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## OPINION OF A SCHOLAR

### Criminal Investigation in Japan

WILLIAM B. CLEARY\*

#### INTRODUCTION

The purpose of this article is to examine the initial stages of a Japanese criminal case by looking at some actual cases decided by the courts in that country. The decisions presented here are considered to be landmark cases by the Japanese legal community. It is useful to note initially that the law of criminal procedure in Japan is a mixture of Continental law, common law and Anglo-American constitutional law. However, the Japanese application of these imported concepts and principles is unique.

In any country, the initial phase of a criminal case is one of the most important stages. Governmental action and suspect behavior at this stage will have a direct relationship to the final outcome of a given case. As a result, the interaction between the government, the suspect, and defense counsel can most vividly be shown through case law examples. By examining the actual cases, the reader will understand how the Japanese authorities execute their tasks.

To accomplish their work, the authorities, especially prosecutors, are given a great amount of discretion. The prosecutor has the power to investigate and to interrogate persons concerning any criminal matter. The exercise of this power in Japan is usually done with a high degree of professionalism and concern for the rights of the individual, but it has also been abused, as we shall see from the following cases.

Also, the use of confessions in Japan is still considered to be the best and most effective way of obtaining a conviction. When a suspect is interrogated by the police or prosecutors, the purpose of the interrogation is to extract a confession. In order to obtain a confession, a suspect is isolated from family, friends, and legal

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counsel for a lengthy period of time, usually twenty-three days.<sup>1</sup> During this time the suspect is subjected to techniques which might be considered barbaric by other developed countries.

To accomplish the investigation and interrogation, the authorities can utilize one of two possible courses of action. Voluntary measures are those steps taken by either the police or prosecutor which do not require a warrant or judicial order. These include the act of requesting an individual to come down to the station for questioning, or the stopping of a vehicle on a road or highway in order to question the driver or passengers. The first half of this article will deal with such voluntary measures.

Once the authorities have sufficient evidence of criminal activity, they may go to the court and obtain search warrants and/or arrest warrants. They may also arrest a flagrant offender and conduct a search incident thereto without a warrant. These are known as "compulsory measures" and will be covered in the second half of this article.

## I. VOLUNTARY MEASURES

### A. *Voluntary Measures and the Use of Force*

Under article 198 of the Code of Criminal Procedure, the authorities may request any person to appear at the police station for questioning.<sup>2</sup> It is routine practice to prepare a statement of what the individual said. Subsequently, to verify its authenticity, the de-

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1. Code of Criminal Procedure, Article 205(2) (three days); Article 208(1) (ten days); and Article 208(2) (additional ten days). *See also* JOHNSON & CHALMERS, CONSPIRACY AT MATSUKAWA, University of California Press, Berkeley (1972), at 405.

2. Code of Criminal Procedure, Article 198, states:

(1) A public prosecutor, a secretary of the public prosecutor's office or a policeman may, when it is necessary for conducting an investigation of an offense, call upon the suspect to appear and examine him: provided that the suspect may, except in such cases as arrest or detention, refuse to appear, or leave at any time after appearance.

(2) At the examination as mentioned in the preceding paragraph, the suspect shall beforehand be notified that he shall not be required to make a statement contrary to his will.

(3) The statement of the suspect may be recorded in a protocol.

(4) The protocol as mentioned in the preceding paragraph shall be perused by or read to the suspect for his verification, and in case the suspect has made a motion for any addition or deletion, or alternation, his statement with regard thereto shall be entered into the protocol.

(5) The suspect may, when he has affirmed that the contents of the protocol are correct, be asked to sign and make seal thereon: provided, that this shall not apply if he refused to do so.

Basic translation of code sections is from EHS Law Bulletin Series, published by Eibun—Horeisha, Inc. (1955). The author has modified the translation for the sake of clarification when the original is unintelligible.

clarant signs the statement and places his personal seal on it.<sup>3</sup>

The authorities can use physical force to persuade a suspect to comply with a request to cooperate.<sup>4</sup> The distinction between a voluntary and a compulsory measure does not relate to the use of physical force. In one case, the trial judge misinterpreted the distinction and held that the police could not physically restrain an individual when invoking voluntary measures. The defendant was driving an automobile in an erratic manner at 4:00 a.m. and was stopped by the police.<sup>5</sup> The police asked the driver for his license and requested that he submit to a breath analyzer examination because his eyes and face were red and he reeked of alcohol. At the police station, he was interrogated concerning his whereabouts and activities prior to being stopped. No arrest had been made. The man gave the police his license but continued to refuse the breath analyzer examination.

The defendant had called his mother to come to the station, and while they were waiting for her to arrive, the defendant asked the attending officer for a match to light his cigarette. When the officer refused to give him one, the defendant quickly stood up and headed toward the exit, stating that he would get the matches himself. The officer thought he was trying to escape and grabbed the defendant's left wrist with both hands. The defendant struggled to get free and hit the officer in the face and tore a shoulder patch from his uniform. The defendant was then arrested and charged with obstructing an officer in the performance of official duties.<sup>6</sup>

The trial court decided that the police officer had overreacted to the situation, and the defendant was acquitted. The court reasoned that since the defendant had not been arrested (that is to say, that the police had not utilized compulsory measures of investigation), they had no right to physically restrain the defendant.<sup>7</sup> According to the trial court, the use of force by the police is prohibited until they have taken the trouble to exercise compulsory measures.<sup>8</sup>

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3. In Japan, a personal stamp with the individual's last name engraved thereon is used the same way a signature is used in the United States.

4. (Japan v. Tanahashi), Supreme Court Judgement, March 16, 1976, 30 Keish 187, 809 Hanrei Jiho 29. Note: the case name is not used in Japan; instead, the court and the date are given. In this article the names will be provided when they are available.

5. *Id.*

6. Article 95(1) of the Penal Code: "A person who uses violence or threats against a public servant in the performance of his duties, shall be punished with penal servitude or imprisonment for not more than three years."

7. *Id.* at 30 Keishu 205.

8. *Id.* at 202-05.

On appeal, both the high court and the Supreme Court<sup>9</sup> decided the issue in favor of the government. The high court held that the degree of restraint the defendant encountered when the officer grabbed his wrist was not significant. The Supreme Court held that it was proper for the police to physically restrain the defendant, even without making an arrest. Since the defendant was suspected of drunk driving, the act of restraining him was considered to be proper police procedure under the circumstances. The defendant was convicted and given a four-month sentence.

This case is used in Japan to demonstrate that the use of physical force is not restricted to instances in which compulsory measures are invoked, and that it can be utilized *prior* to an official arrest.<sup>10</sup> The Supreme Court stated that "compulsory measures" refers to certain restraints and limitations the authorities can place on the person, dwelling or property of an individual, and not to the use of force.

### *B. The Length of Questioning Prior to Arrest*

In Japan, criminal suspects are subjected to a very lengthy interrogation. This interrogation can occur before or after the suspect has been arrested. In most cases, the police ask the suspect to voluntarily come to the station for questioning. The suspect has the right to refuse, but, as we will see in the following cases, the exercise of that right is rare.

The police prefer to conduct an investigation on a voluntary basis without having to resort to arrests and warrants. The main motive behind this practice concerns time. There is no provision in the Code of Criminal Procedure to limit the length of time the police can question someone who has voluntarily agreed to be questioned. On the other hand, if an arrest is made, the police have only two days to question the person. After two days they must either send the suspect to the prosecutor or release the person.<sup>11</sup> Thereafter, the prosecutor has only a day in which to ex-

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9. The High Court is the regional court of appeal for appeals from District, Family, and Summary Courts.

10. Kumai, Hiroshi, "Nin-i Doko to Taiho no Genkai," (The Limits of Arrest and the Voluntary Trip to the Police Station); Kumagai, Matuso, Tamiya Hen, 1 Sosaho Taikei 84.

11. Article 203 of the Code of Criminal Procedure provides:

(1) A police official shall, upon the arrest of a suspect, with or without a warrant, inform him of the gist of facts constituting the offense and the right to appoint a counsel, and shall give an opportunity for the explanation thereof; and shall forthwith release him in case he believes that it is not necessary to retain him; and shall, in case he believes that it is necessary to retain him, take such procedure as to send him to a public prosecutor within forty-eight hours from the time of arrest, together with the documents and evidence.

amine the suspect without obtaining a warrant that authorizes further detention.<sup>12</sup>

In a 1979 case, a suspect was stopped by the police while driving to work one morning.<sup>13</sup> The police told him that they wanted to question him about a certain matter,<sup>14</sup> and he agreed to come to the station. He rode in the police car and an officer followed in the suspect's car. At the station, the police questioned the man all day, taking breaks only for meals and when the suspect needed to use the restroom. When he went to the restroom he was always under observation by a policeman.

Later that evening, the police obtained an arrest warrant and executed it just after midnight. The next day the police transferred the case to the prosecutor, who applied for a warrant of detention. However, the district court judge who heard the matter denied the warrant because the length of pre-arrest interrogation had been too long. Even though the suspect was theoretically at the police station voluntarily, the facts indicated that the police used compulsion and intimidation in order to keep the suspect at the station.<sup>15</sup> Significantly, the police never asked the suspect if he wanted to leave or to contact someone.

This case indicates that some judges in Japan have recognized that the practice of lengthy pre-arrest interrogation is wrong. If the police want to ask more than just ask a few questions, a proper arrest should be made to facilitate a thorough interroga-

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(2) In the case of the preceding paragraph, the suspect shall be asked whether or not he has a counsel, and if he has, he shall not be informed of the right to appoint a counsel.

(3) In case the procedure for sending is not taken within the limitation of time as mentioned in paragraph 1, the suspect shall immediately be released.

12. *Id.* Additionally, Article 205 states:

(1) A public prosecutor shall, in case he has received the suspect sent in accordance with the provisions of Article 203, give him an opportunity for explanation, and shall, when it is considered that it is not necessary to detain him, immediately release him, and shall, when it is considered that it is necessary to retain him, request a judge to commit him within twenty-four hours from the time the suspect was received.

(2) The limitation on time as mentioned in the preceding paragraph may not exceed seventy two hours as from the time when the suspect was arrested.

(3) In case the public prosecution was instituted within the limitation on time as mentioned in the preceding two paragraphs, the request for commitment shall not be made.

(4) [If] the request for commitment or the institution of public prosecution is not made within the limitation on time as mentioned in paragraphs 1 and 2, the suspect shall be released immediately.

13. Toyama District Court Judgment, July 26, 1979, 946 Hanrei Jiho 137, 410 Hanrei Taimuzu 154. (Case name not published.)

14. The author has searched every available source but was unable to discover the name or nature of the suspect's offense in this case.

15. 946 Hanrei Jiho 137, 138.

tion. Prosecutors generally oppose this idea on the ground that it is in the best interest of the suspect *not* to be formally arrested.<sup>16</sup> In this way the individual is not subjected to the higher degree of embarrassment and shame associated with a formal arrest. However, the court in the case above was unconvinced by this rationale and realized that the police simply planned to conduct unlimited interrogation without making an arrest.<sup>17</sup>

Once a suspect is arrested, the police can properly begin an interrogation in the hope of extracting a confession. However, there are some safeguards against convicting a person based on a false confession, as we shall see in the next section.

### C. Pre-Arrest Confessions

In Japan, a confession alone is insufficient grounds for an arrest or conviction. Article 38(3) of the Constitution provides that no person shall be convicted or punished where the only proof is a confession.<sup>18</sup> This provision has been interpreted to mean the police must also have sufficient corroborating evidence before an arrest can be made.<sup>19</sup> Even though an individual may have admitted to committing a crime, this fact does not end the interrogation. The police will continue to question a suspect for long intervals in order to obtain the information necessary for corroboration.

This practice is exemplified in the landmark case known as the "Takanawa Green Mansion Murder Case," decided by the Supreme Court in 1984.<sup>20</sup> A bar hostess was murdered on May 18, 1977, in a Tokyo apartment. The leading suspect in the case was a former boyfriend who had lived with the victim. He claimed an alibi which the police discovered was false, and suspicion surrounding him intensified.

In the early morning hours of June 7, an investigator went to the defendant's residence (a dormitory provided by his employer). At the investigator's request, the man voluntarily went to the police station for questioning. At the station, he confessed to the murder. However, because of the lack of corroborating evidence, he was not arrested. At 11 p.m., after a full day of questioning, the interrogation ended and a written statement was prepared. The man stated he did not want to return to the dormitory, and he

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16. Based on personal interview with Mr. Yasui Susuki, former Chief Prosecutor, Office of the High Prosecutor, Sapporo.

17. *See supra* note 15.

18. The Constitution of Japan, Article 38(3): "No person shall be convicted or punished in cases where the only proof against him is his own confession."

19. *Id.*

20. (*Japan v. Ikuhara*) Supreme Court Judgment, Feb. 29, 1984, 38 Keishu 479.

asked the police to find a nearby inn where he could sleep for the night. Arrangements were made at a local boarding house. The man went there, accompanied by four or five policemen, all of whom stayed with him for the next four nights. He was subjected to questioning every day, even though no arrest had been made. When they checked out of the boarding house, the police paid all the charges except for the last night.<sup>21</sup>

The man was then released and returned to his home town. Six weeks later he was finally arrested and confessed again to the murder. At the trial, the defendant recanted both confessions and claimed they were the result of police compulsion and torture. The court was unconvinced, and he was convicted and sentenced to twelve years in prison.<sup>22</sup>

On appeal to the Supreme Court, the conviction was affirmed. The Court was critical of the police for their conduct in the matter, but held that, pursuant to Article 198 of the Code of Criminal Procedure, the police had conducted a voluntary examination of the defendant from the 7th to the 11th of June.

In determining whether the measures are voluntary, the totality of the circumstances of the case must be carefully considered. The nature of the facts, the degree of suspicion, and the suspect's attitude are all factors relating to the question of volition.<sup>23</sup>

The Court found that even though the period of interrogation was extreme, and the intent of the police in putting up the defendant at the boarding house was not the most desired approach, there was no evidence of compulsion. The defendant went to the inn voluntarily, never complained about the questioning, and never demanded that he be allowed to leave.

This case is instructive in two important respects. The first is that even though a suspect may confess to a crime, an arrest cannot be made until sufficient corroboration is obtained. The second point concerns the issue of voluntary measures. Contrary to the rationale used in the case in the preceding section, the police can in these circumstances legitimately conduct very lengthy interrogations, provided the suspect consents.<sup>24</sup>

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21. *Id.*, 38 Keishu 1259. The defendant was from Tanabasgu Prefecture (one hour from Tokyo by train). After graduating from Nichigawa High School, he moved to Tokyo and was employed by Takashimaya, Inc. in Nihonbashi at the time of this case.

22. *Id.* 38 Keishu 1255.

23. Shibahara, Kuniji, 89 *Juristo* 16, Sept. 1986.

24. This is the majority rule.



#### D. Stop and Question

There are times when it is necessary for the police to stop people on the street and to ask them a few questions concerning a recent crime committed in the vicinity. It is generally thought that citizens have a duty to cooperate with the police in crime prevention and investigation efforts.<sup>25</sup> Of course, the degree to which the police may impose on people must be reasonable.<sup>26</sup> Reasonableness is determined by looking at all of the circumstances of a given case.<sup>27</sup>

In one case, the police stopped a large group of people for four or five minutes in an effort to find a man who had just committed a battery against a police officer.<sup>28</sup> A group of more than 100 members of a Korean youth organization staged a demonstration outside the Korean Embassy in Tokyo. One of the demonstrators struck an officer in the face with his fist, then turned and ran into the crowd. The officer sustained injuries requiring ten days of treatment. The injured officer got a good look at his assailant, but was unable to make an immediate arrest. Soon thereafter, about forty riot police stopped everyone in the crowd in an attempt to find the criminal. In the process, one of the riot police touched a man on the shoulder who had nothing to do with the matter. The man suddenly turned toward the officer and struck him. The first policeman then arrived and confirmed that this was not the man who had hit him. These events took place in the span of four or five minutes.<sup>29</sup>

The first man was never found and the second man was prosecuted. The legality of stopping the entire group was put to the Supreme Court. In holding that the police acted legally, the Court reasoned that even though the freedom of the entire group, which included many innocent third parties, was restricted, the police action was justified under the circumstances. The justification stemmed from the fact that the injury to the first officer was serious, there was a high probability that the police could find the criminal if they took quick action, and the policeman could posi-

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25. The Constitution of Japan:

Article 12. The freedoms and right guaranteed to the people by this Constitution shall be maintained by the constant endeavor of the people, *who shall refrain from any abuse of these rights and shall always be responsible for utilizing them for the public welfare.* [emphasis added].

26. The Police Duty Law provides in relevant part:

Article 2(2). The police, when they have relevant suspicion of criminal activity, may stop and question those persons whom they believe to have knowledge of the offense. (Author's translation).

27. *Id.*

28. (Japan v. Boku) Supreme Court Judgment, Feb. 13, 1984, 38 Keishu 295.

29. *Id.*

tively identify his aggressor.<sup>30</sup>

The Court held that the degree of restraint on the liberty of the group members as a whole was slight, and it was only for a brief period. In addition, the act of touching someone on the shoulder was considered reasonable under the circumstances.<sup>31</sup>

This case is significant because it was the first case decided by the Supreme Court which dealt with the use of physical force against innocent bystanders.<sup>32</sup> Suspicious characters, as well as many innocent people who are not suspected of any wrongdoing, are often stopped and questioned in Japan. This policy is also illustrated by the line of "drunk driver" cases in the Japanese courts.

### E. Traffic Stops

In Japan, the police frequently stop vehicles for a variety of reasons. In some cases they are looking for a violent criminal, while in others they simply want to determine if the late night driver has consumed any alcohol.<sup>33</sup> The propriety of these stops, and the extent to which the police can permissibly impose upon the freedom of the driver, is a question the Supreme Court has considered.

In one case, two policemen were on routine patrol one night when they observed a car running a red light.<sup>34</sup> They stopped the driver, who promptly gave them his driver's license and admitted to running the red light. One of the officers asked the driver to get out of the car and come back to the patrol car. The driver agreed and, as they walked to the patrol car, the officer detected a strong odor of alcohol. He informed the driver that he would be subjected to a breath analyzer examination. At this point, the driver became very angry and upset. He ran back to the car, got in, and attempted to drive away. The other officer reacted quickly and reached into the car through an open window and removed the ignition key. At this, the driver became infuriated and attacked the two policemen. He was charged with both obstructing an officer in the performance of official duties and battery.<sup>35</sup>

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30. *Id.*

31. *Id.*

32. Kitani, Akira, 89 *Juristo* 18, Sept. 1986.

33. As a preventative measure the police in Japan set up semi-road block type stops late at night, and check to see if the driver has consumed any alcohol.

34. (Japan v. Fukuoka) Supreme Court Judgment, Sept. 22, 1978, 32 *Keishu* 1774, 903 *Hanrei Jiho* 104.

35. Articles 95(1) and 204, respectively, of the Penal Code. For Article 95(1), see *supra* note 3. Under Article 204: "A person, who inflicts an injury upon the person of another, shall be punished with penal servitude for not more than ten years or a fine of not

At the district court level the defendant was acquitted. The court held that the police action was inappropriate since the investigation was still in the voluntary stage.<sup>36</sup> The prosecution appealed and the judgment was reversed by the high court. It held the action by the police was proper, and the act of removing the key was necessary to prevent both further crimes and a potential traffic hazard.

The defendant then appealed to the Supreme Court, which held that the Police Duty Law<sup>37</sup> authorizes the police to question and stop people when it is necessary to prevent crime.<sup>38</sup> This law is separate from the Code of Criminal Procedure, and is often relied upon by the courts to support aggressive police activity.<sup>39</sup>

For example, a common method used by the police to catch drunk drivers and to prevent drunk driving in general is the use of late-night check points. These check point stops are based on the Police Duty Law, and all drivers are stopped and questioned to determine if they have consumed any alcohol.

The Supreme Court considered the constitutionality of these types of stops in the following case.<sup>40</sup> Two policemen set up a watch in an area where drunk driving frequently occurred. The police stopped a driver and then discovered from the results of a breath examination that he had more than the legal limit of 0.25 milligrams of alcohol content in his breath.<sup>41</sup> Since he was not intoxicated,<sup>42</sup> the police just gave him a ticket. At the trial he claimed that the evidence was inadmissible because it had been illegally obtained. He claimed that it was illegal and a violation of human rights for the police to stop someone without a suspicion of criminal behavior.<sup>43</sup> Since all drivers were stopped, regardless of their actual driving ability, he contended that the police went too far in their zeal to prevent crime.

The defendant lost at all three levels—district court, high court, and Supreme Court. The Supreme Court held the method em-

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more than 100,000 yen" [approximately \$700 U.S.].

36. See *supra* note 34, *Juristo* 18, Sept. 1986.

37. DANDO, SHIGEMITSU, *JAPANESE LAW OF CRIMINAL PROCEDURE*, Fred B. Rothman & Co. (1965), translated by B.J. George, at 308.

38. In this case, the act of reaching in the window and removing the key was justified based upon this law.

39. Shima, Shinichi, 89 *Juristo* 20, Sept. 86.

40. (*Japan v. Tanaka*) Supreme Court Judgment, Sept. 22, 1980, 34 *Keishu* 272, 977 *Hanrei Jiho* 40.

41. According to the enforcement provisions (*shikorei*) of the Road Traffic Law, Article 44-3, the legal blood alcohol limit is 0.5 milligram/liter of blood.

42. Apparently, the defendant had not consumed such an amount of alcohol as to impair his ability to drive, but did have a sufficient quantity on alcohol on his breath (as determined by the examination) to be guilty of a traffic violation.

43. See *supra* note 40, 34 *Keishu* 275-8.

ployed by the police was a voluntary measure in the sense that all drivers have a duty to cooperate with the authorities. While no specific code provision was cited as a basis for this duty to cooperate, the Court did acknowledge that the Police Duty Law allows the police broad authority for taking action to prevent and investigate crime.<sup>44</sup>

#### *F. Search and Seizure Under the Police Duty Law*

The Police Duty Law is often relied upon by the authorities to conduct searches in the absence of probable cause.<sup>45</sup> When the police feel that criminal activity is in progress, they may take whatever means are reasonably necessary to confirm their suspicions.<sup>46</sup> This can be done without a warrant, even though the police have the opportunity to obtain one.<sup>47</sup>

In one case, a policeman had just received word on his two-way radio that a group of four had just robbed a bank of six million yen.<sup>48</sup> It was near 11 p.m. and the robbers fled the scene. The police conducted a full-scale search of the area and stopped and questioned the defendants, who were driving in the vicinity. The attending officer asked the two men to get out of the car and to open a bowling bag and briefcase they had in their possession. Upon their refusal to open either the bag or the case, they were taken to the police station. The two men remained silent and would not allow the bags to be opened. An hour or so thereafter, one of the policemen lost his patience with the men and forced open the bowling bag without their consent. Inside he found a large amount of cash. The police then used a screwdriver to break open the locked briefcase; they discovered more currency and some money wrappers with the name of the bank in question printed on them. This evidence was confiscated and used against the two at trial.

The Supreme Court held that Article 2(1) of the Police Duty Law gave the police the authority to stop and question anyone in connection with a criminal investigation.<sup>49</sup> In order to validate the warrantless search, the Court extended this doctrine to include searches of personal belongings.<sup>50</sup> The only conditions the Court placed on these types of searches is that the object of the search

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44. *Id.* at 275.

45. Hirakawa, Muneobu, 89 *Juristo* 24-25.

46. *Id.*

47. (Japan v. Sakai) Supreme Court Judgment, June 20, 1978, 32 *Keishu* 670, 896 *Hanrei Jiho* 14.

48. *Id.* The amount in question was approximately \$22,000 at the time.

49. *See supra* note 47, 32 *Keishu* 675-76.

50. *Id.* at 676-67.

must have some connection with the criminal investigation. For example, the search of a purse in connection with an investigation of a theft of a stereo probably would be impermissible. As an ideal, the Court suggested that every effort should be made to obtain the owner's consent prior to a warrantless search, but this is not absolutely required.

In principle, Article 35 of the Constitution guarantees the right not to have one's possessions searched or seized without a warrant.<sup>51</sup> However, such a right obviously is not absolute. The Court made it very clear that the rights of the individual must yield to the public interest in situations similar to this one. Here, the police dealt with a dangerous felony (a hunting rifle and mountain knife had been used to rob the bank), and a quick arrest and fast action were required. Therefore, the act of opening the bowling bag was not an egregious violation of the defendant's rights, and it did not tip the balance of justice in favor of the criminal.<sup>52</sup>

This is a leading case involving warrantless searches in Japan; it has been interpreted as a sign of the Supreme Court's pragmatic attitude toward criminal suspects and the exclusion of evidence. In America, the rights of the individual suspect (as well as the rights of the general populace) are often given as reasons for condemning invasive police conduct and excluding otherwise valuable evidence. In Japan, the "rights of the general populace" are interpreted to include not merely the right to privacy, but also the right to live in a safe community. The latter right is considered by the Supreme Court to be of equal (if not paramount) importance when compared with the individual's right to be free from official invasion of privacy.<sup>53</sup>

While it may appear that people in Japan enjoy less freedom from official interference when compared with people in the United States, there are certain areas of personal privacy where the Japanese enjoy rights not recognized in American law. For example, in principle, people in Japan have a right not to be photographed.<sup>54</sup>

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51. The Constitution of Japan, Article 35:

(1) The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the places to be searched and things to be seized or except as provided by Article 33.

(2) Each search or seizure shall be made upon separate warrant issued by competent judicial officer.

52. *Supra* note 50, 32 Keishu 688.

53. *Japan v. Hasegawa*, note 56, *infra*.

54. *Id.*; see also Tokyo District Court Judgment, June 27, 1974, 759 Hanrei Jiho 16.

### G. *Photographing By the Police*

In Japan, the individual enjoys some rights not known in most other countries. For example, Article 13 of the Constitution, which guarantees the dignity of the individual and the right to life, liberty and the pursuit of happiness, has been interpreted to include a constitutional right not to have one's face photographed by the police.<sup>55</sup> However, as is typical of most rights, there are exceptions.

For example, in one case the defendant was participating in a campus demonstration and his face was photographed by a plain-clothes policeman at the scene.<sup>56</sup> The defendant objected to this, and when the policeman failed to identify himself upon the defendant's request, the defendant struck the policeman in the jaw with a flagpole. The injuries required one week of medical care.

The defendant was tried and convicted of obstructing an officer in the performance of official duties. He objected, on the grounds that the policeman had violated his right not to be photographed. The Court recognized the general right not to be photographed,<sup>57</sup> but held that there were exceptions. It held that the act of taking someone's photograph is not an act of compulsion, and must generally be tolerated, provided that it remains within a certain socially accepted level. Using a reasonable standard test, the Court stated that it is proper for the police to take pictures of a crime in progress without consent.<sup>58</sup> The Court's reasonable approach and pragmatic attitude are characteristic of these cases.<sup>59</sup>

Another example is the use of speed detection cameras in Japan. These cameras are designed to photograph the front license plate of any normal-sized passenger car when the car exceeds a certain rate of speed. The driver's face, as well as the face of anyone sitting near the driver, is photographed. In one case, the defendant was photographed when he drove his car 40-50 km/hr above the posted speed limit.<sup>60</sup>

As a defense, he made the following four points:

1) The taking of a photograph by a speed camera was a violation of privacy and the right not to be photographed guaranteed by Article 13 of the Constitution. As a part of this argument, the defendant asserted that these cameras were also a violation of the

55. (Japan v. Hasegawa) Supreme Court Judgment, Grand Bench, Dec. 24, 1969, 23 Keishu 1625, 577 Hanrei Jiho 18.

56. *Id.*

57. *Id.*

58. *Id.* at 23 Keishu 1627.

59. Morii, Akira, 89 Juristo 26, Sept. 86.

60. Supreme Court Judgment, Feb. 14, 1986, 1186 Hanrei Jiho 149, 591 Hanrei Taimuzu 31. (Case name not published.)

freedom of association found in Article 21 of the Constitution,<sup>61</sup> because anyone sitting next to the driver was also photographed.

2) The cameras were a violation of equal protection because they could not be used to photograph large-sized vehicles or motorcycles (which only have rear license plates).

3) The defendant's rights were violated because no opportunity exists in these situations to defend oneself against such evidence.

4) The cameras constituted entrapment, in that there was no warning or notice of their existence.<sup>62</sup>

The Supreme Court found all of these contentions without merit.<sup>63</sup> It noted that the camera was a reasonable way to detect crime in progress and to preserve such needed evidence. The Court adopted a no-nonsense approach to criminal investigation. Simply stated, if the device used by the police is effective in combating crime, the Court will usually support it. The Court will balance the interest of the particular defendant with the interest of the general public (which is seen not merely in terms of protecting the individual's rights from governmental intrusion, but also, and more emphatically, in protecting the right to live in a safe community).

#### *H. Tape Recording Private Conversations*

The use of wire tapping is an issue in Japan that has yet to be definitively resolved by either the courts or the legislature. There is no provision in the Code of Criminal Procedure authorizing the government to obtain a warrant for a wire tap. Moreover, the Supreme Court has yet to issue an opinion dealing with this subject. Nevertheless, scholars in Japan have come up with three different opinions. The first group believes that wire tapping is permissible as a "voluntary measure," provided the methods used are reasonable.<sup>64</sup> The second group holds that wire tapping is a compulsory measure and as such must be conducted pursuant to a warrant.<sup>65</sup> However, since there is provision in the code authorizing the issuance of a warrant, until the Diet<sup>66</sup> passes such a law, wire tapping

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61. The Constitution of Japan:

Article 21.

(1) Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

62. *Id.* note 61, 1186 Hanrei Jiho 149-51.

63. *Id.*

64. Hisaoka Yasunari, 89 Juristo 28, Sept. 86.

65. *Id.* at 28-9.

66. The Diet is the highest organ of state power in Japan and is the sole law-making organ of the State, (Const. Art. 41).

is unlawful. The third group<sup>67</sup> feels that wiretapping is neither a search nor a seizure, therefore, it is permissible provided there is authorizing legislation and that any wire tapping is done in manner consistent with the due process clause of Article 31 of the Constitution.<sup>68</sup>

It is possible to predict the manner in which the courts might resolve a wire tapping case from an examination of a case dealing with recorded conversations.<sup>69</sup> A man planned to kill his daughter in order to collect insurance money. The main evidence used against him at trial was a recorded conversation he had with the man he hired to carry out the killing. The police had negotiated with the trigger man for a tape of this conversation. However, when this man testified at the trial, he claimed the police had bribed him to record the conversation, and that he had been offered a reward of 50,000 yen. To counter this testimony, the prosecutor offered a second tape of a conversation between the police and this witness. This tape clearly showed the hired gun had initially offered to sell the tape to the police for the money, and the recording of the first conversation had not been prompted by the authorities.

Defense counsel objected to the introduction of both tapes. He claimed that the recordings were illegally obtained because they were made without the consent of one of the parties to the conversation. The Court disagreed and allowed the evidence, and the defendant was convicted. Generally, the court held, when there is gross illegality in the method used to obtain evidence, even if it is intended only as impeachment evidence, it may not be used in court.<sup>70</sup> However, the court distinguished the circumstances here from cases of wire tapping, which it presumably saw as a more questionable and improper method. Without clearly setting forth the reason for its opinion, the court simply held that the act of recording these conversations was reasonable under the circumstances.<sup>71</sup>

In Japan, if one of the parties to a conversation agrees to allow it to be recorded there is no problem. Both of the tapes above were of this nature. But what about a conversation which is recorded

67. *Supra* note 65, 89 Juristo 28-9.

68. The Constitution of Japan, Article 31: "No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law."

69. Matsue District Court Judgment, Feb. 2, 1982, 1051 Hanrei Jiho 162, 466 Hanrei Taimuzu 189. (Case name not published.) As noted in the discussion below, the Court addressed the issue of wire tapping only peripherally in its opinion.

70. *Id.*, 1051 Hanrei Jiho 162-4.

71. *Id.*



without the consent of *either* of the participants? This remains an open question in Japan. If the police are making the recording, there is a strong possibility the courts would hold the police action unconstitutional as a violation of the right to privacy, and as unauthorized by the code because no provision allows for it.<sup>72</sup> This would be equally true for tapes made by private citizens.<sup>73</sup> It is quite probable that the final answer would depend on the nature of the case. If a violent criminal were tried for a heinous murder, the courts would probably allow the wire tapping evidence to be admitted. The rationale would involve balancing the need for the evidence with the degree of the violation of the right to privacy, while taking into account the gravity of the offense. As the cases discussed above indicate, the court would be likely to see a greater interest in the conviction and punishment of the criminal than the protection of privacy in these instances.

## II. COMPULSORY MEASURES: ARREST, SEARCH AND SEIZURE, AND WARRANTS

### A. *Arrest, Search and Seizure and Warrants*

An arrest, search, or seizure, with or without a warrant, is a compulsory measure. These measures sometimes include the use of force and are always related to the restriction of movement or the limitation of rights. The police in Japan are not authorized to take any action unless it is provided for by law.<sup>74</sup> Moreover, in principle, a warrant must be issued by a judge prior to utilizing a compulsory measure. In certain cases the police can dispense with the warrant requirement if certain conditions are present. For example, an arrest may be made without a warrant in the case of an emergency,<sup>75</sup> or a so-called flagrant offense.<sup>76</sup> A "flagrant offense"

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72. *Supra* note 65, 89 Juristo 28-9.

73. A violation of a right is still a violation of a right, whether it is carried out by a government official or a private individual.

74. Article 197 of the Code of Criminal Procedure:

(1) With regard to an investigation, a necessary examination may be made in order to attain the object thereof: Provided, that compulsory measures may not be taken unless otherwise stipulated in this Code.

(2) In regard to an investigation, a report on necessary matters may be requested of public offices, or public or private organizations.

75. Article 210 of the Code of Criminal Procedure:

(1) A public prosecutor, a secretary of the public prosecutor's office, or a policeman may, when there exists sufficient reason to suspect that the suspect has committed a crime punishable by death, life imprisonment, or penal servitude or imprisonment for a maximum period of more than three years and exigency is required, and the request for a warrant for arrest of a judge may not be obtained, arrest him and inform him of the reasons therefor. In such a case, the procedure for the requesting of a warrant for arrest shall be taken immediately. When a warrant is not issued, the suspect shall be released.

occurs when a suspect is caught in the act of committing the offense.<sup>77</sup>

In Japan, an arrest can be made only for serious offenses.<sup>78</sup> A serious offense is classified as any offense wherein a person can be punished with thirty days or more of imprisonment, or fined more than 8000 yen.<sup>79</sup> When a flagrant offense occurs, anyone can make an arrest.<sup>80</sup> But how flagrant must the offense be before an arrest can be made without a warrant? The police do not actually have to be present at the scene of the crime when it occurs, provided they arrive shortly thereafter. For example, in a 1966 case the Tokyo police suspected that an illegal bookmaking business was being conducted at a certain residence.<sup>81</sup> They set up a stakeout nearby and observed a delivery man for a local restaurant entering and leaving the premises without making any deliveries. The police were suspicious and questioned the man when he was about 220 yards from the residence. He admitted he had just placed a bet with a man inside. The police entered the residence and found another gambler placing a bet with the partner of the man with whom the delivery man had placed his bet. The man suspected of collecting the bet from the delivery man was in an adjoining room dressed in a robe. He was not seen accepting a bet, but was, nevertheless, arrested. He protested his arrest, claiming that it was improper because he had not been observed in the act of committing an offense, and he did not, therefore, qualify as a flagrant offender.<sup>82</sup>

The Court rejected this argument, holding that the short lapse of time between the time when the bet was placed and the time of

(2) The provisions of Article 200 shall apply *mutatis mutandis* to the warrant for arrest as mentioned in the preceding paragraph.

76. Article 212 of the Code of Criminal Procedure:

(1) Any person actually committing or having just committed an offense shall be called a flagrant offender.

(2) In case it is deemed clearly that any person coming under any one of the following items has just committed an offense, he shall be deemed to be a flagrant offender:

(a) In case any person is pursued as an offender with hue and cry;

(b) In case any person is carrying with him stolen goods, arms or other things which appear to have been used for an offense;

(c) In case there is a conspicuous trace of an offense on the body or clothes;

(d) In the case where any person who is challenged attempts to run away.

77. *Id.*

78. In Japan there is no felony-manslaughter distinction; however, Japanese law does distinguish serious and minor offenses (Juzai—heavy crime and Keizai—light offenses).

79. Articles 18 of the Penal Code and 199 of the Code of Criminal Procedure.

80. Article 213 of the Code of Criminal Procedure: "Any person may arrest a flagrant offender without a warrant of arrest."

81. (Japan v. Takahashi) Tokyo High Court Judgement, June 28, 1966, 195 Hanrei Taimuzu 125.

82. *Id.*, 195 Hanrei Taimuzu 125-6.

the questioning of the delivery man was short enough to remain within the definition of a flagrant offense.<sup>83</sup> The trail was still hot and the police were justified in making an arrest without a warrant. Moreover, the Court focussed on the nature of the offense here, noting that the ordinary person who observes the placing of a bet may not actually understand that something illegal has occurred at all. This is different from other types of offenses, like robbery or rape, for example. Anyone who observes the latter offenses knows that a crime has been committed. However, because of the unique nature of gambling offenses, the court held that the police can arrest a suspect based on the information of others and without actually witnessing the crime.<sup>84</sup> All that is required in these situations is sufficient suspicion based on reliable information. In these cases, the police can make an arrest without a warrant.

Arrests are sometimes made with questionable motives. The police may arrest a suspect for one crime with the intent to question him about a different, usually more serious, offense. This will be examined in the following section.

#### B. Arrest for a Different Crime—*Bekken Taiho*

A common technique used by the police in Japan is called the *bekken taiho*. The phrase refers to the practice of arresting a suspect for a minor offense with the underlying purpose of interrogating him about a more serious crime. This practice violates the defendant's right to be informed of the reason for his arrest. Under Article 34 of the Constitution, the suspect must be informed of the crime of which he is suspected at the time of his arrest.<sup>85</sup> The courts have held that the police arrest of an individual for one crime with the intent of interrogating him about a different offense is a gross violation of constitutional rights.

For example, in one case involving a riot at a fair in the city of Kobe, a taxi was overturned and set ablaze in front of the city hall.<sup>86</sup> A group gathered and began to push and rock a large police vehicle, which rolled over and killed a news reporter standing nearby. The police suspected two individuals were primarily re-

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83. *Id.*

84. *Id.*; see also Hama, Kunihisa, 89 *Juristo* 34, Sept. 86.

85. The Constitution of Japan, Article 34: "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."

86. Osaka High Court Judgment, April 19, 1984, 37 *Kosai Keishu* 98, 534 *Hanrei Taimuzu* 225. (Case name not published.)

sponsible for the killing, but they had insufficient evidence to make an arrest. Instead, the police arrested the two for obstructing an officer in the performance of official duties. The police then began to interrogate both men about the news reporter's death. Both men confessed during this interrogation.

The defendants felt that their rights had been violated and appealed to the Kobe District Court. The court accepted their argument and held that the confessions were inadmissible evidence because they were obtained through unconstitutional police tactics. The Osaka High Court subsequently affirmed, stating that when one is arrested and confined in relation to fact A and is questioned in regard to fact B, it is the same as if he had been arrested for B.<sup>87</sup> Taking into account the type of crime, the degree of criminality, the amount of objective evidence related to the second offense, the necessity for confinement, and the subjective intent of the interrogator, the Court must determine in situations like this one what the proper limits of the practice are.<sup>88</sup> It is clear that when no evidence of another crime exists, questioning of the suspect pertaining to any other offense is improper.

Although the practice of *bekken taiho* has been condemned by both the courts and scholarly opinion, it still remains a favorite police maneuver.

### C. *Right to Counsel During an Investigation*

In Japan, a suspect in a criminal case has virtually no right to legal counsel during the investigative stage of a case. A distinction exists between parties to litigation and suspects, and the investigative stage is something completely different from the trial. Until a person is formally indicted, there is no litigation, and since there is no litigation there can be no adversary relationship between the parties.<sup>89</sup>

Another point that seems quite unfair and one-sided is the fact that the prosecutor controls the time, place and date of all meetings between counsel and client.<sup>90</sup> In general, the Japanese Bar has been rather unassertive in this area and has failed to demand fairness and equality from the courts in regard to client counsel-

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87. *Id.*, 37 *Kosai Keishu* 100.

88. *Id.* at 101.

89. *See supra* note 37, at 347.

90. Article 39(3) of the Code of Criminal Procedure:

A public prosecutor, a secretary of the public prosecutor's office or a policeman may, in cases where it is necessary for the investigation, designate the date, place, and time concerning an interview with the suspect, only prior to the institution of public prosecution: provided that such designation shall not unreasonably restrict the rights of the suspect to prepare for defense.

ing. However, one attorney was ambitious enough to sue the government for interfering with his right to meet with his client. Unfortunately, he lost his case at the Supreme Court level.<sup>91</sup>

Here are the facts of that particular case. On the morning of April 25, 1965, an individual was arrested<sup>92</sup> and confined. An assistant investigator at the police station contacted the suspect's attorney and apprised him of the situation; he also informed the attorney that the latter would not be allowed to meet with his client unless he had a permission slip signed by the prosecutor. The two men argued about the necessity for such a document, and the attorney declared that it was a violation of Article 39(1) of the Code of Criminal Procedure to impede free meetings with his client.<sup>93</sup>

When the attorney arrived at the police station, he attempted to go to the interrogation room where his client was being held. An officer stopped the attorney from approaching the interrogation room, and a small disturbance occurred. The attorney was treated for his injuries for the next four days. However, he was undiscouraged, and continued to pursue the issue through established procedures. That evening, he finally obtained the permission slip to meet with his client. But this was no great victory, for he was only allowed the customary ten minutes of meeting time and could not conduct any meaningful attorney-client counseling.

Outraged by this system, the attorney sought compensation from the government in a civil suit. He asked for 200,000 yen in his complaint, and the district court awarded a judgment of 150,000 yen.<sup>94</sup> The government then appealed and the high court reduced this amount to 100,000 yen.<sup>95</sup>

Rather surprisingly, the Supreme Court reversed this decision and the attorney was not allowed any damages.<sup>96</sup> The Court, in its decision, emphasized the fundamental nature of the right to counsel, but this was only lip service, according to one scholar's opinion.<sup>97</sup> The Court stated that, from the attorney's point of view, it

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91. (Sugiyama v. Osaka) Supreme Court Judgement, July 10, 1978, 32 Minshu 820, 903 Hanrei Jiho 20.

92. The name of the offense is not given in the information available.

93. Article 39 of The Code of Criminal Procedure:

The accused or the suspect placed under physical restraint may, without any official being present, interview with his counsel or any other person (in regard to a person who is not a lawyer, this shall apply only after the permission as mentioned in Article 31, paragraph 2 has been obtained), who is going to be his counsel upon solicitation of the person entitled to appoint a counsel, and may receive documents or articles therefrom.

94. *Supra* note 91, 32 Minshu 842.

95. *Id.*

96. *Id.* at 863.

97. Based on the author's personal interview with His Honor Yasuo Watanabe, for-

cannot be denied that the right to meet with a client is very important. However, in order to regulate the investigation and interrogation of criminal suspects, the prosecution has been given broad discretion to control contact with anyone on the outside, including legal counsel.<sup>98</sup>

#### *D. Seizure*

Before any item can be seized, a certain degree of necessity must exist. How much necessity is required and who is to make such a determination is a question that has been raised in Japan. It is well known that prosecutors enjoy broad discretion and authority over criminal investigation. Does this power give prosecutors unbridled control over the seizure of evidence? The problem is exacerbated by the existence of two conflicting provisions in the code. One provision states that the police or prosecutor may seize evidence when necessary in connection with a criminal investigation.<sup>99</sup> Another provision states that the courts may seize any evidence when it is necessary, and may order the owner of certain items to produce them for inspection.<sup>100</sup>

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mer Supreme Court Clerk and retired High Court Judge with more than twenty-five years on the bench (Hokkaido University, May 1989).

98. Based on the author's discussion with members of the Sapporo Bar Association at Hokkaido University during the summer of 1987. Attorneys in reality are usually allowed to see their clients for ten to fifteen minutes once every three days, and the attorneys have time only to pass along messages from the suspect's family.

99. Article 218 of the Code of Criminal Procedure:

(1) A public prosecutor, a secretary of the public prosecutor's office, or a policeman may, when it is necessary with respect to the investigation of an offense, make a seizure, search, or inspection under a warrant issued by a judge. In the case of a body examination, it shall be conducted pursuant to a warrant for examination of the body.

(2) Taking the finger or foot prints of the suspect under arrest, measuring the height or weight thereof, or taking the picture thereof shall be made without warrant as mentioned in the preceding paragraph unless the suspect is naked.

(3) The warrant as mentioned in paragraph 1 shall be issued upon the request of a public prosecutor, a secretary of the public prosecutor's office, or a police official.

(4) A public prosecutor, a secretary of the public prosecutor's office or a police official shall, in making a request for a warrant for examination of the body, set forth the reasons necessary for such an examination of the body, sex, and health condition of the person subjected to a body examination, and such other matters as prescribed in the rules of the courts.

(5) A judge may stipulate such condition as deemed appropriate in regard to a body examination.

100. Article 99 of the Code of Criminal Procedure:

(1) The court may, when it is deemed necessary, seize any evidence or article considered to be confiscated: provided, that nothing therein contained shall apply in such cases as particularly specified. [sic]

(2) The court may designate article or articles to be seized, and order the owner, possessor, or custodian thereof to produce such article or articles.

The Supreme Court resolved the issue in a 1969 decision.<sup>101</sup> A demonstration occurred at a university campus in Tokyo and the university photography club took 16 mm. footage of it. The police, believing that the film contained evidence of a crime, obtained a warrant for the film and seized it from the club's office. The following day, the club's representative brought an action for the return of the film, and claimed that Article 21 of the Constitution (which guarantees freedom of the press) protected the film from seizure.<sup>102</sup> The district court held that the seizure was unlawful, using a balancing test to decide the issue. It reasoned that when police attempt to seize evidence belonging to a third party, they must be able to demonstrate that the evidence is extremely necessary for the investigation.<sup>103</sup> In this case, the necessity for the evidence was not shown and the rights of the club were vindicated.

The prosecution appealed, claiming that the trial court had grossly violated proper protocol. It argued that the decision to seize evidence of crime should properly be left to the discretion of the police or prosecutor, and that the courts did not have the authority to overturn a policeman's decision to seize certain items. The Supreme Court dismissed this argument. It held that it is the courts, not the police or prosecution, which decide the question of necessity.<sup>104</sup>

In this case a warrant had been issued, but in many cases the police search for and seize evidence without one. This is usually done incident to an arrest, but, as we shall see in the next section, the police can abuse this warrantless search exception.

### *E. Search Incident to Arrest*

In Japan, an arrest can be made with or without a warrant, depending on the circumstances. In principle, if the arrest is made without a warrant, any search or seizure incident to it must be conducted "at the very spot" of the arrest.<sup>105</sup> This language has

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101. (Prosecutor v. Tokyo District Court), Supreme Court Judgment, March 13, 1969, 23 Keishu 153, 548 Hanrei Jiho 22.

102. The Constitution of Japan, Article 21, provides:

Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

103.

104. *Id.*, 23 Keishu 155.

105. Article 220 of the Code of Criminal Procedure provides:

In case it is necessary at the time when a public prosecutor, a secretary of the public prosecutor's office, or a policeman arrests the suspect in accordance with the provisions of 199, or arrest a flagrant offender, he may take the measures necessary in accordance with the provisions of Article 210.

been interpreted liberally by the courts. For example, in one case, several students were arrested during a demonstration at a university campus.<sup>106</sup> They were taken to a police station some four hundred meters away, and forty minutes later they were searched. As a result of this search, the police seized copies of the group's information bulletin, and their armbands, helmets, gloves and other personal effects.

The students argued that the search and seizure of their possessions was not authorized by statute and was, therefore, illegal; it had not been conducted at the scene of the arrest. The Tokyo High Court rejected this contention and held that there is an exception to the "on the spot" requirement.<sup>107</sup> If the police find it necessary (to avoid confusion at the scene of the crime), they may transport the subjects to the station and carry out a search there, seizing in the process those items relevant to the crime.

In principle, searches made incident to an arrest should be limited both to the immediate vicinity of the arrest and the discovery of guns and other dangerous weapons.<sup>108</sup> However, this principle is seldom observed.

For example, in a 1983 case, a court approved of a full-scale search conducted without a search warrant.<sup>109</sup> Late at night on September 27, 1982 in Sapporo, a man was at a bar with his girlfriend and the girlfriend's younger sister. The two girls began to argue; at that point, the man interfered in the conversation and slapped the younger sister on the face with his open hand. She filed a complaint for battery.

After checking the man's background, the police discovered he had a history of drug usage and was a member of a local gang. Nearly two months after the woman's complaint was filed, the police obtained an arrest warrant for battery, and went to the man's apartment to execute it on the morning of November 18. When they entered the premises, the man was still asleep on his futon, a Japanese mattress used for sleeping. The police noticed a small box under the head of the futon. They then arrested the defendant and conducted a warrantless search; at this point they opened the little box and found drugs. The police then conducted a full-scale

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(1) To search the suspect by entering into a dwelling or residence, building, or vessel under guard;

(2) To seize, search or inspect *at the very spot of the arrest*. [Emphasis added].

106. Tokyo High Court Judgment, November 15, 1978, 31 Kosai Keishu 265. (Case name not published.)

107. *Id.*, 32 Kosai Keishu 266-8.

108. Hirose, Kenji, 89 Juristo 54-5, Sept. 86.

109. Sapporo High Court Judgment, December 26, 1983, 1111 Hanrei Jiho 143. (Case name not published.)



search of the entire premises.<sup>110</sup>

At the trial the defense counsel argued that the police had conducted an illegal search that exceeded the permissible scope for searches made incident to an arrest.<sup>111</sup> It was clear that the police waited for the most opportune time to make the arrest, so a search could be conducted of the entire apartment. Of course, the arrest was made for the crime of battery, not for a drug offense. Yet the court allowed the evidence to be used. In doing so, it completely ignored the principle set forth above. It used a balancing test to reach this result. The court held that the degree of invasion here was outweighed by the necessity for the evidence at trial, for without it the suspect could not be convicted for the drug violation.<sup>112</sup>

The use of the balancing approach to the exclusion of illegally seized evidence has consistently favored the authorities. While the courts ostensibly defer to Japan's exclusionary rule, in fact *no* Supreme Court decision has ever excluded tainted evidence. The Court has always found the requisite degree of necessity does exist, and the search is upheld.

The ploy used by the police in this case may be shocking to some, but it is a technique which is often employed. In Japan, there is no "shocks the conscience" test for police investigations, and the authorities are allowed to obtain evidence in many ways. The following section covers this area.

#### F. *Extraction of Body Fluids*

In Japan, the police can order the extraction of body fluids from a suspect, provided they have the necessary warrant.<sup>113</sup> If the suspect fails to cooperate, this can be done by force. For example, in one case a suspected drug user was asked three times for a urine sample.<sup>114</sup> He refused each time. The police took the suspect to a hospital where 100 cc. of urine was forcibly extracted from the suspect by means of a catheter.

This evidence was used against the man at trial. He objected, claiming the police had overstepped the bounds of common decency, and the forced extraction of urine was a gross violation of his human rights. The trial court held that there was sufficient showing of necessity by the government, and the evidence was

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110. *Id.* at 144-46.

111. *Id.*

112. *Id.*

113. Article 139 of the Code of Criminal Procedure: "The court may, when it is deemed that non-penal fines or penalty will be ineffective, order examination of a body over the person's objections."

114. (Japan v. Goto) Supreme Court Judgment, October 23, 1980, 34 Keishu 300, 980 Hanrei Jiho 17.

used to convict the defendant.

The Supreme Court upheld the conviction, stating that the forced extraction of urine did not exceed permissible limits of decency because it had been carried out in a hospital under medically safe conditions by a doctor.<sup>115</sup> Many scholars reacted to this decision and wrote articles critical of the Court's reasoning and decision.<sup>116</sup>

### CONCLUSION

In this article, I have attempted to introduce English-speaking readers to some of the important aspects of Japanese criminal procedure and investigation. Some of the court decisions examined in this paper may seem strange to those unfamiliar with Japanese law enforcement techniques. The methods used by the police would not be tolerated in many other countries. However, though these methods appear highly questionable, it is also important to understand them in terms of an overall world view. Arguably, this system of investigation is one of the factors which has helped Japan to remain a relatively safe society.

The concept of individual liberty is not as potent in Japan as it is in other countries. In the United States, the idea of freedom involves the delicate balance between governmental interference and the autonomy of the individual. However, in Japan, the concept of individual freedom is of secondary importance to the perceived necessity for public safety and social control. Consequently, the Japanese procedures are not viewed as an extreme affront to individual liberties, and perhaps this helps to explain the conservative holdings in the cases above.

The public interest in Japan is a broad concept, and the courts allow the police considerable latitude in their fight against crime. While the Japanese place too much reliance on the confession, obtaining one is nevertheless viewed as an important first step toward the rehabilitation of a criminal offender. In the context of Japanese culture, if the suspect is truly the person who committed the crime, it is thought that the extraction of a confession (even by intimidation) will help the individual to feel remorse for his bad behavior, and encourage him to conform with standards of law-abiding behavior thereafter.

Whether the issue is one related to voluntary measures or one related to compulsory measures, the conservative stance of Japanese courts is readily apparent. This conservative trend is likely to

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115. *Id.* at 304-07.

116. 89 *Jurisuto* 57 (1986) *Criminal Procedure Hakusen Series*.

continue for some time, as the reasoning and decision-making process described in these cases is only a particular manifestation of a general social perspective.