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Arrest First, Ask Questions Later: The Japanese Police Detention System

I. Introduction

Imagine for the next few moments that you have just been arrested by the police as a suspect for a criminal offense. You have been taken to the police station where you will remain for the next twenty-three days without a formal criminal charge filed against you. During your incarceration you will be subjected to relentless interrogation periods which last for over ten hours a day, and run late into the evening hours.¹ These interrogation periods have been designed to coerce a confession from you, whether you have actually committed the crime or not. Interrogation techniques may include the bartering of "privileges" such as water, food or bathroom visits;² other forms of cruel, inhuman or degrading treatment;³ or perhaps even violence.⁴ During this time, if you are fortunate, you will be permitted to meet with an attorney, for two fifteen-minute visits.⁵

Has this hypothetical situation placed you in a totalitarian state? Or in a country in a state of emergency where civil and political rights have been suspended? No, for the past few moments, you have been a suspect held under the police detention system of Japan, one of the most technologically advanced democracies in the world today.

Japan's Prison Law of 1908 authorized the detention of suspects in police station cells.⁶ The Japanese police detention system has been the subject of criticism in Japan, however, little is known about the Japanese criminal justice system and the police detention system abroad. A new bill which would permit the present police detention system to continue was submitted to the Japanese Legislature during the summer of 1988.⁷ The bill has served to increase the focus on the system in Japan and abroad.

1. See K. Itoh, Report Concerning Present Status of Human Rights in Japan 8, 9 (June 1988) [hereinafter JCLU Report] (available through the Japan Civil Liberties Union, 306 Atagoyama Bengoshi Bldg., 1-6-7, Atago, Minato-ku Tokyo, Japan).

2. *Id.* See also *infra* text accompanying notes 91-92.

3. See Chira, *Secrets of Police Cell: Woman's Grim Story*, N.Y. Times, Sept. 20, 1988, at A4, col. 4. See also *infra* text accompanying notes 73-75.

4. See JCLU Report *supra* note 1, at 9. See also *infra* text accompanying notes 94-95.

5. Itoh, *On Publication of the "Citizens" Human Rights Reports 20 LAW IN JAPAN 29* (1987) [hereinafter Itoh].

6. See *supra* note 3, at col. 3.

7. *Id.*

The purpose of this Comment is to explore more fully the Japanese police detention system. This Comment presents an overview of the Japanese criminal justice system, discussing the social and procedural context in which the police detention system exists. Next, general treatment of suspects and specific abuses under the police detention system is explained. Further, the applicability of the Covenant on Civil and Political Rights⁸ to human rights problems in Japan is analyzed and specific provisions of the Covenant are applied to the problems presented by the police detention system. Finally, a proposal for change in the system to remedy human rights abuses is discussed.

II. The Japanese Criminal Justice System: An Overview

A. *Crime and Japanese Society*

In order to understand the human rights problems presented by the Japanese Police Detention System, it is necessary to survey the Japanese criminal justice system. Japan has been noted throughout the world for its extremely low crime rates.⁹ Many commentators believe that the reason Japanese crime rates have been so low is because of the existence of informal social controls.¹⁰ Since ancient times, Japanese society has been hierarchial, the society's norms and mores subject the individual to the needs of the entire group.¹¹ Today, Japan's "intricate, rigid and ancient norms and mores exist side by side with an open-minded and cosmopolitan life-style."¹² As such, in Japanese society, affiliation with a group is still of primary importance. The Japanese tend to act with the group in mind; there is typically strong commitment to uphold the honor of one's family, school class, employer, political party and nation.¹³

The individual is very wary of committing an act which may cause a loss of prestige, or "face" to any groups to which the individual belongs.¹⁴ "By committing a crime, a Japanese not only loses

8. INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS, 21 U.N. GAOR Supp. (No. 16) at 52, U.N. Doc. A/6316 (1966) [hereinafter COVENANT ON CIVIL AND POLITICAL RIGHTS] reprinted in R. LILICH, INTERNATIONAL HUMAN RIGHTS INSTRUMENTS 170.1-180.1 (1983) [hereinafter R. LILICH].

9. See generally M. STANDISH & L. VILLALON, TOKYO: ONE CITY WHERE CRIME DOESN'T PAY (1975) [hereinafter M. STANDISH & L. VILLALON]; D. BAYLEY, FORCES OF ORDER (1976) [hereinafter D. BAYLEY]; Araki, *The Flow of Criminal Cases in the Japanese Criminal Justice System*, 31 CRIME & DELINQ. 601 (1985) [hereinafter Araki].

10. See generally, F. ALDER, NATIONS NOT OBSESSED WITH CRIME (1983) [hereinafter F. ALDER]; W. AMES, POLICE AND COMMUNITY IN JAPAN (1981); D. BAYLEY, *supra* note 9; M. STANDISH & L. VILLALON, *supra* note 9; Haley, *Law and Society in Contemporary Japan: American Perspectives*, 17 LAW IN JAPAN 1 (1984).

11. F. ALDER, *supra* note 10, at 96.

12. *Id.* at 95.

13. *Id.* at 96. See also M. STANDISH & L. VILLALON, *supra* note 9, at 13.

14. M. STANDISH & L. VILLALON, *supra* note 9, at 13.

“face” for himself or herself but also for a senior, whether a parent or employer. An action which brings loss of “face” inevitably results in expulsion from the social structure of which the individual is so essentially a part.”¹⁵ Further, with its extremely dense population, houses are built close together on narrow streets in Japan, and therefore informal social controls work well because deviant behavior is difficult to hide.¹⁶

The extensive use of apology for misconduct rather than legal sanction provides another social control in Japan.¹⁷ The Japanese police often adjust their reaction to misconduct based on the repentance of the individual.¹⁸ An apology serves as more than an admission of guilt; it is a promise to refrain from committing the offense again.¹⁹ Among the Japanese people there are strong ethical norms that require people to acknowledge their guilt.²⁰ Thus, the use and acceptance of apology points to two characteristics of Japanese society. First, the Japanese police possess a great amount of discretion when dealing with criminal suspects and second, the Japanese people, as a societal unit, are willing to accept authority and cooperate with police.

Another relevant and unique characteristic of the Japanese criminal justice system is the frequency of confessions of guilt. The confessions of suspects play an important role in the criminal justice system in Japan. It is important, therefore, to study its role in an effort to appreciate the potential for abuse of obtaining confessions in the police detention system. Confessions are similar to apologies to the extent that “Japanese offenders are more willing than Americans to throw themselves on the mercy of policemen, prosecutors, and judges because reconciliation is considered a more important objective of legal process than vindication.”²¹ As stated previously, repentance, which can be shown by compliance with authority, often has the effect of lessening punishment. Thus, through compliance, suspects sometimes calculatingly seek leniency and less severe punishments.²² Further, “Japanese policemen and prosecutors not only expect suspects to confess their misdeeds, they act in such a way as to reinforce that norm.”²³

Not only are citizens under a moral obligation to confess in Japanese society, but discovery of an involuntary confession does not

15. *Id.*

16. F. ALDER, *supra* note 10, at 98.

17. D. BAYLEY, *supra* note 9, at 134-40. *See generally* Haley, *supra* note 10, at 2.

18. D. BAYLEY, *supra* note 9, at 134.

19. *Id.* at 139.

20. *Id.* at 138.

21. *Id.* at 148.

22. *Id.* at 150.

23. *Id.* at 149-50. *See generally infra* text accompanying notes 56-59.

affect a case as it would in the United States. In the United States, a confession which was given involuntarily is inadmissible at trial.²⁴ In Japan, however, "not only may the prosecution continue on other grounds, but the judge need not throw out the entire confessions. The judge has the discretion to decide for himself whether specific items in the confession are likely to be true even if other parts are not."²⁵

The potential for abuse in the area of involuntary confessions is obvious. On one hand, among the Japanese people there exists a "psychological compulsion to confess."²⁶ Further, with a conviction rate of over 99 percent in criminal cases in recent years,²⁷ the innocent criminal suspect may feel his only chance at decreasing his punishment is to confess even to a crime he did not commit. On the other hand, the police and prosecutors know that a confession may still be upheld as valid by the courts even though it was obtained involuntarily.

Both the police and people of Japan must be commended on the low crime rate in their country. Informal social controls play an essential role in keeping the crime rate so low. The Japanese police have skillfully observed these social controls, and have used them effectively in fighting crime. Because, however, the social control of confessions is so ingrained in Japanese culture, the police must take care not to abuse it. The laws of criminal procedure play an important role in preventing such abuse.

24. See *Miranda v. Arizona*, 384 U.S. 436 (1966), where the U.S. Supreme Court stated:

Procedural safeguards must be employed to protect the privilege and unless other fully effective means are adopted to notify the person of his right to silence and to assure that the exercise of the right will be scrupulously honored, the following measures are required. He must be warned prior to any questioning that he has the right to remain silent, that anything he says can be used against him in a court of law, that he has the right to the presence of an attorney, one will be appointed for him prior to any questioning if he so desires. Opportunity to exercise these rights must be afforded to him throughout the interrogation. After such warnings have been given, and such opportunity afforded him, the individual may knowingly and intelligently waive these rights and agree to answer questions or make a statement. But unless and until such warnings and waiver are demonstrated by the prosecution at trial, no evidence obtained as a result of interrogation can be used against him.

Id. at 478-79.

25. D. BAYLEY, *supra* note 9, at 152.

26. *Id.* at 153.

27. Repeta, *The International Convention on Civil and Political Rights and Human Rights in Japan*, 20 LAW IN JAPAN 1 (1987) [hereinafter Repeta]. The high conviction rate prompted a prominent professor of Japanese law to ask: "Focusing on a conviction rate which has gotten this high, we must finally ask: Just what does the defense do? If 99.8 percent really are guilty, if that figure is correct, maybe we don't need criminal lawyers." *Id.* at 14.

See also Araki, *supra* note 9, at 601: "Only a small handful—less than 10%—of the cases processed in Japanese courts are seriously contested. In the vast bulk of cases the accused is convicted largely upon his or her own confession."

B. Criminal Procedure in Japan

1. *Arrest.*—Most cases enter the Japanese criminal system through arrest by police.²⁸ The Public Prosecutor's Office establishes a set of lesser crimes in which police may release suspects upon a showing of restitution and apology.²⁹ The prosecutors may also initiate cases by conducting investigations and arrests, but they usually do so only in cases of political significance or complexity.

There are three possibilities at the initial stage of the Japanese criminal justice system. First, a suspect may be arrested (by the police or the prosecutor) and taken to the police station to await a detention determination; second, the suspect may only be cited as liable for future prosecution or; third, the suspect may be discharged by the police because of the triviality of the offense and because the suspect has made restitution to the victim.³⁰

2. *Detention.*³¹—Once a decision is made by the police to arrest and detain a suspect, the police must bring the suspect to the prosecutor's office within 48 hours after arrest, unless they decide after questioning that detention is unnecessary.³² Within 72 hours of arrest, the prosecutor must decide whether to indict the suspect (thus instituting prosecution immediately), release the suspect,³³ or make a request for detention.³⁴

If the prosecutor chooses to make a request for detention, the request must be submitted to a judge.³⁵ The judge may issue a writ of detention if he finds that

there are reasonable grounds to suspect that the accused has committed the crime, and that the accused falls under one of the following categories: (1) the accused has no fixed dwelling, (2) there are reasonable grounds to suspect that the accused may destroy evidence, or (3) the accused has escaped or there are reasonable grounds to suspect that he may escape (Keiji Shosho Ho (Code of Criminal Procedure) art. 60 § 1).³⁶

While the above criteria appear narrow for the extension of de-

28. Araki, *supra* note 9, at 607.

29. *Id.* at 610; *see also supra* text accompanying notes 17-20.

30. Araki, *supra* note 9, at 611; *see also supra* note 29 and accompanying text.

31. This section will discuss the simple mechanics of the detention system. *See infra* text accompanying notes 50-96.

32. *Id.*

33. Araki, *supra* note 9, at 612.

34. *Id.* at 629. At this point suspects are usually released "because the offense is considered to be too trivial, because there is a problem with the complaint, or some other reason unrelated to insufficient evidence." *Id.* In the United States most cases are dropped for evidentiary reasons. *Id.*

35. *Id.* at 613; *see also* Itoh, *supra* note 5, at 52.

36. *Id.* at 64.

tention, when they are applied in practice the criteria are not so narrowly construed. An overwhelming majority of detention requests are granted by judges.³⁷

Upon approval from the judge, the length of the first detention is ten days from the time the prosecution petitioned the court for the writ of detention.³⁸ The detention period may be extended another ten days upon request of the prosecutor.³⁹ Suspects, therefore, may be detained for a total of 23 days in absence of a formal charge against them. After a suspect is indicted under a criminal charge, the prosecutor often has all the detention time he desires,⁴⁰ because suspects are seldom released on bail.⁴¹

3. *Prosecution and Trial.*—Prosecutors in Japan are part of a nationalized system. Unlike the United States, there are no state or federal divisions, and Japanese procedures are standard throughout the country.⁴² Japanese prosecutors are unique because of their very broad discretionary power either to initiate prosecutions or to discharge the suspect.⁴³ The prosecutor may discharge the suspect by either nonprosecution,⁴⁴ or suspension of prosecution.⁴⁵

Once the prosecutor has decided to pursue the case, by indicting the suspect, he has a choice of either bringing the case before a summary procedure or to trial. In a summary procedure, the prosecutor "makes an in camera determination of the suspect's guilt and imposes a fine of no more than 200,000 yen (about \$1000), or a minor fine."⁴⁶ Neither party appears before a court, but either party may appeal the judge's decision of the summary procedure within fourteen days. Most criminal cases are disposed of in this manner.

37. Araki, *supra* note 9, at 612.

38. Itoh, *supra* note 5, at 65. Of the 101,969 requests for detention made in 1982, 101,202 requests were granted, 744 were rejected and 23 were withdrawn. *Id.* Therefore, at this initial stage, judges approve the prosecutor's request for detention in 99.24 percent of the cases. *Id.*

39. Araki, *supra* note 9, at 612.

40. CODE OF CRIMINAL PROCEDURE (*keiji sosho ho*) [hereinafter CODE OF CRIM. PROC.] art. 208. When the crime involves insurrection, foreign aggression, foreign relations, or riot, the judge may extend the term an additional five days. *See also* Araki, *supra* note 9, at 612 n.11.

41. *Id.* at 612.

42. *See generally* Repeta, *supra* note 27, at 16-17; Itoh, *supra* note 5, at 65-73.

43. Araki, *supra* note 9, at 611.

44. *Id.* at 615. *See generally*, George, *Discretionary Authority of Public Prosecutors in Japan*, 17 LAW IN JAPAN 42 (1984).

45. Araki, *supra* note 9, at 611. The prosecutor may suspend a case through nonprosecution if he finds that there is insufficient evidence, lack or defect in the complaint or a case of insanity. *Id.*

46. *Id.* The prosecutor may discharge a case also under article 248 of the Code of Criminal Procedure which states: "If after considering the character, age, situation of the offender, the gravity of the offense, the circumstances under which the condition subsequent to the commission of the offense, prosecution is deemed unnecessary, prosecution may not be instituted." CODE OF CRIM. PROC., *supra* note 39, at art. 248.

47. Araki, *supra* note 9, at 619.

Cases that go to trial are typically those that the prosecutor found to be too important to handle through summary procedure. In Japan, complex case trials are often comprised of separate hearings held at long intervals, thus a final decision in a complex case may not be rendered for many years.⁴⁷ There are no jury trials in Japan. The general rule is that one judge presides over the court and gives the decision. In serious cases such as murder, robbery or rape, however, a three judge panel often presides.⁴⁸ The acquittal rate in trials during 1987 was less than one percent.⁴⁹

III. A Closer Look at the Japanese Police Detention System

A. Description

After a Japanese prosecutor has made the decision to detain a criminal suspect, he must file a request with a judge within 72 hours of the suspect's arrest. The prosecutor at this time will also suggest a detention location for the suspect. The prosecutor, in almost all cases, will request a police detention facility (Daiyo Kargoku) in an effort to "guarantee convenient police investigation."⁵⁰ The use of police detention cells rather than one of the 113 Detention Centers run by the Ministry of Justice has been permitted since the passage of the Prison Law of 1908.⁵¹ Judges are willing to allow the detention of suspects in police detention facilities because there are many more police facilities (1,267) than Detention Centers (113). More importantly, however, "judges seem to be unwilling to oppose the prosecutor's recommendation and hinder the convenience of the investigation."⁵²

Observers in Japan have noted that arrest is just the beginning of the criminal investigation.⁵³ The police and the prosecutor use the suspect's detention time to build their case. The police and prosecutors view the suspect as the center of the investigation, often relying on the suspect's confession, rather than extrinsic evidence discovered through investigative skill.⁵⁴ This practice is significantly different than in the United States, where arrest usually occurs after an extensive investigation reveals that there is enough evidence to indict the suspect.⁵⁵ Thus, in Japan, criminal suspects are often detained

47. Repeta, *supra* note 27, at 16-17.

48. Araki, *supra* note 9, at 621.

49. Repeta, *supra* note 27, at 14.

50. Araki, *supra* note 9, at 613.

51. JCLU Report, *supra* note 1, at 9.

52. Araki, *supra* note 9, at 614-15.

53. *See supra* note 3, at col. 4.

54. *Id.*

55. Toshikuni Murai, professor of criminal law at Hitotsubashi University in Tokyo stated: "In principle, arresting a person should be the final step after collecting evidence. In the United States, when the police arrest a person, there is usually enough proof to indict him.

for up to 23 days, without formal charges against them, usually in the custody of the same police officials who are responsible for the investigation. The temptation of police officials to coerce confessions from suspects is obvious in this situation. As such, the potential for the abuse of a suspect's human rights is clear.

B. *Treatment of Detained Criminal Suspects*

1. *Questioning.*—Suspects must undergo intense questioning by investigating officers who are under the direction of prosecutors during the 23 day detention period following arrest. There are no restrictions by which the police must abide during the interrogations of suspects. Questioning in police holding cells may exceed ten hours a day.⁵⁶ During the detention period, judges have no authority to interfere with the police and prosecutor's interrogations. Further, affidavits containing the suspect's confession are crucial evidence at trial, because of the traditional role of confessions in Japanese society. In cases where the suspect refuses to confess or remains silent, therefore, investigating officials apply maximum pressure.⁵⁷ The exertion of such pressure by officials, combined with the culturally ingrained expectation of confession,⁵⁸ has led to a serious problem of coerced confessions.⁵⁹

2. *Inability to Meet with Counsel.*—During their 23 days of police detention, suspects are typically frustrated by denials of access to counsel. Investigators have complete control over the daily lives of those in detention. Suspects are precluded from contact with attorneys and the rest of the outside world and are subjected to lengthy interrogations designed to coerce confessions. As Lawrence Repeta notes:

In a system in which more than 99 percent of persons tried in formal proceedings are found guilty with the overwhelming majority confessing at the first court hearing to crimes alleged, it is during this initial interrogation period that most confessions are obtained. During this period, the suspect is isolated from attorneys or any other person who may lend emotional support and subjected to interrogations of a length and severity deter-

But in Japan, the arrest is the start of the investigation." *Id.*

56. JCLU Report, *supra* note 1, at 8.

57. Itoh, *supra* note 5, at 56.

58. See *supra* text accompanying notes 21-27.

59. "Among a series of recent cases in which verdicts of not guilty were announced following retrials of cases in which final death sentences had previously been rendered, the cause of the initial erroneous verdict in both the Sumidagawa and Matsuyama cases was false confession which had been coerced in police holding facilities." JCLU Report, *supra* note 1, at 8.

mined solely by the will of the interrogator.⁶⁰

The practice of denying access to counsel is difficult to understand in light of Article 34 of the Constitution of Japan which states: "No person shall be arrested or detained without being at once informed of the charges against him or without being granted the right to retain the services of legal counsel." Further, Article 39(1) of the Japanese Code of Criminal Procedure provides statutory language which confirms the right of access to counsel provided in the Constitution.⁶¹ Article 39(3) of the Code of Criminal Procedure provides statutory language which has been used by police and prosecutors in practice, to circumvent the Constitutional guarantee of the right to counsel. Article 39(3) states:

[P]rior to the institution of a public prosecution, a prosecutor, clerk to a prosecutor, or judicial police official may, in cases where it is necessary for the purpose of investigation, designate the dates, places, and times for interviews and deliveries as described in paragraph one of this article, provided, however, that such designation shall not unfairly restrict the right of the suspect to prepare his defense.⁶²

Police and prosecutors have used Article 39(3) of the Code of Criminal Procedure to create a system of specific and general designations of counsel.⁶³ Through the designation of counsel, suspects are denied their right to have an attorney present during interrogations. Under the system, visits, when permitted, are at the convenience of investigating police and typically are very brief.⁶⁴ The Japanese national bar association expressed great concern over this practice, stating that despite the guarantee of free contact and communication provided in the Constitution and the Code of Criminal Procedure, in actual practice, investigators continue to refuse suspects access to counsel.⁶⁵ The members of the bar association believe that the reason investigating officials refuse access is because of their failure to revise investigating techniques.⁶⁶ Current investigators rely on pre-

60. Repeta, *supra* note 27, at 15.

61. Article 39(1) of the Code of Criminal Procedure states: "A defendant or criminal suspect in physical 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." CODE OF CRIM. PROC., *supra* note 39, at art. 39(1).

62. CODE OF CRIM. PROC., *supra* note 39, at art. 39(3).

63. See *infra* text accompanying notes 137-42 for a detailed description of general and specific designation of counsel systems. See also Tamiya, *On The Designation of Communication With Counsel*, 4 LAW IN JAPAN 87 (1970).

64. In most cases the attorney is permitted to visit for only fifteen minutes. *Id.* at 92; see also Itoh, *supra* note 5, at 59.

65. Repeta, *supra* note 27, at 16-16 quoting JINKEN HAKUSITO (White Paper on Human Rights) 119; (*Nihon Bengoshi Rengokai* ed., 1985) [hereinafter WHITE PAPER ON HUMAN RIGHTS].

66. *Id.*

World War II methods where the suspect is the sole object of the investigation and no outside investigation is conducted by police and prosecutors. During such investigations, the suspect is isolated from the rest of the world, especially his attorney. Many commentators have identified the denial of access to counsel as a source of false confessions.⁶⁷

3. *No Bail System for Suspects in Detention.*—Under the detention system, suspects may not be released on bail prior to indictment. The rationale used by government officials in rejecting a bail system for detainees is that the 23 day detention period is too short to justify such a system.⁶⁸ While a 23 day detention period may be reasonable in some situations, many times such a period may be unreasonable, especially when only a minor criminal offense is involved.⁶⁹

Typically, release from detention or release on bail (after indictment) is refused if the suspect asserts his innocence or if the suspect refuses to sign a detailed statement of the facts according to the prosecution.⁷⁰ The Japanese national bar association stated in its "White Paper on Human Rights,"⁷¹ that the prosecution abuses confinement in order to "serve the purposes of investigation and obtain confessions."⁷²

4. *Reported Abuses Under the Detention System.*

a. *The Tezuka case.*⁷³—The story of Chisako Tezuka provides a recent example of abuse of a suspect while under police detention. Ms. Tezuka was arrested on suspicion of fraudulently obtaining a loan. She was taken to a police station for detention. At the station, she was stripped naked, subjected twice to a genital search, and forced to urinate while male police officers watched.⁷⁴ Ms. Tezuka was detained and questioned for 20 days. During her questioning, she was handcuffed and roped around the waist. Tezuka was never

67. *Id.*

68. Itoh, *supra* note 5, at 66.

69. *Id.*

70. Repeta, *supra* note 27, at 16.

71. WHITE PAPER ON HUMAN RIGHTS, *supra* note 65, at 119.

72. Repeta, *supra* note 27, at 16, quoting WHITE PAPER ON HUMAN RIGHTS, *supra* note 65, at 128-29.

73. *Supra* note 3, at col. 3.

74. *Id.* The police claim that Ms. Tezuka's account was inaccurate. *Id.* at col. 5. Mr. Yasuhiro Maeda stated that abuses in police detention were the exception, not the rule. *Id.* at col. 5. He stated that Ms. Tezuka was searched because the police thought that she might commit suicide and because her behavior led them to believe that she was hiding something in her sexual organs. *Id.* at col. 5-6. Recent books on the police detention system in Japan written by former police officers, as well as testimony by former detainees, however, substantiate Ms. Tezuka's claims. *Id.* at col. 6.

indicted because the police found that she had paid back the loan two months prior to her arrest. Ms. Tezuka claimed that the secrecy of the detention system enabled police to treat her with "dehumanizing brutality."⁷⁵

b. Specific examples of denials of access to counsel.—During the late 1960's and early 1970's, Japan was in a state of civil unrest.⁷⁶ This unrest was manifested in the form of student riots⁷⁷ and terrorist bombings. Access to counsel was consistently denied to those suspected on involvement in the civil unrest.⁷⁸

An example of this denial of access to counsel can be found in the Hideki Iwabochi⁷⁹ case. Iwabochi was indicated upon a charge of attempting to bomb a police administration building. He was found not guilty in his trial at first instance.⁸⁰ Mr. Iwabochi described how he was denied access to counsel as follows:

We could not request an interview; all we could do was wait. In frame-ups like our case, a daily visit from the attorney would decrease our anxiety and give us courage. Under the threat that "your attorney will be arrested, too," we were limited to only two attorney's visits while we were held on the separate charge of theft⁸¹ and two visits when we were held on the main charge. Moreover, the length of time was absolutely inadequate. And a cop would stand outside with his ear to the wall of the interviewing room to listen to the conversations with the attorney. The room where the interviews took place was a flimsy structure and if you put your ear to the wall, you could overhear the conversation within.⁸²

Denials of access to counsel have continued in all types of criminal cases in to the 1980's. The 1981 arrest of a university professor provides another typical example.⁸³ The professor was arrested under

75. *Id.* at col. 4.

76. See M. STANDISH & L. VILLALON, *supra* note 9, at 48-9.

77. In 1969, for example, police and students clashed on 1,500 separate occasions. *Id.* at 48.

78. Of course, those who were suspected of involvement in civil unrest were not the only suspects who were denied access to counsel; they received the most publicity because their cases were of great national interest. See also Itoh, *supra* note 5, at 60-1.

79. See Itoh, *supra* note 5, at 60.

80. This is a practice commonly used by Japanese prosecutors, it is known as "*bekken taiho*" or "arrest on a separate charge." *Id.* at 60, n.*. It provides the prosecutor with the ability to extend the period in which he may hold the suspect in detention. *Id.* In the Iwabochi case, the suspect was arrested first for theft, but he was questioned during his initial detention period about a series of bombing incidents. Following the lapse of the initial 23 day detention period, the suspect was rearrested and charged with the bombing of the police administration building. *Id.* This action gave the police an additional 23 days to interrogate the suspect and to deny the suspect's access to counsel. *Id.*

81. *Id.*

82. *Id.*

83. Rapeta, *supra* note 27, at 18 n.55.

suspicion of accepting a bribe. The Special Investigations Division of the Tokyo District Prosecutors Office handled the investigation. The professor's attorney was one of the most well-known lawyer in Japan. Two days after arrest, the attorney sought access to the suspect for the first time.⁸⁴ At first, he was denied a meeting and was told to come back in three days. The attorney demanded a meeting immediately and was finally permitted to meet with the suspect for twenty minutes.⁸⁵ During the suspect's sixteen days of detention before indictment, his attorney was permitted to meet with him seven times for a cumulative total of three hours.⁸⁶ Each time the attorney went to meet with the professor, his initial request was denied and he was forced to argue in order to gain access to his client.

The attorney maintained a record of the length of interrogation and methods used by the prosecution on his client. During the sixteen day period of interrogation, the prosecutors had questioned the professor for 141 hours and 31 minutes (an average of 8 hours and 50 minutes a day).⁸⁷ The prosecution's interrogation methods included continuously shouted demands that the suspect confess. When the suspect refused, the prosecutor "sat on the edge of the table and thrust a ballpoint pen immediately in front of the suspect's eye. Then he would move the pen in a circle, while ordering the suspect to stare at the tip of the pen."⁸⁸ When the suspect still refused to confess, the prosecutor screamed that he was a liar, kicked the chair out from under him, and made him stand facing the wall.

Finally, the suspect signed his *chosko*, or suspect's statement, which is a fact statement prepared by the prosecutor, or in effect, a confession. At trial, the attorney presented evidence of the interrogation methods used by the prosecution in an effort to show that his client's confession was involuntary. The judge accepted the attorney's evidence, but ruled that the interrogation methods of the prosecutor were lawful, and therefore the confession was voluntary.⁸⁹

c. Other examples of abuses under the police detention system.—In June of 1988, the Japanese Civil Liberties Union published a report listing other serious abuses which regularly take place under the police detention system.⁹⁰ The report states that the continued

84. *Id.*

85. *Id.*

86. *Id.*

87. The interrogations not only lasted for almost nine hours a day, they typically continued past 10 p.m. *Id.*

88. *Id.*

89. *Id.* at 19, n.55. "This case involved both elite prosecutors of the Tokyo Special Investigations unit and one of the country's most reputed attorneys. *Id.* [In a similar situation] where such prominent members of the legal profession are not involved, the interrogation techniques may be much more extreme." *Id.*

90. See JCLU Report, *supra* note 1, at 8-9.

abuse of suspects has lead to many cases of false confessions and erroneous judgments.⁹¹ First, as the report notes, a major cause of false confessions is because of the bartering of "privileges," such as food and meetings with family members in exchange for confessions.⁹² For example, if the suspect refuses to confess, he may be subjected to restrictions on drinking water and visits to toilet facilities.⁹³

The second cause of false confessions listed in the JCLU Report is of major importance. The report notes that many false confessions are obtained because interrogators utilize violence against suspects in an effort to force confessions.⁹⁴ Because police detention or interrogation cells are enclosed compartments which are inaccessible to third parties, incidents of violence occur against suspects. The following is a sampling of the numerous examples of violence and coercion that have been reported:

- (1) Pain is inflicted on suspects by squeezing their fingers together while pencils are inserted between the fingers.⁹⁵
- (2) Suspects are questioned with high-powered lamps continuously trained on their faces.
- (3) Threats are made that family members will be arrested unless the suspect confesses.⁹⁶

IV. Relevance of the International Covenant on Civil and Political Rights⁹⁷ to Human Rights Questions in Japan

A. *Beginnings of the "Human Rights Revolution"*

With the end of World War II came two important developments regarding human rights in Japan. The first development was the establishment of a democratic government through the 1947 Constitution of Japan. The 1947 Constitution provided for a demo-

91. *Id.*

92. *Id.* at 9.

93. *Id.*

94. *Id.*

95. This technique is used because it is a means of inflicting pain without leaving any scars. Telephone interview with Lawrence Repeta, Esquire (Oct. 11, 1988).

The basis of this paper is to attempt to point out some basic human rights violations which have taken place under the Japanese police detention system. Unfortunately, the specific topic of torture under the police detention system will not be addressed. It should be noted, however, that Japan is subject to numerous United Nations Declarations regarding torture, and has signed the United Nations' UNILATERAL DECLARATION AGAINST TORTURE AND OTHER CRUEL, INHUMAN OR DEGRADING TREATMENT OR PUNISHMENT, G.A. Res. 3452 (XXX), 30 U.N. GAOR Supp. (No. 34-A/10034) at 91, U.N. Doc. A/10408 (1975). For a discussion of torture and the treatment of prisoners see, N. RODLEY, *THE TREATMENT OF PRISONERS UNDER INTERNATIONAL LAW* (1987); AMNESTY INTERNATIONAL, *TORTURE IN THE EIGHTIES* (1984).

96. JCLU Report, *supra* note 1, at 9.

97. COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.1-180.1.

cratic form of government and guaranteed the citizens of Japan fundamental human rights.⁹⁸

The second development was the adoption of the United Nations Charter and the Universal Declaration of Human Rights⁹⁹ in 1948. Before World War II, international law did not regulate the manner in which countries treated their own citizens.¹⁰⁰ With the Universal Declaration of Human Rights, "this pre-war system composed solely of insular legal systems each confined within the boundaries of a single nation-state has been replaced by a new international order."¹⁰¹

This new international order has been formed by multinational human rights treaties which have followed the Universal Declaration of Human Rights.¹⁰² These treaties permit citizens who have "grievances against their own government to have access to universal principles of human rights embodied within these multi-national declarations and agreements."¹⁰³

B. Ratification of the Covenant on Civil and Political Rights in Japan

The Covenant on Civil and Political Rights was ratified by the General Assembly of the United Nations on December 16, 1966.¹⁰⁴ The Covenant contained an Optional Protocol to the International Covenant on Civil and Political Rights.¹⁰⁵ The Japanese government ratified the Covenant on June 21, 1979; on September 21, 1979 it became effective.¹⁰⁶ Japan did not, however, ratify the Optional Pro-

98. The Constitution of Japan guarantees fundamental human rights, but there is neither a listing of exactly what those rights are or "Bill of Rights" amendments as set forth in the United States Constitution.

99. UNIVERSAL DECLARATION OF HUMAN RIGHTS G.A. Res. 217A (III), U.N. Doc. A/810 at 71 (1948) [hereinafter UNIVERSAL DECLARATION], reprinted in R. LILICH, *supra* note 8, at 440.1

100. For a discussion of how international law was changed to deal with nations that deny human rights to their own citizens, see Buergenthal, *International Human Rights Law and Institutions: Accomplishments and Prospects*, 63 WASH. L. REV. 1 (1988) [hereinafter Buergenthal].

101. Repeta, *supra* note 27, at 1.

102.

The Universal Declaration is not a treaty. It was adopted by the United Nations General Assembly in the form of a resolution that has no force of law, and it was not intended by the assembly to create binding legal obligations Time, however, transformed the normative status of the Universal Declaration. Today few international lawyers would deny that the Universal Declaration imposes some international legal obligations.

Buergenthal, *supra* note 100, at 8.

103. Repeta, *supra* note 27, at 1.

104. See *supra* note 8.

105. OPTIONAL PROTOCOL TO THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS G.A. Res. 220 (XXI), 21 U.N. GAOR Supp. (No. 16) at 59, U.N. Doc. A/6316 (1966), reprinted in R. LILICH, *supra* note 8, at 370.1.

106. For a general discussion of the effect of the Covenant on Japanese law, see Kawashima, *The International Covenants on Human Right and the Japanese Legal System*,

to the International Covenant on Civil and Political Rights.

"The Covenant was designed to transform the general principles proclaimed in the Universal Declaration into binding treaty obligations."¹⁰⁷ Unlike the procedure under the Universal Declaration, once a state becomes a party to the Covenant, it is under an immediate legal obligation to comply with provisions of the Covenant.¹⁰⁸ The provisions of the Covenant are implemented by a body known as the Human Rights Committee through a reporting and complaint procedure.¹⁰⁹

Thus, Japanese human rights activists believe that the ratification of the Covenant was a momentous occasion for the protection of human rights. Activists see the Covenant as a measuring stick from which they can objectively gauge the performance of their government on human rights issues.¹¹⁰ Further, "it provides a concrete set of legal obligations which observers outside Japan can cite when confronting the always delicate task of criticizing the actions of a foreign sovereign within its own territory."¹¹¹

C. *Status of the Covenant in Japan*

The Covenant's vast potential has been essentially untested in Japanese law thus far.¹¹² Although the Human Rights Commission of the United Nations has examined complaints concerning discrimination against Koreans in Japan, the Human Rights Commission does not appear ready to play an important role in preventing Japanese human rights violations in the near future.¹¹³ The inability of the Human Rights Commission to play a more significant role stems from the failure of the Japanese government to make a declaration under Article 41 of the Covenant¹¹⁴ and from their failure to ratify the Optional Protocol to the Covenant.¹¹⁵ Either of these treaties would permit the Human Rights Commission to hear complaints from individuals.¹¹⁶

In terms of national enforcement, the Japanese judiciary has yet to consider the Covenant in reaching a decision.¹¹⁷ Most litigants

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107. Buergenthal, *supra* note 100, at 10.

108. *Id.* at 12.

109. *Id.*

110. Repeta, *supra* note 27, at 3.

111. *Id.*

112. See generally Repeta, *supra* note 27; see also Itoh, *supra* note 5.

113. Repeta, *supra* note 27, at 3.

114. *Id.* at 3, n.8.

115. *Id.*

116. *Id.*

117. Article 41 of the Covenant states:

A State Party to the Present Covenant may at any time declare that it recognizes the competence of the Committee to receive and consider communi-

make "perfunctory reference"¹¹⁸ to the Covenant in their complaints. Japanese judges, however, "tend to hold an extremely broad view of administrative discretion and a rather limited view of their own authority to order change."¹¹⁹ As such, Japanese judges make court enforcement of the Covenant "merely illusory."¹²⁰

There are two techniques for enforcement, however, which appear promising. The first is the use of heavy media campaigns, which draws international attention to human rights problems, and forces changes in policy. Such appeals to international opinion have had a positive impact on human rights concerns in Japan in the past.¹²¹

The second technique for enforcement of the Covenant is through the Constitution of Japan. Article 98(2) of the Constitution of Japan states: "Treaties concluded by Japan and established laws of nations shall be faithfully observed."¹²² Thus, Article 98(2) of the Constitution can be viewed as not only incorporating treaties into Japanese law, but also incorporating customary international law as well. The view that customary international law has the force of law in Japan has been accepted by the majority of Japanese constitutional scholars.¹²³ If this view is correct, then Japanese judges should be unable to disregard precedents from abroad. Thus, since the European Commission of Human Rights and the European Court of Human Rights have been interpreting the 1950 European convention on Human Rights, which contains provisions parallel to those in the Covenant, these decisions should influence the decisions of Japanese

cations to the effect that a State Party claims that another State Party is not fulfilling its obligations under the present Covenant. Communications under this article may be received and considered only if submitted by a State Party which has made a declaration recognizing in regard to itself the competence of the Committee

COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.11. Japan has not made a declaration under Article 41 which would recognize the competence of the Human Rights Committee to receive complaints from individuals. Repeta, *supra* note 27, at 3 n.8. Japan has not ratified the Optional Protocol to the International Covenant on Civil and Political Rights which would also permit the Human Rights Committee to hear complaints from individuals. *Id.*

118. *Id.* at 3.

119. *Id.* at 6.

120. *Id.*

121. *Id.* at 3. As Professor Buergenthal notes: "The international condemnations and pressure to which recalcitrant governments are increasingly being subjected tend to have a prophylactic and ameliorative effect. Buergenthal, *supra* note 100, at 4-5, *quoted in* Repeta, *supra* note 27, at 4 n.9.

As governments come to realize that they must pay a higher political price for violating their international human rights obligations, the world's human rights situation cannot but improve." *Id.*

122. KENPO (Constitution) art. 98, para. 2 (Japan).

123. Professor Iwasawa states: "A majority of scholars interpret Article 98(2) of the Constitution as incorporating into Japanese law not only treaties but customary international law as well. The view that customary international law has the force of law in Japan is widely accepted." Y. IWASAWA, LEGAL TREATMENT OF KOREANS IN JAPAN: THE IMPACT OF INTERNATIONAL HUMAN RIGHTS LAW ON JAPANESE LAW (International Human Rights Law Group, Aug. 1986), *quoted in* Repeta, *supra* note 27, at 5.

courts.¹²⁴ Although the use of foreign precedents in Japanese courts would constitute a fundamental change in the Japanese system, it would give the Covenant the proper emphasis afforded to it as a treaty under the Japanese Constitution.

V. Application of the Covenant to Specific Human Rights Problems Presented By the Japanese Police Detention System

A. *The Use of Alternative Detention Facilities is in Violation of the Covenant*

1. *The Use of Police Stations for Extended Detentions Violates Article 9 of the Covenant.*—Detention of suspects in police detention cells violates two fundamental principles addressed in Article 9 of the Covenant.¹²⁵ First, it violates the right to be informed of reasons for arrest within a reasonable time. Second, it denies an individual the right to be placed under judicial authority following arrest.

a. *Right to be informed of the reasons for arrest.*—Article 9(2) of the Covenant¹²⁶ states: “Anyone who is arrested shall be informed, at the time of arrest, of the reasons for his arrest and shall be promptly informed of any charge against him.”¹²⁷ The police detention system provides no method of informing suspects of the reasons for their arrest and detention. Only upon indictment, possibly 23 days after arrest, are suspects informed of the formal charges against them.¹²⁸ Thus, since the suspects do not know the formal charges against them during their detention period, it is almost impossible to prepare defenses. Further, even if suspects were aware of the charges, their incarceration deprives them of a critical time period during which to prepare their defenses.

124.

[t]he 1950 European Convention on Human Rights . . . contains provisions parallel to those in the Covenant on Civil and Political Rights. Two special institutions, the European Commission of Human Rights and the European Court of Human Rights, have developed considerable jurisprudence with respect to the European Convention. There are almost daily press releases about cases submitted or decided. In Europe, international decisions on human rights are no longer extraordinary occurrences.

This European jurisprudence throws light not only on the provisions of the European Convention, but also on the similar provisions in the Covenant on Civil and Political Rights.

Sohn, *The New International Law: Protection of the Rights of Individuals Rather than States*, 32 AM. U.L. REV., quoted in Repeta, *supra* note 27, at 6.

125. COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.1.

126. *Id.* at 170.4.

127. *See id.*

128. *See supra* text accompanying notes 32-41.

b. *Right of suspects to be placed under the supervision of the judiciary.*—Currently, under the Japanese police detention system, if the prosecutor decides to detain a suspect, he must submit a request for detention to a judge within 72 hours of the suspect's arrest.¹²⁹ Once the request is granted, the suspect is said to be under the supervision of the judiciary. In nearly all cases, however, the judge fails to exercise judicial power over the suspect. The judge merely functions as a "rubber stamp" of the prosecutor's desire to detain the suspect under police supervision rather than in one of the 113 detention centers.¹³⁰ The lack of judicial supervision over suspects who are detained violates Article 9(3) of the Covenant, which states: "Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power and shall be entitled to trial within a reasonable time or to release."¹³¹

2. *Detention of Suspects under Police Authority Facilitates Coercion of Confessions Prohibited by Article 14 of the Covenant.*¹³²—Article 14(3)(g) states: "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality: . . . (g) Not to be compelled to testify against himself or to confess guilt."¹³³

The Japanese police detention system is in violation of Article 14(3)(g), because the purpose of the system is admittedly to coerce confessions from suspects.¹³⁴ Police and prosecutors are no doubt tempted to coerce confessions from suspects who are held in their authority. In the past, investigators have used various methods to coerce confessions from suspects.¹³⁵ One method which is especially notorious is the use or threat of violence. Not only does the use or threat of violence violate Article 14(3)(g) of the Covenant, it also violates Article 7, which prohibits the use of torturous, cruel or de-

129. *Id.*

130. Repeta, *supra* note 27, at 23-24. *See also* JCLU Report, *supra* note 1, at 9.

131. COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.4.

132. *Id.* at 170.5.

133. *Id.*

134. "Investigating officials publicly assert that the purpose of detention is to force the suspect to confess." Itoh, *supra* note 5, at 60, *quoting* Kato, *Sekken Kotsu to Sosa* (Contacts with criminal suspects and the investigation), KEISATSU GAKURONSHU (No. 9).

135. To coerce confessions police have:

- 1) used extended questioning sessions, *see supra* text accompanying notes 73-89.
- 2) bartered with suspects for privileges, *see supra* text accompanying notes 90-93.
- 3) used violence and threats of violence, *see supra* text accompanying notes 94-96, or other inhuman or degrading treatment, *see also* text accompanying notes 73-75.

grading treatment or punishment.¹³⁶

B. Designation of Counsel is in Violation of the Covenant

1. *The Designation System.*¹³⁷—The designation system is the method utilized by prosecutors to deny contact between attorneys and criminal suspects in detention. Under the designation system, the police and prosecutors have sole discretion in determining whether a suspect will have access to counsel. The Japanese judiciary is completely detached from the decision-making process.

When the prosecutor chooses to permit an attorney to visit a criminal suspect, the prosecutor fills out a Number 48 Form¹³⁸ (the “general designation form”), and he provides a copy of this form to the suspect and to the chief of the police station where the suspect is held.¹³⁹ When the attorney requests to visit the suspect, and the prosecutor permits a visit, the prosecutor fills out a Form Number 49 (the “specific designation form” or “interview ticket”) upon which the prosecutor specifies the time and date of the interview. The prosecutor then makes a request for the attorney to come to prosecutor’s office to pick up the document.¹⁴⁰

When the Number 48 general designation form is issued to the police chief, the attorney’s visit is denied unless he has the Number 49 specific designation form (or interview ticket) with him. Thus, the rule is that where a Number 48 general designation form is issued, visits with counsel only become possible with the issuance of Number 49 specific designation forms.¹⁴¹ Thus, the general rule is prohibition of visits; allowance of visits constitutes the exception.¹⁴²

2. *Impact of the Designation System on Criminal Suspects.*—Use of a designation system has a significant impact on criminal suspects and their ability to prepare a defense. The system of designations is used by police and prosecutors to deny suspects access to their attorneys so that they might elicit confessions from the uninformed suspects. Additionally, the system severely restricts the dates and times of visits that an attorney may have with the suspect. Investigating officers have also developed numerous excuses

136. Article 7 states: “No one shall be subjected to torture or to cruel inhuman or degrading treatment or punishment.” COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.3.

137. See generally *supra* text accompanying notes 60-67; see also text accompanying notes 73-75.

138. This form is to be prepared pursuant to Article 28 of the Ministry of Justice Order of Regulations for the Processing of Cases. Itoh, *supra* note 5, at 57.

139. Recently, prosecutors and police have chosen not to give the Number 48 Form to suspects. *Id.*

140. *Id.*

141. *Id.*

142. *Id.*

to deny specific designations further limiting the number of visits.¹⁴³

Not only are the dates, time and number of visits severely restricted, but when a visit with an attorney is granted, it is extremely short. In most cases, the duration of a visit is limited to fifteen minutes.¹⁴⁴ With so little time, all an attorney can do is exchange greetings, take messages to be given to the suspect's family, and explain the suspect's basic rights. There is certainly not enough time to discuss the intricacies of the suspect's case. Accordingly, it is nearly impossible to prepare a defense for the suspect.

3. *Denials of Access to Counsel through the Designation System Violates the Covenant.*—Article 14(3) of the Covenant states: "In the determination of any criminal charges against them, everyone shall be entitled to the following minimum guarantees, in full equity: . . . (b) To have adequate facilities for preparation of his defense and to communicate with counsel of his choosing."¹⁴⁵

Article 14 makes no reference to restrictions upon the right of a suspect to contact his attorney. The absence of such a references does not mean that countries are free to restrict the suspect's access to counsel, but rather it establishes a general principles that no restrictions on the access to counsel may be established.¹⁴⁶ This general principles is defined further by the Third Subcommittee of the Twelfth International Criminal Law Conference (A.I.D.P.).¹⁴⁷ The Subcommittee states that access to counsel may be restricted only when: (1) ordered by a judicial officer, and (2) restriction is an indispensable means necessary to maintain security.¹⁴⁸

The designation system currently used in Japan today violates

143. The reasons given to refuse specific designations include:

- 1). the suspect is being moved to a distant prosecutor's office for investigation;
- 2) conditions of the interrogation or other investigation will not allow an interview;
- 3) the time is outside the regularly scheduled hours for operation of the government office involved;
- 4) the prosecutor in charge is not present and therefore a specific designation cannot be issued;
- 5) there has already been sufficient opportunity for interviews between attorney and suspect, so there is no need for additional interviews.

Id. at 58.

144. *Id.* at 59. See also Tamiya, *supra* note 63, at 92.

145. COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.5.

146. Itoh, *supra* note 5, at 61.

147. The Third Subcommittee of the Twelfth International Criminal Law Conference stated in Article 6 of the Resolutions of the Conference, that:

6. All persons accused of crime shall be able to prepare a defense and to receive the assistance of a qualified attorney at all stages of the criminal justice process and shall be informed of the foregoing (c) Attorneys shall be allowed to be present at all significant stages of the proceedings (e) All persons placed in physical custody shall have the right to meet and communicate privately with attorneys. Restrictions on this right shall be allowed only when ordered by a judicial officer as an indispensable means necessary to maintain security.

Id. at 61-62.

148. Itoh, *supra* note 5, at 61-62.

both Article 14(3)(b) of the Covenant and Article 34 of the Japanese Constitution¹⁴⁹ which provide for the right of a criminal suspect to have free access to his attorney. The Covenant and the Constitution are violated in several respects. First, the official with the authority to place restrictions on access to counsel is not a judicial officer, but rather the prosecutor who is also in charge of the investigation of the suspect. Second, denials of counsel are rarely made to maintain security as required by the Covenant. The reason most often given for restriction, "the needs of the investigation," is extremely vague and subject to an overly broad interpretation.¹⁵⁰

The designation system is unfair to suspects for four reasons. First, during the initial period of detention, the suspect is isolated from counsel who could provide him with moral and emotional support. Second, the inability to meet with counsel during detention severely restricts the suspect's ability to gather evidence and establish a defense. Third, the presence of an attorney would put an end to efforts by over zealous prosecutors and police who try to coerce confessions from suspects. Fourth, and most importantly, since an attorney is not permitted to be present during the interrogation of the suspect, the attorney is unable to apprise the suspect of his legal rights and obligations.

C. Lack of a Bail System for Suspects Violates Article 9(3) of the Covenant

No bail system exists for suspects under the police detention system prior to indictment. This violates Article 9(3) of the Covenant which generally states that persons awaiting trial may not be detained in custody.¹⁵¹ Article 9(3) applies to criminal suspects prior to indictment as well as thereafter.¹⁵² The prosecutor's rationale for the denial of bail to detainees in Japan is that 23 days is too brief a period of time to grant bail.¹⁵³ In the case of a minor criminal infraction, however, a 23-day deprivation of liberty is excessive. Moreover, lack of a bail system prior to indictment places the suspect at a disadvantage if his case goes to trial because the detained suspect

149. Article 34 of the Constitution of Japan states:

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

KENPO art. 34.

150. Itoh, *supra* note 5, at 63.

151. COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.4; *see also supra* text accompanying notes 129-31.

152. *See supra* text accompanying notes 129-31.

153. Itoh, *supra* note 5, at 66.

has had no opportunity to gain access to evidence which may clear him of guilt.¹⁵⁴

VI. A Proposal for Change

A. Decisions of the Japanese Courts Must Accord Precedential Value to International Courts Interpreting the Covenant on Civil and Political Rights

Presently, the Japanese courts have an extremely expansive view of administrative discretion. This view is evident in the broad discretion afforded to prosecutors in the Japanese criminal justice system. The prosecution in Japan has increasingly gained power to decide the innocence or guilt of suspects.¹⁵⁵ "Rights of access to counsel and release on bail and the right not to testify against oneself have been virtually extinguished."¹⁵⁶ This elimination of fundamental rights could not have occurred without acquiescence by the courts.¹⁵⁷

While Japanese courts afford wide administrative discretion, they have a limited view of their own ability to promote change. If Japanese law granted recognition to international customary law,¹⁵⁸ Japanese courts would be forced to "take off their blinders" and acknowledge the fundamental rights within the Covenant on Civil and Political Rights.¹⁵⁹ The importance of the Covenant may not only be found through the substantive fundamental rights it lists,¹⁶⁰ but it may also provide an entrance for decisions from international courts¹⁶¹ which grant greater protection to those substantive fundamental rights. If the decisions of the international courts interpreting the Covenant were given precedential value in Japan, human rights litigants could regularly cite the decisions of these courts. As such, international law would not remain a lifeless statement of principles

154. Repeta, *supra* note 27, at 17.

155. *Id.* at 23.

156. *Id.*

157. *Id.*

Formal authority to decide whether a suspect may be detained beyond seventy-two hours resides with the judge. The same is true of the authority to decide whether to grant bail requests and what the amount of bail is to be. A judge must also decide whether to issue warrants for searches and seizures and whether evidence obtained by the police and prosecutors—whether in the form of confessions obtained during lengthy interrogations or physical evidence gathered during searches or otherwise—may be accepted and deemed reliable in that court. In all these areas, it appears that the judiciary has granted the government a *carte blanche*.

Id. at 23-24.

158. See *supra* text accompanying notes 112-24.

159. Many of the rights listed in the Covenant have been previously enumerated in the Constitution of Japan. Repeta, *supra* note 27, at 23-24.

160. COVENANT ON CIVIL AND POLITICAL RIGHTS, *supra* note 8, at 170.1.

161. Among these international courts are the European Court of Human Rights and the Inter-American Court of Human Rights. Repeta, *supra* note 27, at 27.

but could be used as a tool to combat injustice in concrete cases.¹⁶²

VII. Conclusion

The Japanese criminal justice system should be both complimented and condemned. The system should be praised for producing one of the lowest crime rates in the world. The Japanese people should be commended, too, for creating a society in which morals and social controls still play a significant part in curtailing crime. The Japanese criminal justice system should be condemned, however, for the denial of fundamental human rights which occurs to suspects under the police detention system. The police detention system clearly conflicts with the International Covenant on Civil and Political Rights as well as the Constitution of Japan. The system also exploits the social controls that are so important to Japanese society, not only threatening the guilty, but the innocent as well. Hope for change comes from the Japanese Judiciary which has acquiesced to administrative authority in the past. The Japanese courts now have the opportunity, through the Covenant of Civil and Political Rights, to effectuate change and prevent the human rights abuses inherent in the police detention system.

Christopher James Neumann

162. *Id.*

