the only international tribunal in which criminal procedures have been adopted.⁹ Therefore, it is the only international tribunal that may be even remotely compared to an individual nation's criminal justice system. Part VI looks to the future of human rights and the impact of International pressures as well as the development of the International Criminal Court on the Japanese criminal justice system. Part VII calls for reformation of the Japanese criminal justice system. Although Japan has already begun some reform, further rectification is needed. In addition, any reformation must fit into the Japanese way of life. Finally, conclusions are drawn in Part VIII regarding the effectiveness of the Japanese legal system and the future of human rights in Japan.

California Press 1991) (1976).

6. Many of the rights that the Japanese Constitution guarantees its suspects and the accused are not actually realized. *See generally id.* *See also* III. a. iv. Rights of the accused During Detention, *infra* page 16. *Compare* U.S. Const. with Japan Const.

7. *See e.g.*, Amnesty International, available at www.amnesty.org. (searching for "Japan") (last visited May 31, 2003).

8. *See* II. b. Cultural Development, *infra* page 6.

9. *See* Rome Statute of the International Criminal Court, adopted 17th day of July 1998, art. 67(1)(e), available at <http://untreaty.un.org/> (last visited May 31, 2002)[hereinafter Rome Statute].

THE DEVELOPMENT OF THE JAPANESE CRIMINAL JUSTICE SYSTEM

Legal History

Scholars believe Japan has had some sort of a judicial system in place since the fourth century, but Japan's modern legal history consists of three main eras, which commence in the 17th century.¹⁰ During the first stage, known as the Tokugawa/Edo phase, Japan established many of the traditional legal institutions employed today, including a primitive judicial system.¹¹ After the fall of the shogunate in 1867, an Emperor resurfaced as the controlling governmental entity known as the Meiji government.¹² The Meiji government appointed judges for criminal matters and in 1875 a Supreme Court of Justice was established.¹³ It was during this time that torture was abolished as well as rendering an opinion "solely upon confession," which was a common practice.¹⁴ In 1889, the Meiji Constitution was formed, which provided for a more formal court system with district courts, appellate courts, and local courts.¹⁵ A year later, the Code of Criminal Investigation was reformed to become the Code of Criminal Procedure, and was modeled after the French Code of Criminal Procedure established by Napoleon.¹⁶

A sense of westernization began to develop initially as a result of borrowed laws, both from France as well as Germany.¹⁷ Later, in 1854, trade treaties were formed under pressure from U.S. warships.¹⁸ These treaties provided certain privileges for foreigners.¹⁹ Japan viewed these treaties as a threat to their full sovereignty.²⁰ Therefore, the Emperor established a European legal order in order to modify the treaties.²¹ In 1894, "the extraterritorial treatment of foreigners [by the treaties] was eliminated and the most-favored nation clause was based on the principle of reciprocity."²² Following the modification of the treaties, the Meiji

10. See A Guide to Court Procedures, *History of Criminal Justice in Japan* [hereinafter referred to as *History of Criminal Justice in Japan*], at <http://arapaho.nsuok.edu/~dreveskr/jap.html-ssi> (selecting Guide to Criminal Court Procedures) (last visited July 14, 2003). See also Harald Hohmann, *Modern Japanese Law: Legal History and Concept of Law, Public Law and Economic Law of Japan*, 44 AM. J. COMP. L. 151, 153 (1996) (summarizing the legal history of Japan).

11. Ichiro Kitamura, *The Judiciary in Contemporary Society: Japan*, 25 CASE W. RES. J. INT'L L. 263, 263 (1993).

12. See *History of Criminal Justice in Japan*, *supra* note 9.

13. Kitamura, *supra* note 10, at 263.

14. *History of Criminal Justice in Japan*, *supra* note 9.

15. See *id.* See also Kitamura, *supra* note 10, at 263.

16. See *History of Criminal Justice in Japan*, *supra* note 9. See also Kitamura, *supra* note 10, at 263.

17. See Kitamura, *supra* note 10, at 263. In 1922, Japan modeled their new Code of Criminal Procedure after current German and French laws. In fact, the Meiji government was almost entirely based upon the European culture. See *History of Criminal Justice in Japan*, *supra* note 9.

18. See Hohmann, *supra* note 9, at 155.

19. See *id.*

20. See *id.*

21. See *id.*

22. *Id.*

leaders believed that modern law could develop a strong economy and as a result, the Meiji Constitution of 1889 was formed.²³ It was intended "to encourage the citizens to live in harmony with each other."²⁴ Therefore, a system in equity rather than justice developed.²⁵

After World War II, the United States helped the Japanese rebuild its shattered country. In the process, American and Anglo-American culture had a great influence on the development of the Japanese legal system.²⁶ Americans pushed Japanese leaders to change the Constitution, Code of Criminal Procedure, and organization of the courts.²⁷ The new laws were heavily influenced by Western culture and all contained provisions, which "fully guarantee fundamental human rights" including warrant requirements, terms regarding inadmissible evidence and hearsay, and the implementation of a trial based upon an adversary system.²⁸ After the changes were made, a new Supreme Court was established and the public prosecutor's office "held the main responsibility for investigation and exclusively supervised prosecution and pre-trial proceedings."²⁹ In fact, the Japanese prosecutor's office was once hailed as the "cornerstone of an inquisitorial system of law enforcement."³⁰

Cultural Development

Because "western institutions were not copied faithfully" and the Japanese incorporated "Franco-Germano-American ingredients," the Japanese legal system developed much differently from that of the United States.³¹ The unique Japanese culture also played a major role in the development of the criminal justice system.³² For instance:

In the United States a person tends to be perceived by self and others as an individual actor whose identity and sense of self stand apart from the community, while in Japan a person is perceived by self and others as a contextual actor whose identity is, in substantial part, defined by social relationships.³³

Because of these differences, Japan ultimately developed many different

23. *See id.*; Kitamura, *supra* note 10, at 263.

24. Hohmann, *supra* note 9, at 156.

25. *See* Joel Rosch, *Institutionalizing Mediation: The Evolution Of The Civil Liberties Bureau In Japan*, 21 LAW & SOC'Y REV. 243, 254 (1987).

26. Hohmann, *supra* note 9, at 153.

27. *See* Kitamura, *supra* note 10, at 263-264.

28. *See History of Criminal Justice in Japan*, *supra* note 9.

29. Kitamura, *supra* note 10, at 264.

30. *Id.*

31. *Id.*

32. Jessica Hardung, *The Proposed Revisions to Japan's Juvenile Law: If Punishment Is Their Answer, They Are Asking the Wrong Question*, 9 PAC. RIM L. & POL'Y J. 139, 139 (2000).

33. Hohman, *supra* note 9, at 158-59 (quoting V. LEE HAMILTON & JOSEPH SANDERS, EVERYDAY JUSTICE. RESPONSIBILITY AND THE INDIVIDUAL IN JAPAN AND THE UNITED STATES XIII, 290 (New Haven/London: Yale University Press, 1992)).

rights including the rights of suspects and how the accused are treated.³⁴

First and foremost, it is vital to understand the cultural differences between the United States and Japan. The differences are significant and any revision to be made to the Japanese criminal justice system must be achieved within the context of the Japanese culture.

The Japanese criminal justice system is thought to be a "family model."³⁵ It is based "both on love (similar to a parent's love for a child) and mutual respect."³⁶ For that reason, the primary aim of the Japanese criminal justice system is correction rather than strictly punishment.³⁷ Japanese officials hope to rehabilitate their criminals and allow the offenders to re-enter society and become a part of the "family" once again.³⁸ The Japanese "family model" is also an "inquisitive family" that keeps tabs on its members, especially when they become suspects.³⁹ Such a model leads to close community ties and moral responsibility, which is reflected not only in the Japanese societal structure, but also in its laws and criminal procedure.⁴⁰ In fact, the importance of rehabilitation and focus on familial ties is so strong that "the apprehension of offenders, their successful prosecution, proof of guilt, and procedural fairness are secondary to the pervasive concern for rehabilitation of offenders and their conformity to socially acceptable conduct."⁴¹ The procedures Japan employs to force suspects to conform to Japanese society or to facilitate rehabilitation has come under grave attack by the international community.⁴²

Because the Japanese community is remarkably closely-knit, its citizens find sanctions that distinguish themselves from the community to be morally reprehensible.⁴³ For example, "confessing, apologizing, and throwing himself upon the mercy of the authorities" is seen as firm punishment extracting repentance.⁴⁴ The citizen becomes eschewed from the rest of the community and is greatly ashamed.⁴⁵ Because of such moral considerations and tight community ties, the Japanese suspect is most likely to be submissive to authority.⁴⁶

34. *Id.* at 159.

35. Daniel H. Foote, *The Benevolent Paternalism of Japanese Criminal Justice*, 80 CAL. L. REV. 317, 319-321 (1992).

36. *Id.* at 319.

37. See JOHN O. HALEY, *Introduction: Legal vs. Social Controls*, LAW AND SOCIETY IN CONTEMPORARY JAPAN: AMERICAN PERSPECTIVES 2 (John O. Haley ed., Kendall/Hunt Publ'g Co. 1998).

38. *Id.*

39. Foote, *supra* note 34, at 321.

40. See *generally id.*

41. HALEY, *supra* note 36, at 2.

42. See *generally* Section III. a., *infra* page 9. Japan focuses their energy on extracting confessions during the pre-trial phase of prosecution in the hopes of rehabilitating the suspect and releasing him back into society. However, the police and prosecutors often violate human rights in order to achieve that end result.

43. See Foote, *supra* note 34, at 344-345.

44. HALEY, *supra* note 36, at 2.

45. See *id.* See also Foote, *supra* note 34, at 344-345.

46. See BAYLEY, *supra* note 5, at 139.

Moral considerations play a large role in the Japanese legal system.⁴⁷ These traditions and mores, based not on autonomy, but upon communal acceptance, have played a significant role in forming the Japanese Code of Criminal Procedure.⁴⁸ Therefore, individual rights, including the rights of suspects, are sacrificed for the good of the community.⁴⁹ The United States, on the other hand, tends to focus primarily on punishment and the individual.⁵⁰ The sharp distinction between the American and Japanese criminal justice systems is due to cultural differences. Many Americans, for example, are concerned with due process only for fear of being handed a heavy punishment after conviction.⁵¹ In Japan, on the other hand, a simple apology can often be seen as worse punishment than imprisonment.⁵² Because of the dissimilarity of the two cultures, it is not feasible to impose one society's practice on the other. To a great extent, imposing American values on the Japanese will likely have deleterious effects.⁵³

A COMPARISON OF CRIMINAL PROCEDURES

Japan

Lesser Crimes

The Japanese criminal procedure and treatment of suspects, differs depending on the seriousness of the crime.⁵⁴ Suspects of lesser crimes, including assault, theft, fraud, embezzlement, and gambling, are rarely prosecuted at a formal trial.⁵⁵ In fact, over 70% of all criminal cases in Japan in 1990 did not go to trial.⁵⁶

47. See Arthur Taylor von Mehren, *The Legal Order in Japan's Changing Society: Some Observations*, 76 HARV. L. REV. 1170, 1190 (1963).

48. See BAYLEY, *supra* note 5, at 177. See also V. Lee Hamilton et al., *Punishment and the Individual in the United States and Japan*, 22 LAW & SOC'Y REV. 301, 303 (1988).

49. See BAYLEY, *supra* note 5, at 177.

50. See V. Lee Hamilton, *supra* note 47, at 304.

51. See Gil Sapir & Mark Giangrande, *Right To Inspect And Test Breath Alcohol Machines: Suspicion Ain't Proof*, 33 J. MARSHALL L. REV. 1, 19 (1999) (focussing on due process rights when the accused is convicted).

52. See HALEY, *supra* note 36, at 2; BAYLEY, *supra* note 5, at 127. See generally Hiroshi Wagatsuma and Arthur Rosett, *The Implications of Apology: Law and Culture in Japan and the United States*, 20 LAW & SOC'Y REV. 461, 492 (1986).

53. Cultural differences are important to consider when determining the cruelty of a system. In a culture where an apology is seen as a harsh sentence, pre-trial detention procedures, in which food and sleep are withheld from the suspects and suspects are bribed into confessing, are considered unbearable. Although Japan is compared to the United States, it is important to keep cultural differences in mind. The comparison is made only to illustrate the differences in the criminal justice systems. Nevertheless, Japan must afford its suspects fundamental human rights as discussed in Section III. a., *infra* page 9.

54. See e.g., BAYLEY, *supra* note 5, at 134.

55. See Foote, *supra* note 34, at 342.

56. See Japan: Criminal Procedure, at <http://lcweb2.loc.gov> (last visited July 14, 2003). Most of these cases involved small or returned sums of money, victims that were unwilling to press any charges, or accidental acts. See *id.*

However, police must send any formal complaint, irrespective of its validity, to prosecutors for further proceedings known as an “at-home basis.”⁵⁷ Police are then required to “counsel the suspect sternly and admonish him or her not to commit crimes in the future.”⁵⁸ In order to “counsel” the suspect, police give strong lectures.⁵⁹ In addition, they are required to “call in a member of the suspect’s family, the suspect’s employer, or some other such responsible individual, counsel that person to keep close watch over the suspect in the future, and even have that person undertake in writing to provide such ongoing supervision.”⁶⁰ The police also persuade the suspect to make an apology or partake in some other type of restitution.⁶¹ These sanctions tend to ostracize the suspect from the community and extract heavy punishment because social isolation often prevents individuals from performing normal social endeavors.⁶² This is a sharp distinction from the fines and informal court appearances that many American suspects accused of misdemeanors are subjected. The lectures and counseling, even for lesser crimes, illustrates the close community ties existing in Japan. Where the American system is individualized and its citizens remain detached from one another, the Japanese system more closely resembles a family in which the police are seen as a parent reprimanding a child.

Critics tend to disregard the “at-home basis” proceedings and focus on the procedures used to process more austere crimes such as murder and rape.⁶³ It is apparent from the discussion above that no human rights are violated during the “at-home basis” proceeding. There are no claims of torture or violations of any fundamental freedoms. Nevertheless, a discussion of the “at-home basis” proceedings illustrates the close familial ties of the Japanese culture.

Severe Crimes

The abusive nature of the Japanese criminal justice system and violation of human rights becomes apparent when a suspect is accused of committing a more serious crime. Once a suspect of a serious crime in Japan is identified, he is detained in what is called a *daiyo-kangoku* or “substitute prison.”⁶⁴ These prisons are actually jails that are attached to police stations and act as detention centers during interrogation and investigation procedures.⁶⁵ These detention facilities are considered “one of the most peculiar detention systems in the modern world”

57. Foote, *supra* note 34, at 343.

58. *Id.*

59. *See id.*

60. *Id.*

61. *See id.* *See also* BAYLEY, *supra* note 5, at 132-133.

62. *See* HALEY, *supra* note 36, at 3.

63. *See generally* Amnesty International, available at www.amnesty.org. (searching for “Japan”) (last visited May 31, 2003).

64. Jennifer H. Svan, *Woodland Trial May Spotlight Flaws in Japanese Criminal Justice System*, STARS AND STRIPES (Sept. 11, 2001), available at <http://www.pstripes.com/01/sep01/ed091101b.html> (last visited May 31, 2003); BAYLEY, *supra* note 5, at 145.

65. *See* BAYLEY, *supra* note 5, at 145.

because of the procedures involved in interrogating a suspect.⁶⁶ In order to detain a suspect in a *daiyo-kangoku*, judicial approval must be obtained; however, typically less than 1% is ever denied.⁶⁷

Although most suspects are detained for less than ten days, a suspect may be detained for up to twenty-three days in a "substitute prison" before the prosecutor decides whether or not to prosecute.⁶⁸ Police, however, must decide whether to "release or refer a suspect to the prosecutors within forty-eight hours after arrest."⁶⁹ Once a suspect is referred to the prosecutor's office, prosecutors "then have another twenty-four hours within which to decide whether to release the suspect or go to court to seek a warrant for the suspect's detention."⁷⁰

This unique detention system is often referred to as "hostage justice" not only because of the improbable chance that the accused will be allowed to post bail, but also because of the lengthy detention times.⁷¹ The detention period in and of itself is often brutal because it tends to sever many of the close familial ties that are vital to any citizen of Japan.⁷²

Detention Procedures

The Japanese detention system is riddled with abusive procedures, on which most legal analysts focus.⁷³ After the suspect is detained, the Japanese criminal proceeding then advances to the investigation stage.⁷⁴ This is perhaps the most crucial and important aspect of the entire proceeding because securing either a guilty plea or judgment is fundamental to the Japanese legal culture.⁷⁵ Therefore, investigating police have "considerable and wide-ranging powers of coercion and examination."⁷⁶ In fact, interrogations are completely unregulated in Japan.⁷⁷ Japanese law dictates that law enforcement officials' right to interrogate trumps the suspect's right to counsel.⁷⁸ However, Japan contends that the length of detention for interrogation purposes is *limited* to twenty-three days in order to balance the

66. Svan, *supra* note 63 (quoting the Japan Federation of Bar Associations (JFBA)). The procedures are explained in further detail in subsequent paragraphs. See III. a. iii., *infra* page 12.

67. See BAYLEY, *supra* note 5, at 145.

68. See *id.* at 144.

69. Foote, *supra* note 34, at 335.

70. *Id.*

71. Svan, *supra* note 63.

72. See generally Foote, *supra* note 34.

73. See Human Rights Watch, *Prison Conditions in Japan*, at <http://www.hrw.org/research/japan.html> (last visited May 26, 2003) [hereinafter referred to as *Prison Conditions in Japan*]. See generally Amnesty International, available at www.amnesty.org. (searching for "Japan") (last visited May 31, 2003);

74. See generally Kitamura, *supra* note 10.

75. See Japan Const. art. 40 (allowing any person found innocent to sue the state). See generally BAYLEY, *supra* note 5.

76. Kitamura, *supra* note 10, at 266.

77. See Svan, *supra* note 63.

78. See Foote, *supra* note 34, at 337-338.

law enforcement officers' right to investigate with the suspect's right to counsel.⁷⁹ Nevertheless, police may interrogate the suspect for the entire twenty-three days while depriving the suspects of sleep and food and forbidding them from using a restroom.⁸⁰ Despite any accusations that interrogations are done to torture the suspect into confessing, police practices have not assuaged.⁸¹

The goal of rigorous interrogation practices is to "obtain every relevant fact from the suspect."⁸² International organizations such as Human Rights Watch has reported that suspects placed in the *daiyo-kangoku* "face severe pressure, often involving physical abuse, in order to obtain confessions."⁸³ In order to extract confessions, interrogators may "instill a kind of psychological attachment, through a series of concentrated contacts and questionings that may include the use of violent methods."⁸⁴ Such methods may include "isolation, lack of privacy, interrupted sleep, and complete dependence on custodial staff."⁸⁵ Because of the wide-ranging powers of the police during investigation, such inducement is rarely found to be unfair by the judicial system.⁸⁶ However, inducing the suspect to confess has been found to be unfair in cases in which police have offered suspects special food or cigarettes.⁸⁷ In such cases, the confession may be deemed involuntary.⁸⁸ In one case, the confession was deemed involuntary because "the chief of the police station visited the suspect in his bath and undertook to wash his back for him."⁸⁹ In such extreme cases, the court may judge the confession involuntary, and therefore inadmissible.⁹⁰ Police interrogate a suspect to determine the "suspect's motives, family background and other personal circumstances, and involvement in any other crimes."⁹¹ In line with the Japanese goal of reformation, the information that police and prosecutors gather from such questioning will determine what form of punishment will be best to reach specific prevention.⁹²

In addition to police interrogations, suspects must also endure questioning from prosecutors.⁹³ Public prosecutors have the liberty of conducting independent interrogations.⁹⁴ That is, their interrogations do not need to be in conjunction with

79. See Mr. Satoru Satoh, Letter Written in Response to the Article "Awkward Japan" in the Washington Post; Daisuke Moriyama, *Criminal Justice System in Japan: Present Situation and Issues* [hereinafter referred to as *Criminal Justice System in Japan*], February 1999, available at <http://www.eu.emb-japan.go.jp/interest/crimju.htm> (last visited July 14, 2003).

80. See e.g., *No Advance on Human Rights*, *supra* note 1; Kitamura, *supra* note 10, at 266; Svan, *supra* note 63; Bayley, *supra* note 5, at 146.

81. See *No Advance on Human Rights*, *supra* note 1.

82. Kitamura, *supra* note 10, at 267.

83. *Prison Conditions in Japan*, *supra* note 71.

84. Kitamura, *supra* note 10, at 267.

85. BAYLEY, *supra* note 5, at 148.

86. See *id.*

87. See *id.*

88. See *id.*

89. *Id.*

90. See *id.*

91. Foote, *supra* note 34, at 346.

92. See *id.* at 347.

93. See *id.*

94. See Kitamura, *supra* note 10, at 267.

police practices.⁹⁵ Unlike police interrogations, the prosecutor's authority is statutorily devised.⁹⁶ Like police procedures, however, prosecutorial investigation practices have become highly criticized and have prompted "international investigation as well as submissions to the U.N. Commission on Human Rights."⁹⁷ In particular, prosecutors are accused of abusing their wide-ranging powers of detention and investigation by coercing suspects into confessing "through a combination of isolation from outside support, prolonged and harassing interrogation, demeaning physical conditions, and uncertain access to food, sleep, and bathing."⁹⁸

Furthermore, prosecutors have almost unlimited discretion in deciding whether or not to prosecute.⁹⁹ The most important factors to consider include "character, age, and situation of the offender."¹⁰⁰ In addition to questioning the suspect, prosecutors also "interview the victim or the victim's heirs. . . [and] may also obtain information about the suspect's character and background from the suspect's family and employer and from other members of the community."¹⁰¹ This not only adds to the "inquisitive family model," but also affords a form of punishment for the suspect.¹⁰² After such treatment and publicity, the community will most likely recognize the suspect as a criminal, regardless of whether he is truly innocent or not, and therefore shun him.¹⁰³

If a prosecutor decides not to prosecute a case, the "victim of the crime, or a suitable proxy may demand a hearing regarding the prosecutor's decision."¹⁰⁴ A "prosecution review commission" conducts such a hearing.¹⁰⁵ Although this is unique to the Japanese legal system, its roots are in the American legal system.¹⁰⁶ It is actually a hybrid between the American grand jury system and the Japanese legal culture.¹⁰⁷ Nevertheless, the Japanese legal system is essentially a system controlled by the prosecutor.¹⁰⁸ Judges examine any statements made during interrogations and then hand down a sentence.¹⁰⁹ Trials are not seen as forums to discover the truth.¹¹⁰ Instead, the judges simply review the suspects' file of

95. *See id.*

96. *See* Mark D. West, *Prosecution Review Commissions: Japan's Answer to the Problem of Prosecutorial Discretion*, 92 COLUM. L. REV. 684, 686 (1992) (discussing the authority of Japanese prosecutors).

97. BAYLEY, *supra* note 5, at 146.

98. *Id.*

99. *See id.* at 134.

100. *Id.*

101. Foote, *supra* note 34, at 347.

102. *See generally id.*

103. *See* Rajendra Ramlogan, *The Human Rights Revolution in Japan: A Story of New Wine in Old Wine Skins?*, 8 EMORY INT'L L. REV. 127, 179 (1994).

104. West, *supra* note 94, at 685.

105. *Id.*

106. *See id.*

107. *See id.*

108. *See* Kitamura, *supra* note 10, at 266.

109. *See id.* at 268-269.

110. *See id.* at 268.

statements and verify evidence.¹¹¹ Therefore, the public prosecutor is seen as the “king” of the criminal justice system.¹¹²

Rights of the Accused During Detention

In order to assure greater protection of human rights for criminal suspects in Japan, reform is needed. However, the Japanese Code of Criminal Procedure and Constitution currently promise many rights that are considered fundamental human rights, including the right to bail, the right against self-incrimination, and the right to counsel.¹¹³ The problem with the Japanese criminal justice system is that few of these rights are ever realized by detained suspects.

Although the right to bail is guaranteed in the Japanese Constitution, it is only granted after formal charges have been filed and often proves to be a “hollow promise.”¹¹⁴ Because of the necessity of a confession before formal charges are filed, confession becomes a condition for bail.¹¹⁵ In addition, a suspect is typically not granted bail when he denies the allegations because police and prosecutors believe that the suspect is likely to destroy evidence and deter witnesses.¹¹⁶ Therefore, the main objective during detention is to obtain a confession and only when a confession is obtained may bail be granted.¹¹⁷

Japanese suspects are also afforded the right against self-incrimination.¹¹⁸ Nevertheless, police can continue to question them and any statement made by the suspect can be used as evidence.¹¹⁹ Even during detention, suspects cannot refuse to answer questions presented to them by either the police or prosecutors.¹²⁰ This questioning often lasts for the entire twenty-three days and can be carried on day or night, often resulting in extreme fatigue and exhaustion for the suspect.¹²¹ Although there is no statutory law upholding the legality of such interrogation, substantial case law has admitted the lawfulness of such practice.¹²²

Because of such rigorous interrogation practices, “the importance of counsel for a suspect cannot be over-emphasized.”¹²³ Although the right to counsel is guaranteed by the Japanese Constitution, the suspect’s right to counsel is also greatly limited.¹²⁴ During detention, access to counsel is at the sole discretion of

111. See *id.* at 268-269. See generally Mirjan Damaska, *Evidentiary Barriers To Conviction And Two Models Of Criminal Procedure: A Comparative Study*, 121 U. PA. L. REV. 506 (1973) (comparing criminal procedures in adversarial and inquisitorial systems with regards to admitting evidence).

112. Kitamura, *supra* note 10, at 266.

113. See Japan Const., arts. 34-39; Japan Code of Criminal Procedure.

114. Svan, *supra* note 63.

115. See BAYLEY, *supra* note 5, at 145.

116. See Svan, *supra* note 63.

117. See BAYLEY, *supra* note 5, at 145.

118. See Japan Const. art. 38.

119. See Kitamura, *supra* note 10, at 266. See generally Damaska, *supra* note 109.

120. See Kitamura, *supra* note 10, at 266.

121. See *id.* See also Svan, *supra* note 63.

122. See Kitamura, *supra* note 10, at 266-267.

123. Ramlogan, *supra* note 101, at 194.

124. See Japan Const. art. 38.

the police and prosecutors.¹²⁵ Defense attorneys must appear before the prosecutor and ask for written permission.¹²⁶ Even after the prosecutor grants permission, the police may deny access for various reasons.¹²⁷ For example, a suspect's access to counsel may be suspended while the suspect is "interrogated, moved, asleep, bathing, and so forth."¹²⁸ Because of the emphasis on interrogation procedures, defense counsel visits may be suspended due to interrogation practices.¹²⁹ In fact, defense attorneys have no right to be with their client during interrogation procedures conducted in the "substitute prisons" and interrogations are rarely, if ever, recorded.¹³⁰ Further, suspects may not refuse to answer interrogations simply because their attorneys are absent.¹³¹

Defense counsel is only formally assigned after legal proceedings are undertaken, not during detention.¹³² If the suspect appoints his attorney during his detention, his attorney must then ask for permission to visit his client.¹³³ Public prosecutors normally only allow two visits for every ten days of detention.¹³⁴ In addition, these visits are limited to fifteen minutes each.¹³⁵

A Current Example Involving the United States

The case of Staff Sgt. Timothy Woodland exemplifies the arguments made in this paper, namely that the rights of suspects in Japan are not afforded adequate protection and, as a result, human rights are being violated. An American airman, Staff Sgt. Timothy Woodland, was accused of raping a Japanese woman while stationed in Okinawa.¹³⁶ Japan urged the United States to relinquish the airman so that Japan could prosecute him for his crime.¹³⁷ In fact, Japan requested that the airman be turned over to Japanese officials prior to indictment, which is rare except in cases dealing with "heinous crimes," including rape.¹³⁸ Recognizing the danger in handing over American citizens to foreign nations, the United States agonized over whether to comply with Japan's requests.¹³⁹ Because relations

125. See BAYLEY, *supra* note 5, at 145.

126. See *id.* at 146.

127. See *id.*

128. *Id.*

129. See *id.*

130. Svan, *supra* note 63.

131. See BAYLEY, *supra* note 5, at 146.

132. See Kitamura, *supra* note 10, at 268.

133. See BAYLEY, *supra* note 5, at 146; Kitamura, *supra* note 10, at 268

134. See Kitamura, *supra* note 10, at 268.

135. See *id.*

136. See *US to Turn Over Rape Suspect to Japan*, CHINA Daily, July 6, 2001, available at <http://www1.chinadaily.com.cn>. (last visited May 27, 2003). This recent news story has brought many of the Japanese criminal procedures to light in America and has instigated American concern for Americans currently subjected to Japanese laws. See also Svan, *supra* note 63.

137. See *US to Turn Over Rape Suspect to Japan*, *supra* note 134.

138. *Id.* According to an agreement between the United States and Japan, the United States does not need to surrender suspects before they are charged with a crime, except in cases dealing with "heinous crimes." *Id.*

139. See *id.*

between the United States and Japan were deteriorating rapidly, the United States ultimately surrendered the airman.¹⁴⁰ At one point, the United States negotiated with Japan to ensure that Woodland's rights, as a suspect, would be upheld.¹⁴¹ They discussed such provisos as "a lawyer, interpreter and some limits on questioning by Japanese police."¹⁴² Woodland was eventually convicted in a Japanese court and sentenced to a Japanese prison where 11 American servicemen are currently serving time.¹⁴³

After the airman was convicted, the United States was appalled and now seeks an appeal.¹⁴⁴ It should be no surprise Japan found the airman guilty because the Japanese adversarial system is designed to convict all suspects. Unlike international or American standards, Japanese criminal procedures provide far fewer safeguards to the accused. During Woodland's trial, his accuser never addressed him, nor was he given the opportunity to confront her.¹⁴⁵ According to Japanese law, the accused has no such right.¹⁴⁶ In addition, the prosecution may appeal the first verdict in the hopes that the suspect is actually convicted.¹⁴⁷ In the United States, on the other hand, it is the accused that is afforded the opportunity to appeal a loss.¹⁴⁸ In addition, both international practices and the American legal system recognize the accused's right to challenge any witness against him.¹⁴⁹

The United States

The United States, unlike Japan, focuses on the individual.¹⁵⁰ American citizens do not have close community ties, as do Japanese citizens.¹⁵¹ Instead, Americans can easily detach themselves from the community, and socially-based reprimands, such as an apology, would be a miniscule punishment.¹⁵² In addition,

140. See *Japan Mulls Revising US Forces Pact After Okinawa Rape*, CHINAdaily, available at <http://www1.chinadaily.com.cn/news/2001-07-06/18755.html> (last visited May 27, 2003).

141. See *US To Turn Over Rape Suspect To Japan*, *supra* note 134.

142. *Id.*

143. See Howard W. French, *Airman's Rape Conviction Fans Okinawa's Ire Over U.S. Bases*, N.Y. TIMES, March 29, 2002. See also Svan, *supra* note 63.

144. The airman is now serving out his sentence in a Japanese prison where the torture and cruel treatment of inmates is profound. See French, *supra* note 141. See also *US Airman Gets 32 Months Jail*, CHINAdaily, March 29, 2002, available at <http://www1.chinadaily.com.cn/cndy/2002-03-29/63203.html> (last visited July 14, 2003). For example, just recently, the media reported that an inmate in a Japanese prison was killed when the guards turned a high pressured hose on him. See *Japanese Warders Plead Innocent in Death of Inmate*, Agence France-Presse (March 11, 2003).

145. See French, *supra* note 141.

146. See *id.*; Suvendrini Kakuchi, *Japan's Battlers of Sex Abuse Confront Culture, Law*, WOMEN'S ENEWS, April 17, 2003, available at <http://www.womensenews.org> (last visited July 14, 2003). Although the United States forbids certain evidence to be admitted in a rape case, the suspect still has a right to address his accuser. See Fed. R. Evid. 412.

147. See *Criminal Justice System in Japan*, *supra* note 77.

148. See Fed. R. App. Pro. 4. Although this right is not Constitutionally protected, it is well recognized by federal statutes and case law.

149. See Rome Statute at art. 67(1)(e). See also U.S. Const. Amend. VI.

150. See Hohmann, *supra* note 9, at 158.

151. See *id.*

152. See *id.*, at 159; Wagatsuma, *supra* note 51, at 492.

most American citizens tend to be angered, rather than embarrassed, by the legal system.¹⁵³ The reason for such a discrepancy lies in the development of moral considerations. Japanese citizens are more likely to have close community ties, whereas American citizens are individualized.¹⁵⁴ Because of this difference, the American legal system operates in a distinctly different fashion.¹⁵⁵

Nevertheless, the United States affords many rights to its citizens that Japan does not provide. Most of these rights can be found in the Bill of Rights.¹⁵⁶ The first eight of those amendments primarily deal with the rights of suspects and criminal offenders.¹⁵⁷ However, these rights were not always protected by states.¹⁵⁸ Instead, they were sparingly provided.¹⁵⁹ With the passage of the Fourteenth Amendment, states were forced to apply all fundamental Constitutional guarantees.¹⁶⁰

Included in the Bill of Rights is the Fifth Amendment, which guarantees the privilege against self-incrimination.¹⁶¹ That is, American citizens cannot be forced to confess to crimes or testify against themselves in a court of law.¹⁶² Approximately a century after the passage of the Fourteenth Amendment, the Supreme Court of the United States decided the landmark case of *Miranda v. Arizona* "in an attempt to bring an end to police use of coercion, threats, psychological pressure, promises, and deception to get suspects to confess in criminal cases."¹⁶³ *Miranda* forced police officers at the time of arrest to tell suspects that they had a right to remain silent as well as a right to counsel.¹⁶⁴ When a suspect is initially detained, a *Miranda* warning is read to ensure that the suspect is aware of these rights.¹⁶⁵

In addition, whether the suspect's confession is voluntarily given is subjected to stricter standards in the United States than in Japan. In the United States, the police and prosecutors are forbidden to use any violent, coercive methods.¹⁶⁶

153. See BAYLEY, *supra* note 5, at 136.

154. See Hohmann, *supra* note 9, at 158-159.

155. See generally Hohmann, *supra* note 9.

156. See U.S. Const., amends. I-X.

157. See U.S. Const., amends. I-VIII. See also Stephen C. Thaman, *Is America A Systematic Violator of Human Rights in the Administration of Criminal Justice*, 44 ST. LOUIS L.J. 999, 1000 (2000).

158. See Thaman, *supra* note 155, at 1002.

159. See *id.* See also Jerold H. Israel, *Selective Incorporation: Revisited*, 71 GEO. L.J. 253, 253 (1982).

160. See Israel, *supra* note 157, at 253. See also Thaman, *supra* note 155, at 1002.

161. See US Const, amend. V

162. See *id.*

163. Thaman, *supra* note 155, at 1009. See also *Miranda v. Arizona*, 384 U.S. 436, 86 S.Ct. 1602, 16 L. Ed. 2d 694 (1966). This case has come under heightened scrutiny in recent years. Many legal scholars fear that this case will soon be overturned reducing a suspect's protection to remain silent and demand counsel before questioning. See e.g., Steven D. Clymer, *Are Police Free To Disgard Miranda*, 112 YALE L.J. 447 (2002); George C. Thomas III and Richard A. Leo, *The Effects Of Miranda v. Arizona: "Embedded" In Our National Culture?*, 29 CRIME & JUST. 203 (2002).

164. See *Miranda*, 384 U.S. at 444.

165. See *id.*

166. See *id.* at 506; *Blackburn v. Alabama*, 361 U.S. 199 (1960); *Mincey v. Arizona*, 437 U.S. 385

Nevertheless, suspects often feel coerced to confess.¹⁶⁷ Those confessions have often been found to be false, resulting in many innocent persons being convicted.¹⁶⁸ To ensure fairness and justice, American courts have deemed confessions obtained as a result of coercive measures to be inadmissible.¹⁶⁹ In furtherance of the Fifth Amendment right against self-incrimination, if a suspect is questioned, he may choose to remain silent, and has a right to do so.¹⁷⁰

Also included in the Constitution is the right to counsel.¹⁷¹ This guarantee was also included in the Miranda warning.¹⁷² A suspect not only has the right to refuse to answer questions, but also may demand that his attorney be present during the entire pre-trial period.¹⁷³ The United States, unlike Japan, guarantees the right to counsel even during interrogation.¹⁷⁴ In the United States, a suspect may refuse to answer any questions without an attorney present.¹⁷⁵ In addition, the defense attorney does not need to obtain permission from either the prosecutor or the police before seeing his client.¹⁷⁶ Instead, the prosecution must first seek permission from defense counsel before continuing to question the suspect.¹⁷⁷ In fact, once the suspect requests an attorney, all interrogation must cease until the suspect speaks to an attorney.¹⁷⁸

Before being questioned without an attorney present, a suspect must waive both his right to remain silent and to consult with a lawyer.¹⁷⁹ Because of such Constitutional guarantees, there seems to be many more restrictions on interrogation procedures in the United States than in Japan. The purpose of interrogation in the United States also differs from that of Japan. Unlike Japan, the main focus of the interrogation period is to determine the facts surrounding the case. Although police and prosecutors would like to procure a confession, it is not necessary to obtain a confession before trial.¹⁸⁰

When a suspect in the United States is arraigned, the court may choose to set

(1978). See also Thaman, *supra* note 155, at 1000; Andrew Pace, *Fifteenth Annual Review Of Criminal Procedure: United States Supreme Court and Courts of Appeals 1984-1985: Confessions*, 74 GEO. L.J. 593, 594 (1986).

167. See Thaman, *supra* note 155, at 1009; Pace, *supra* note 164, at 594.

168. Judges have often found that the mere presence of the police and the pre-trial process are coercive in and of themselves. This may add to the number of false confessions. See Thaman, *supra* note 155, at 1009.

169. See *id.*

170. See *id.*

171. See U.S. Const, amend V and VI.

172. See *Miranda*, 384 U.S. at 467-468.

173. See Peter Brooks, *Storytelling Without Fear? Confession in Law & Literature*, 8 YALE J.L. & HUMAN. 1, 20 (1996).

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

175. See *id.* at 293.

176. See *People v. Donovan*, 13 N.Y.2d 148 (1963).

177. See Suess, *supra* note 172, at 294-295.

178. See *Edwards v. Arizona*, 451 U.S. 477, 484-485 (1981).

179. See Thaman, *supra* note 155, at 1009.

180. See BAYLEY, *supra* note 5, at 145.

bail.¹⁸¹ The purpose of bail in the United States is to ensure the offender's appearance in a court.¹⁸² Therefore, a confession is not necessary before bail is granted. Most people are allowed to post bail, except for offenders of heinous crimes, including murder. In those cases, the suspects are detained in jail cells until trial begins. Although American prosecutors also have wide discretion, their decision to prosecute does not rest as heavily on criminological reasons like the prosecutors in Japan.¹⁸³ Rather, most of the cases that are not prosecuted lack sufficient evidence.¹⁸⁴

The United States and Japan practice rather different pre-trial procedures. Although they are both strong, democratic, and industrialized nations, they each treat their suspects quite differently. This difference may be due to cultural influences, and the difference between a closely-knit community in Japan, and the need to recognize the individual in the United States. Whatever the cause, the Japanese system is quite distinct from most other democratic, industrialized nations.¹⁸⁵

APPRAISAL OF THE JAPANESE LEGAL SYSTEM

The Japanese have had tremendous success with their legal system, despite, or perhaps because of, the abusive procedures.¹⁸⁶ In 1985, it was estimated that "four or five times fewer offenses are committed in Japan than in Western countries."¹⁸⁷ The percentage of arrests also affords a great disparity.¹⁸⁸ In Japan, the percentage of charges that led to arrests is 64.2% while it is 20.9% in the United States.¹⁸⁹ Once a citizen is arrested, he is referred to one of several types of courts.¹⁹⁰ In Japan, 92.4% of the 65,553 persons accused and brought before the district court were tried within six months.¹⁹¹ In addition, only 0.14% of the total 81,093 persons accused were acquitted.¹⁹² The conviction rate totals approximately 99.86%.¹⁹³

181. See Gina Barry, *Appellate Procedure / International Law—United States v. Kirby: The Case For Appellate Review of Grants of Bail By District Court Judges in International Extradition Cases*, 21 W. NEW ENG. L. REV. 565, 596 (1999).

182. Bayley, *supra* note 5, at 145.

183. See BAYLEY, *supra* note 5, at 134-135.

184. *See id.*

185. It is important to note, however, that the United States and Japan are the only two democratic, industrialized nations that still employ the death penalty. Nevertheless, the United States sentences convicts to death and carries through with their execution at a much higher rate that does Japan. See Thaman, *supra* note 155, at 1000.

186. See Kitamura, *supra* note 10, at 265-66.

187. *See id.* at 265.

188. *See id.*

189. *See id.*

190. See An Overview of the Judicial System: *Court System of Japan*, at http://www.courts.go.jp/english/soshikie_1.html (last visited May 31, 2003).

191. See Kitamura, *supra* note 10, at 266.

192. *See id.*

193. *See id.* The conviction rate for miscellaneous charges is comparable (99.88%). *Id.*

These numbers suggest that what was once the “family model” has become a model for “precision justice,” leading to both efficiency and success in the Japanese legal system.¹⁹⁴ In addition, there tends to be “an excessive tendency to praise the ‘Japanese methods’ of operation and administration.”¹⁹⁵ However, this system has also been highly criticized. Many critics have questioned whether this level of efficiency justifies a system of diminished rights for suspects. In fact, the Japanese system is criticized for both “the insufficient guarantee of due process and the risk of violations of the rights and freedoms of suspects.”¹⁹⁶

The treatment of suspects is a grave concern for the International community not because of what might the suspect undergo if he is ever convicted, but merely because the pre-trial treatment itself is horrendous.¹⁹⁷ The rights of suspects afforded by Japan have been highly criticized in recent years.¹⁹⁸ Japanese citizens are afforded far fewer rights as suspects in order for the Japanese system to work more efficiently.¹⁹⁹ The Japanese legal system is a “system that is prepared to sacrifice [individual] rights at the altar of successful conviction statistics.”²⁰⁰

High conviction and clearance rates suggest “judicial review does no more than verify investigative results.”²⁰¹ Such criticism has prompted investigation into the Japanese legal system. Legal scrutiny has found that “abuses and errors sometimes resulting from the humiliating methods employed by investigators and the small degree of control exercised by the judges,” are responsible for such high rates.²⁰² Although legal scholars in the international arena are amazed by such efficiency in the Japanese legal system, they are now questioning its process. Because of such problems, some have deemed the Japanese system “abnormal,” “diseased,” and even “hopeless.”²⁰³

194. *Id.*

195. *Id.* at 289.

196. *Id.* at 268. As discussed in Section III. a. of this paper, Japan’s criminal justice system is scrutinized for its lack of fundamental human rights including the right to bail, right against self-incrimination, and right to remain silent. Further, the Japanese police and prosecutors often violates human rights during interrogation by subjecting the suspects to cruel treatment such as withholding food and water, depriving them of sleep, and bribing suspects with cigarettes or special food. See BAYLEY, *supra* note 5, at 146.

197. See Foote, *supra* note 34, at 317-18 (arguing that the Japanese criminal justice system is actually lenient because few convicts are sentenced to prison and those that are only receive short terms). See BAYLEY, *supra* note 5, at 146.

198. See Ramlogan, *supra* note 101, at 127. Although many cases have recently evolved demonstrating the lack of rights afforded Japanese suspects, the Japanese system always has been highly criticized for its pre-trial detention procedures, which is discussed later in this paper. See VI. a. International Scrutiny and Its Effect, *infra* page 31.

199. See Ramlogan, *supra* note 101, at 127.

200. *Id.* at 159. A case in 1983 showed that a judge was willing to allow police officers to conduct a search a full two hours after the crime occurred in order to find incriminating evidence to sustain a conviction. *Id.*

201. Kitamura, *supra* note 10, at 268-269.

202. *Id.* at 269.

203. Foote, *supra* note 34, at 319 (quoting Ryuichi Hirano, *Genko keijisoshō no shindan* [Diagnosis of Current Criminal Procedure], in 4 DANDO SHIGEMITSU HAKASE KOKI SHUKAGU RONBUNSHU [COLLECTION OF WORKS TO COMMEMORATE THE SEVENTIETH BIRTHDAY OF DR. SHIGEMITSU DANDO]

An International Reaction

International Human Rights Background

Since 1948 and the adoption of the Universal Declaration of Human Rights, an international customary law relating to criminal procedure has been developing, most of which Japan has not honored.²⁰⁴ Among other concerns, the use of imprisonment for pre-trial detention purposes has been limited by the International community.²⁰⁵ The Tokyo Rules, adopted by the United Nations, state that "pre-trial detention shall be used as a means of last resort in criminal proceedings."²⁰⁶ Ironically, Japan uses a detention system for up to twenty-three days in order to conduct interrogations before trial.²⁰⁷ The Tokyo Rules further provide that "pre-trial detention shall last no longer than necessary. . . and shall be administered humanely and with respect for the inherent dignity of human beings."²⁰⁸ In Japan, however, coercive measures are taken during pre-trial detention in order to extract confessions.²⁰⁹

Many nations have recognized the right to a fair trial and procedures. Included in these rights is the inadmissibility of certain evidence because of the manner in which it was obtained. Evidence that is obtained by torture is excluded under The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and by the American Convention on Human Rights.²¹⁰ Furthermore, The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the American Convention on Human Rights provide that "confessions of guilt by the accused shall be valid only if it is made without coercion of any kind."²¹¹ Many national constitutions provide similar protection; however, the Japanese system uses coercion in order to extract confessions of guilt.²¹²

A number of nations have also recognized the right to counsel. Both the International Covenant on Civil and Political Rights²¹³ and the Body of Principles

407 (Yasuhara Hiraba et al. Eds., 1985), translated in 22 *LAW IN JAPAN* 129 (1989).

204. Brian P. Menard, Book Review, *Evidence of Compliance In International Law, Human Rights, and Japanese Law: The Impact of International Law on Japanese Law*, 40 *VA J. INT'L L.* 763, 772 (2000).

205. See e.g., United Nations Standard Minimum Rules for Non-Custodial Measures [hereinafter referred to as *The Tokyo Rules*], U.N. GAOR, 45th Sess., Agenda Item 100, at 10, U.N. Doc. A/RES/45/110 (1991).

206. *Id.*

207. See BAYLEY, *supra* note 5, at 144.

208. *The Tokyo Rules*, *supra* note 202.

209. See Kitamura, *supra* note 10, at 267.

210. See United Nations Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Treaty Series, vol. 1465, p. 85; 26 June 1987, No. 2484, Adopted by the General Assembly of the United Nations on 10 December 1984. See also Bassiouni, *supra* note 4, at 269.

211. Bassiouni, *supra* note 4, at 269.

212. See Kitamura, *supra* note 10, at 267.

213. International Covenant On Civil And Political Rights, U.N.T.S. No. 14668, vol 999 (1976).

for the Protection of All Persons under Any Form of Detention or Imprisonment²¹⁴ require that anyone accused of a crime be afforded the right to counsel. The International community has recognized this right as fundamental to the idea of defense and due process.²¹⁵ Although the right to the presence of counsel during all stages of the proceedings has not been guaranteed by most nations, some, however, do provide for the “right to counsel at all stages of the proceedings” and can be implied in others, “which provide for the right to defense at all stages of the proceedings.”²¹⁶ Nevertheless, the International Covenant on Civil and Political Rights guarantees the accused the right to counsel “in the determination of any criminal charge against him.”²¹⁷ Among other rights, the Convention for the Protection of Human Rights and Fundamental Freedoms provides counsel to “everyone charged with a criminal offense,”²¹⁸ and The Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment and the American Convention on Human Rights guarantees counsel “during the proceedings” to those “accused of a serious crime.”²¹⁹ In addition, the Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment guarantees “the right to counsel during the preliminary investigation period.”²²⁰

In Japan, on the other hand, a suspect is not guaranteed the right to counsel and can be interrogated without a defense attorney present.²²¹ In fact, the defense attorney must receive permission from both the prosecutor as well as the police before he can see or talk to his client during the pre-trial period.²²² Although these fundamental rights have been recognized internationally, they have not been implemented into the Japanese system. Many Americans may argue that the right to counsel is only necessary where the accused is tried and punished. However, it is important to understand the extent of abusive procedures and lack of protection that exist in the pre-trial phase of the Japanese criminal justice system. Regardless of whether any sentence is eventually handed down, every human should be afforded human rights.²²³

214. Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, G.A. res. 43/173, annex, 43 U.N. GAOR Supp. (No. 49) at 298, U.N. Doc. A/43/49 (1988).

215. See generally Bassiouni, *supra* note 4, at 284-5.

216. Bassiouni, *supra* note 4, at 285.

217. *Id.* at 284.

218. Convention for the Protection of Human Rights and Fundamental Freedoms (ETS no. 005), open for signature by the members of the Council of Europe, in Rome, on 4 November 1950, *Entry into force*: 3 September 1953, Article 6.

219. United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 207. See also Bassiouni, *supra* note 4, at 284.

220. Bassiouni, *supra* note 4, at 284.

221. See BAYLEY, *supra* note 5, at 146.

222. See *id.*

223. See Foote, *supra* note 34, at 317-19 (urging that because few convicts are sentenced to prison and those that are only receive a short term, the Japanese criminal justice system is actually lenient). The major concern with the Japanese criminal justice system is not the amount of convicts that actually go to prison, but the abusive procedures that they endure during the pre-trial period and, where applicable, in prison after being sentenced. See generally Amnesty International, *available at*

The International Criminal Court (ICC)

In addition to the passage of the numerous Conventions relating to the rights of suspects and the accused, the construction of the ICC has forced many nations to come together to agree on one criminal procedure standard to be used in international criminal matters. In setting up the ICC, the U.N. Preparatory Committee on the Establishment of an International Criminal Court recognized the importance of guaranteeing the rights of suspects.²²⁴ Many of the rights already recognized by the abovementioned Conventions were also implemented in the criminal procedures of the ICC.²²⁵ Although the ICC is designed to deal exclusively with war criminals and crimes of genocide, it is the only international court with a set of criminal procedures.²²⁶ Therefore, it is the only international tribunal worth noting.

According to the Rome Statute, the legal process is initiated by a prosecutor.²²⁷ After receiving information that a crime may have been committed, the prosecutor may investigate the crime and analyze the seriousness of the crime.²²⁸ Once the prosecutor determines that further investigation is warranted, he submits a request for investigative authority to the Pre-Trial Chamber.²²⁹ If the initial request is denied, the prosecutor is free to gather new information and collect new evidence to submit a new request.²³⁰ Once the investigation commences, suspects are guaranteed certain rights under the Rome Statute.²³¹

After the suspect is indicted and trial has commenced, further rights are guaranteed to ensure the safety of the accused as well as a fair and impartial trial.²³² The rules dealing with trial procedure are found in Part 6 of the Rome Statute and include the following: the right to be informed of the charges against him; adequate time and tools to prepare a defense with the assistance of counsel of the accused's choosing and to speak to his counsel in confidence; to challenge any witness against him and to question his own witnesses on his own behalf; and the

www.amnesty.org. (searching for "Japan") (last visited May 31, 2003).

224. See Christopher Keith Hall, *Current Development: The First Two Sessions of the UN Preparatory Committee on the Establishment of an International Criminal Court*, 91 *Am. J. Int'l. L.* 177, 178 (1997).

225. See Rome Statute.

226. See Rome Statute, art. 5.1.

227. Although the ICC has adopted its own set of procedures to be used, those rules must yield to the rules and procedures delineated in the Rome Statute. See United Nations Preparatory Commission for the International Criminal Court PCNICC/2000/1/Add.1 (Nov. 2, 2000). Therefore, this section of the article primarily addresses the Rome Statute.

228. See Rome Statute, art. 15.

229. See *id.*

230. See *id.*, at art. 84.1.a.

231. See generally *id.*, at art. 55. Article 55 delineates rights of persons during investigations. *Id.* In addition, the Rome statute gives further rights to those suspects who are to be investigated by either the Prosecutor or a national authority. Pursuant to Part 9 of the Rome Statute, a nation may request to prosecute/investigate the crime. *Id.*

232. See *id.*, at art. 67

right to remain silent.²³³

Strikingly similar rights are also delineated in the American Constitution and are guaranteed to any suspect in an American court.²³⁴ With a total of 139 signatories and 87 parties ratifying the Rome Statute and agreeing upon the stated procedures, including Japan, the Rome Statute arguably represents the first sign of emerging international customary law in the realm of criminal procedure.²³⁵

The Future for Suspects in Japan

International Scrutiny and Its Effect

In upholding international standards outlined in the Rome Statute and other Conventions, international organizations, including Amnesty International and Human Rights Watch have begrudged Japan to consider changing its system.²³⁶ It was reported on Japan's abusive practices that suspects "face routine violations of human rights from the moment of arrest through the end of their prison term" and the "penal facilities are overcrowded and secretive and abuse of prisoners is widespread."²³⁷ Amnesty International has also discovered that the rules of detention facilities are kept secretive in order to maintain "security."²³⁸ Amnesty International has labeled the Japanese criminal justice system as "cruel, inhuman and degrading and must be stopped."²³⁹

Amnesty International has also scrutinized Japan's use of the death penalty.²⁴⁰ Again, the procedures used in executing an inmate are kept secretive and the prisoner is usually only given two hours notice that he will be executed.²⁴¹ Even the United Nations Human Rights Committee has had grave concerns over the

233. *See id.*

234. *See* U.S. Const, Amendments IV - VI. Nevertheless, the United States has vehemently opposed the creation of the ICC based on its jurisdictional scope. *See also* Remigius Chibueze, *United States Objection to the International Criminal Court: A Paradox of "Operation Enduring Freedom,"* 9 ANN. SURV. INT'L & COMP. L 19, 31 (2003).

235. *See* Rome Statute of the International Criminal Court, available at <http://untreaty.un.org/> (last visited Jan. 6, 2002); Joel F. England, *The Response of the United States to the International Criminal Court: Rejection, Ratification or Something Else?*, 18 ARIZ. J. INT'L & COMP. L. 941, 946 (2001).

236. *See* *Prison Conditions in Japan*, *supra* note 71; Amnesty International, *Japan's Human Rights Record Must Be Challenged*, October 26, 1998, available at <http://web.amnesty.org> (last visited May 28, 2003).

237. *See* *Prison Conditions in Japan*, *supra* note 71; Amnesty International, *Japan: Prison Abuses Must Stop* [hereinafter referred to as *Prison Abuses Must Stop*], public statement, November 20, 2002, available at <http://web.amnesty.org> (last visited May 28, 2003) (focusing on the Japanese prison system).

238. *Prison Abuses Must Stop*, *supra* note 232. *See also* *No Advance on Human Rights*, *supra* note 1.

239. *See* *Prison Abuses Must Stop*, *supra* note 232.

240. *See* *No Advance on Human Rights*, *supra* note 1.

241. *See* Amnesty International, *Japan: Executions – Continuing the Secret and Cruel Practice* [hereinafter referred to as *Continuing the Secret and Cruel Practice*], public statement, June 21, 2001, available at <http://web.amnesty.org> (last visited May 28, 2003).

application of the death penalty in Japan.²⁴² The nation's failure to notify the prisoner's family or lawyer of the prisoner's execution violates the International Covenant on Civil and Political Rights.²⁴³

AN EVALUATION OF THE EFFICACY OF THE SYSTEM

In 2001, over 2.5 million crimes were committed in Japan, a 12% increase from the previous year.²⁴⁴ Nevertheless, the rate of defendants who confess has remained the same.²⁴⁵ Approximately 92% of all defendants disposed of in 1996 confessed.²⁴⁶ This rate is the same for 1997, 1998, 1999, and 2000.²⁴⁷ This steady and high rate of confessions leaves foreigners bewildered and suspicious of the Japanese system.²⁴⁸ The international community has come to question the cruel treatment of suspects and the accused in Japan. Although the closely-knit Japanese community is attributed to a high and even confession rate over the years, scholars fear that the coercive nature of the Japanese legal system is to blame.²⁴⁹

It has become increasingly apparent that the current Japanese criminal procedures violate human rights and there is no doubt that reform is necessary to protect the fundamental rights and freedoms of criminal suspects in Japan. While substantial and extensive reform is essential to protect suspects of crimes in Japan, the Japanese criminal justice system is not entirely despondent and an appropriate analysis should recognize the prevalence of both despair and hope. A comparison of historical crime and arrest rates to those of recent years reveals that Japan's reliance on detention practices has dramatically decreased.²⁵⁰ This is especially important considering that most abusive procedures take place either within the prison system itself or within the "substitution prisons" during detention.²⁵¹

In 1984, 1,588,693 crimes were reported to Japanese police and 1,002,923

242. See *id.*; Jason Crane, *Japan to United Nations: We Don't Need No Stinkin' Human Rights!* [hereinafter referred to as *Japan to United Nations*], *TABLOID*, November 11, 1998, available at <http://www.tabloid.net> (last visited May 28, 2003).

243. See *Continuing the Secret and Cruel Practice*, *supra* note 236; International Covenant on Civil and Political Rights, *supra* note 210.

244. See *Statistical Handbook of Japan 2002*, available at <http://www.stat.go.jp/> (last visited Jan. 4, 2003).

245. See *A Guide to Court Procedures, Table 2: Annual Comparison of Rate of Defendants Who Confess*, available at <http://courtdomino2.courts.go.jp> (last visited January 4, 2003).

246. See *id.*

247. See *id.*

248. *Id.*

249. See generally Amnesty International, available at www.amnesty.org. (searching for "Japan") (last visited May 31, 2003).

250. See Japan Information Network, *Statistics: Criminal Offenses*, available at <http://jin.jcic.or.jp/stat/stats/14CRM21.html> (last visited Jan. 8, 2003).

251. See *e.g.*, *Japanese Warders Plead Innocent in Death of Inmate*, *supra* note 1. While the crime rate has risen, arrest rates have dramatically fallen. It is not the "superefficient" system it once was: the "good arrest rate (up to 70%) and an even better conviction rate (nearly 100%)." Stephan Hauser, *The Times, They Are A'Changin'*, available at <http://www.tokyo.to/backissues/sep00/editorial/editor.html> (last visited Jan. 8, 2003).

arrests were made.²⁵² That is, just over 63% of all crimes reported led to arrests; however, this rate has continued to decline while the Japanese crime rate, like the crime rate in most other nations, has steadily increased.²⁵³ An all time high of 2,735,612 crimes were reported to Japanese officials in 2001 while only 542,115 arrests were made.²⁵⁴ That is, a mere 20% of all crimes reported led to arrests.²⁵⁵ This downward trend suggests that the once strict and efficient Japanese criminal justice system is becoming more lenient. While a less efficient criminal justice system does not necessarily call for celebration, it does dispel many fears that detainees, suspects, or the accused will be mistreated. Simply stated, they cannot be subject to cruel treatment when they are not in police or state custody. This downtrend in arrest and conviction rates, therefore, should not be seen as a sign of failure. Although the Japanese system seems flawed from a statistical standpoint, the risk of cruel treatment has declined, and the human rights of all Japanese citizens are more secure.

Reformation

In response to the profuse cruelty found within Japanese system, Amnesty International and other international organizations including the United Nations have urged Japan to abide by a "code of conduct which conforms with international standards."²⁵⁶ In 1999, Japan agreed to uphold the ideals outlined in the United Nations Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment.²⁵⁷ This step was seen internationally as a step toward protecting human rights in Japan, especially to those who have been suspected or accused of a crime.²⁵⁸ Although the Japanese people have acceded to the Convention, the Japanese system remains riddled with arbitrary and abusive procedures. As recent as November, 2002, Amnesty International has reported that Japan continues to employ strict disciplinary measures and arbitrary rules, including forcing inmates and detainees to sit in certain positions for hours at a time.²⁵⁹ The organization further reported that "inmates are held in metal or leather handcuffs, forced to eat like an animal, and to excrete through a hole cut in their pants."²⁶⁰

As stated above, imposing Western standards upon the Japanese culture will not succeed in aiding in Japanese reformation. Any reformation that takes place

252. See Japan Information Network, *Statistics: Criminal Offenses*, *supra* note 244.

253. *See id.*

254. *See id.*

255. *See id.*

256. *No Advance on Human Rights*, *supra* note 1.

257. See United Nations Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, *supra* note 207.

258. See Amnesty International, *Amnesty International Welcomes Japans Accession to the Convention Against Torture*, public statement, July 30, 1999, available at <http://web.amnesty.org> (last visited May 28, 2003).

259. See *No Advance on Human Rights*, *supra* note 1.

260. *Id.* Such arbitrary rules and harsh punishments are dealt out to those detained because they are suspected or accused of a crime as well as to prisoners who have been convicted. *See id.*

must be in alignment with Japanese traditions and customs. The first necessary step is to reform its Constitution and Code of Criminal Procedure. The Japanese Constitution allows wrongfully accused individuals to seek redress from the state.²⁶¹ This provision places heavy emphasis on the police and prosecution in ensuring a guilty plea or verdict. The government officials do not have the liberty to search for truth and justice, especially if that means finding the suspect not guilty.²⁶² Instead, the Japanese government is solely focused on a finding of guilt.²⁶³ Such a system easily leads to abuse.

Japan, however, has recently formed a Judicial Reform Council to consider "bold reform of the present judicial system"²⁶⁴ as well as a Research Commission on the Constitution.²⁶⁵ On July 6, 1999, the Japanese House of Representatives Committee on Rules and Administration formed the Research Commission, but limited their authority.²⁶⁶ The Commission cannot actually submit bills to the Diet in order to initiate a change in the Constitution.²⁶⁷ Nevertheless, the Research Commission was instructed to conduct research regarding the current Japanese Constitution over a five-year period.²⁶⁸ Although many are skeptical that the formation and work of these committees will actually result in more rights for suspects and the accused in Japan, it is nevertheless a step in the right direction.²⁶⁹ It is evidence that Japan, along with the international community, recognizes that their criminal justice system is flawed and a sign that it is willing to consider new procedures.

CONCLUSIONS

As a direct result of its culture, the Japanese criminal justice system often sacrifices the safety and well being of its accused for efficiency and legal order. One study showed that "Japan's clearance rate – the percentage of reported crimes that are solved – is among the highest in the world."²⁷⁰ Furthermore, its conviction rate is over 99.8%.²⁷¹ In addition, fewer than 5% are sent to prison and most of those who do serve prison sentences serve less than two years.²⁷² On the other hand, the United States sentences more than 30% of offenders to prison for an average of four and one-half years.²⁷³ While these rates demand praise of the

261. See Japan Const., art. 40.

262. See *id.*

263. See *id.*

264. Svan, *supra* note 63.

265. See Research Commission on the Constitution of the House of Representatives, *available at* http://www.shugiin.go.jp/itdb_english.nsf/html/kenpou/english/kenpou_bg.htm (last visited Jan. 25, 2003).

266. See *id.*

267. See *id.*

268. See *id.*

269. See Svan, *supra* note 63.

270. Foote, *supra* note 34, at 318.

271. See *id.*

272. See *id.*

273. See *id.*

Japanese system, some scholars remain skeptical. Although the Japanese criminal justice system seems to work quite well in controlling crime, it also violates human rights. Suspects are taken advantage of and treated poorly for the good of society and the security of the nation.

Despite its lack of protection and safeguards against cruel and ill treatment, Japan continues to sanction its legal system.²⁷⁴ In response to an editorial printed in the *Washington Post* regarding the treatment of suspects in Japan, the Minister for Public Affairs for the Embassy of Japan in the United States of America, Mr. Satoru Satoh, wrote the *Washington Post* assuring them that the article included “misunderstandings relating to Japan, which lead to erroneous conclusions.”²⁷⁵ He went on to state that the Japanese system “ensures due process and fairness” and described the safeguards granted under the Japanese Criminal Procedure Code.²⁷⁶

Indeed, the Japanese Constitution itself guarantees that an arrest may only be made after a “competent judicial officer” has issued a warrant or while the offense is being committed.²⁷⁷ The Constitution further asserts that any person being arrested or detained must be informed of the charges and must be allowed to seek counsel.²⁷⁸ A person cannot be held without cause; searches and seizures must be reasonable; torture and cruel punishments are forbidden; a speedy, public trial before an impartial tribunal is guaranteed; cross-examination of all witnesses is assured; the right to remain silent is promised, and confessions obtained under torture or undue pressure or not admissible in court.²⁷⁹ Japan’s Code of Criminal Procedure further delineates rights that suspects and the accused are to be granted.²⁸⁰

The problem with the Japanese legal system is not what it claims to provide to suspects. The rights enumerated in the Constitution, Criminal Procedure Code, and various other statutes are many. Unfortunately, the reality of the practice does not mirror the procedures described in any of the laws. There is no doubt that, on paper, the rights of the accused and suspects are numerous and comply with international standards. Nevertheless, there are repeated incidents of cruel and ill treatment. Until the Japanese practices come in line with these standards, its system will continue to be ridiculed.

It is equally important to allow Japan to reform their system within the context of their culture. Because of the drastic cultural differences, imposing Western standards on the Japanese system would be futile. The values held by each society are distinctly different and one cannot operate within the framework of the other. Japan should therefore be allowed to rectify their system in a way that their society can accept and tolerate. Any revision to be made to the Japanese criminal justice system must be achieved within the ambiance of the Japanese way

274. See, e.g., Satoh, *supra* note 77; *Japan to United Nations*, *supra* note 237.

275. Satoh, *supra* note 77.

276. *Id.*

277. Japan Const., art. 33.

278. *Id.* at art. 34.

279. See Japan Const., arts. 34-39.

280. See generally Japan Code of Criminal Procedure.

of life.

With new international light shown upon the Japanese legal realities and the new standards championed in the ICC, the Japanese system is beginning to take a turn for the better. Although the Japanese criminal justice system remains under close scrutiny and continues to be chastised, many critics are simultaneously ignoring the recent trend in arrest rates and creation of new committees, which promise to reform the Japanese criminal procedure. While Japan should be praised for its pains thus far, it should also be encouraged to continue to work within its own cultural context toward a system that grants its criminal suspects and the accused far greater protection and human rights.