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THE "RIGHT OF SILENCE" IN JAPANESE LAW

B. J. GEORGE, Jr.*

INTRODUCTION

There are three great watersheds in the development of Japanese law: the reception of Chinese legal ideas in the eighth to tenth centuries,[1] the adoption of Western European codes between 1880 and 1920,[2] and the importation of Anglo-American concepts after World War II. The reception of ideas from the common law system may eventually have as great an impact on the Japanese legal system as the earlier importations and adaptations. Some of the legal innovations imposed by SCAP, such as the laws regulating monopolies,[3] have had a substantially different impact than SCAP officials contemplated. Others, such as the creation of an independent judiciary,[4] are so well established that probably nothing short of revolution or invasion will overthrow them. A few are still in the process of useful adaptation to the whole of the Japanese judicial and legal system. Among the latter, the right of silence *(mokuhiken)* and its companion, the right to refuse to answer specific questions *(shōgen kyozetsuken)*, are prime examples.

The concept of a right of silence, particularly in the case of an accused person, was totally unknown in traditional Japanese law. Tokugawa procedure made no clear-cut distinction between civil and criminal or judicial and administrative proceedings; those embroiled in disputes were expected, indeed required, to make full revelation of everything which bore on the propriety of their activity.[5] In what today would be a criminal proceeding, the defendant was expected to respond to questioning; and he could be tortured until he made the requisite statement.[6] During the first decade or two of the Meiji period (1868-1912) some changes were made; the use of torture as an investi-

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[1] R. ISHII, JAPANESE LEGISLATION IN THE MEIJI ERA 4-7 (Chambliss trans. 1958) [hereinafter cited as ISHII]; Y. NODA, INTRODUCTION AU DROIT JAPONAIS 32-36 (1966).

[2] ISHII 9-11; NODA, *supra* note 1, at 49-69.

[3] *Cf.* Ariga & Rieke, *The Antimonopoly Law of Japan and Its Enforcement*, 39 WASH. L. REV. 437 (1964).

[4] *See* J. MAKI, COURT AND CONSTITUTION IN JAPAN xviii-xix, xxxix-xlvi (1964).

[5] *See, e.g.*, 1 D. HENDERSON, CONCILIATION AND JAPANESE LAW 128-67 (1965) for an illustrative case, a translation of a matter which would be viewed as civil in nature today.

[6] ISHII 321-25; Abe, *Self-Incrimination—Japan and the United States*, 46 J. CRIM. L.C. & P.S. 613-16 (1956).

gative device was prohibited and evidence other than a confession had to be adduced before a conviction could be entered.[7]

With this background, it was understandable that first French and then German criminal procedure codes were used as the models for the Codes of Criminal Procedure of 1890 and 1922. French and German law contemplated three stages in procedure: (1) investigation by police and public procurator; (2) judicial investigation by a special investigating magistrate *(juge d'instruction; Untersuchungrichter)* based on documents collected and forwarded by administrative officials, terminating in a decision whether to move the case on to the full court for trial; and (3) trial itself, conducted initially on the basis of the documents already examined by the investigating magistrate.[8] No break with Japanese traditions was required in order to adopt a foreign code under which the "suspect" *(higisha)* in the first stage and the "accused" *(hikokunin)* in the second stage constituted a primary source of information and proof. Accordingly, the public procurator could summon the suspect, or other person having information, to his office for questioning.[9] The suspect was under no enforceable duty to answer during this first stage.[10] During the second stage the powers of the investigating magistrate were greater; he had the duty to question the accused and could not terminate the preliminary investigation until he had done so.[11] At the trial of the case, if the examining magistrate forwarded the matter for trial, the court was again empowered to ask the defendant about the circumstances of the case and about his responses to the material adduced against him.[12]

The new Constitution of 1946 required that these procedures be changed. Article 38(1) provides that "no person shall be compelled to testify against himself" *(nambito mo, jiko ni furieki na kyōjutsu o kyōyō sarenai)*. The pattern for this provision quite clearly is the fifth amendment of the United States Constitution and its state counter-

[7] Ishii 324; S. Dando, The Japanese Law of Criminal Procedure 14 (George trans. 1965) [hereinafter cited as Dando].

[8] *See* Keedy, *The Preliminary Investigation of Crime in France,* 88 U. Pa. L. Rev. 385, 692, 915 (1940); Ploscowe, *The Investigating Magistrate (Juge D'instruction) in European Criminal Procedure,* 33 Mich. L. Rev. 1010 (1935); Schmidt, *Introduction* to 10 The American Series of Foreign Penal Codes: The German Criminal Procedure Code 1-4, 10-13, 18-19 (Niebler trans. 1965).

[9] Japanese Code of Criminal Procedure of 1922 art. 253.

[10] S. Ono, Keijisoshōhō kōgi (Lectures on the law of criminal procedure) 356-57, 390-91 (1933).

[11] Japanese Code of Criminal Procedure of 1922 art. 300; *see* Ono, *supra* note 10, at 398-99. Similar provisions had been contained in Article 93 of the Japanese Code of Criminal Procedure of 1890.

[12] Japanese Code of Criminal Procedure of 1922 arts. 338, 339, 345, 347. *See* Ono, *supra* note 10, at 450-51.

parts.[13] It is evident that the law relating to privilege against self-incrimination is developing its own special form in Japan, although Japanese decisions since 1946 reflect American law in many respects.

I. "Witness" vs. "Defendant" Privilege

Privilege doctrine in American law usually stresses the difference between the defendant privilege and the witness privilege. The former prohibits the defendant in a criminal case from being called at the instance of the state. The privilege is waived through the defendant's electing to become a witness in his own behalf. By the latter, the witness can only refuse to answer specific questions that are incriminating. Waiver through volunteered answers extends only to the subject matter opened up by the particular question.[14]

Under Japanese law, however, the distinction is usually drawn in terms of the right to remain absolutely silent, as contrasted with the right to refuse to answer specific questions. The primary reason for stating the issue in this way is that under the present Code of Criminal Procedure the defendant is not considered competent as a witness.[15] This in turn is part of a broader premise, reminiscent of Anglo-American law down to the early nineteenth century, that parties to litigation are not competent as witnesses.[16] This means that the defendant cannot be asked to give "testimony" in the formal sense, cannot be subjected to the other requirements applicable to an ordinary witness,[17] and cannot be prosecuted for the crime of perjury for any false statements he may choose to make.[18] In one sense, therefore, Article 311(1) rests more on the premise of want of witness competency than it does on the concept of a defendant privilege.

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[13] *See generally* 1 Hōgaku Kyōkai (Jurisprudence Association), Chūshaku Nihonkoku Kempō (Commentary on the Constitution of Japan) 659-64 (1953); Keijihōgaku Jiten (Encyclopedia of criminal law and procedure) 759 (T. Takikawa ed. 2d ed. 1962); Keijihō Jiten (Encyclopedia of criminal law and procedure) 250-51 (R. Hirano, K. Naito & H. Tamiya ed. 1961); M. Katsura & S. Takeda, Mokuhiken to Shōgen Kyozetsu Ken (The right to silence and the right to withhold evidence), in 9 Keijisoshōhō, Sōgō Hanrei Kenkyū Sōsho (Comprehensive case study series: criminal procedure law) (1961) [hereinafter Katsura & Takeda]; Tamiya, *Hikokunin to higisha no mokuhiken* (The accused's and suspect's right of silence) in 1 Keijisoshōhō Kōza (Collected essays on the law of criminal procedure) 71 (1963) [hereinafter cited as *Tamiya*].

[14] C. McCormick, Evidence 257-59 (1954) [hereinafter cited as McCormick]; 8 J. Wigmore, Evidence §§ 2252, 2268 (McNaughton rev. 1961).

[15] *See* Dando 278.

[16] McCormick 142; 2 J. Wigmore, Evidence § 575 (3d ed. 1940).

[17] Japanese Code of Criminal Procedure [hereinafter cited as Code] art. 154; Japanese Rules of Criminal Procedure [hereinafter cited as Rules] arts. 117-20.

[18] *Cf.* Katsura & Takeda 73-75. He can, however, be guilty of suborning perjury or slander on the basis of his statements in court.

II. Proceedings in Which Privilege May Be Claimed

By its terms Article 38(1) is not limited to criminal cases. It can be invoked by witnesses in criminal or civil proceedings.[19] Presently there is no direct basis for constitutional litigation in either instance, because both the civil and criminal procedure codes guarantee a statutory right to refuse to testify. Article 146 of the Code of Criminal Procedure permits any person to refuse to answer any question that may incriminate him.[20] Article 311(1) of the same code states that the defendant may remain silent throughout the proceedings or may refuse to answer specific questions.[21] Article 280 of the Code of Civil Procedure gives any witness a right to decline to answer incriminating questions.[22] Because of these statutory bases for refusal to answer, an improper ruling on a claim of privilege is treated as a statutory, rather than constitutional, violation.

However, the statutes may not cover formal administrative proceedings and hearings conducted by legislative committees. There is relatively little case law outside of the special problem areas of tax matters, customs enforcement, alien registration, narcotics control and traffic enforcement, all of which will be discussed below.[23] The concensus of scholarly opinion, however, is that witnesses in nonjudicial proceedings can claim privilege.[24]

Two additional problems have aroused much dispute and continue to split commentators into opposing camps. The first is whether the so-called "opening proceedings" *(bōtō tetsuzuki)*, in which the presiding judge questions the defendant as to his identity before having the information read aloud and warns him of his right to remain silent,[25] requires the defendant to incriminate himself. Some scholars maintain that to ask the defendant his name, age and place of residence impairs his "right to remain silent at all times," and therefore violates Article 38(1). However, the weight of decisions, supported by some commentators, holds that this questioning is solely for the purpose of establishing that the person who is named as the defendant in the information is the person actually before the court. Therefore, except in the rare

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[19] Katsura & Takeda 7-13, 15-17; *Tamiya* 74.

[20] Dando 280.

[21] *Id.* at 372.

[22] H. Kaneko, Minji soshōhō taikei (System of civil procedure law) 256-57 (1967).

[23] See text pp. 1162-66 *infra*.

[24] Katsura & Takeda 15-23.

[25] Code art. 291 (reading of information *(kisojō)* and warning of rights). *See* Dando 373; R. Hirano, *Keijisoshōhō* (Law of criminal procedure), in 43 Hōritsugaku zenshū 178-79 (1958).

instance in which acknowledgment of identity as the person charged is tantamount to an acknowledgment of guilt, there is no violation of privilege in asking these matters of the accused.[26]

The second related problem concerns the constitutional validity under Article 38(1) of certain other provisions of the Code of Criminal Procedure that require the defendant to identify himself. The defendant is required to give his name, age and residence in such procedural contexts as the determination of whether or not to hold him in detention,[27] a motion for indication of reasons for detention,[28] a notice of appointment of counsel retained by the defendant,[29] and a statement of grounds advanced on appeal.[30] In several instances defendants have refused to include this personal information, and as a consequence the court has rejected the application or other document in question. In each instance the appellate court has sustained the lower court, giving rise to considerable scholarly criticism.[31]

III. WARNING OF RIGHTS

Neither a constitutional nor a statutory privilege is likely to mean much unless some notice of its existence is given to the person entitled to exercise it. In American constitutional law the question of notice has arisen only in the context of interrogation, a matter discussed below.[32] This is primarily because the defendant privilege prohibits the prosecution or the court from asking anything at all of the defendant until and unless he has taken the stand to testify on his own behalf after the prosecution has concluded its case-in-chief, and witnesses are are assumed to know that they do not have to incriminate themselves. Except in the confessions area, the tendency has been not to impose new warning requirements to benefit witnesses who may well become defendants, but instead to extend the defendant privilege to cover formal investigative procedures like grand jury proceedings,[33] juvenile

[26] *See, e.g.,* KATSURA & TAKEDA 32-34; KEMPŌ CHŌSAKAI, KEMPŌ UNYŌ NO JISSAI NI TSUITE NO CHŌSA HŌKOKUSHO (fuzokubunsho dai 3-gō) (Report on the Commission on the Constitution, Supplement No. 3, on actual application of the Constitution) 340 (1964). *See also* sources cited in DANDO, SHINKEIJISOSHŌHŌ KŌYŌ (Treatise on the new criminal procedure law) 109, n.6 (7th ed. 1967).

[27] CODE arts. 60-61; DANDO 257-58.

[28] CODE arts. 82-87; RULES arts. 81-86, art. 86-1, art. 86-2; DANDO 259-61.

[29] CODE art. 78; DANDO 258-59.

[30] CODE art. 376; DANDO 423-24.

[31] *See* KATSURA & TAKEDA 32-45 and authorities cited therein.

[32] *See* text pp. 1158-59 *infra.*

[33] *See, e.g.,* Gardner v. Broderick, 36 U.S.L.W. 4536 (June 10, 1968); People v. Calhoun, 50 Cal. 2d 137, 323 P.2d 427 (1958); People v. DeFeo, 308 N.Y. 595, 127 N.E.2d 592 (1955); People v. Smith, 257 Mich. 319, 241 N.W. 186 (1932).

delinquency adjudication proceedings[34] and quasi-criminal administrative investigations.[35]

In Japan, the Code of Criminal Procedure requires that the public prosecutor or judicial police officer who has requested a suspect to appear for an interview first inform the suspect that he may decline to answer questions.[36] As already indicated, the defendant at the time of opening proceedings must be warned that he has the right either to remain absolutely silent or to refuse to respond to specific questions.[37] The Rules of Criminal Procedure also require that a witness in a formal judicial proceeding be warned that he may refuse to give any testimony that may lead to his prosecution or conviction.[38] Thus, the warning requirements under Japanese statute law are more extensive than under American law. However, the public prosecutor who summons an informant who is not a suspect into his office for an interview[39] or the judicial police officer or public prosecutor who has custody of a suspect after execution of an arrest warrant,[40] is under no statutory obligation to warn about privilege. Nor is any warning required by statutes authorizing administrative investigations.

If there is no statutory requirement that a warning be given, and a witness or informant makes a statement that later proves to be incriminating, the question has arisen whether a violation of Constitution Article 38(1) has occurred. To date, the Japanese courts have ruled that there is no constitutional violation if a warning is not given; the prescribing of warnings is deemed to be exclusively a legislative matter. On this basis, even the failure to comply with statutory requirements of warning does not present a constitutional issue; but if it affects the validity of the judgment in the case, it may constitute a statutory ground for reversing the case on appeal.[41]

IV. WAIVER OR RELINQUISHMENT OF RIGHTS

As indicated earlier, the fact that the defendant under Japanese law

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[34] *In re* Gault, 387 U.S. 1 (1967).

[35] Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 36 U.S.L.W. 4534 (June 10, 1968); Garrity v. New Jersey, 385 U.S. 493 (1967). *See also* Camara v. Municipal Court, 387 U.S. 523 (1967), *and* See v. Seattle, 387 U.S. 541 (1967), applying search and seizure limitations of U.S. CONST. amend. IV to administrative searches.

[36] CODE art. 198(2). *See* DANDO 306.

[37] CODE art. 291(2). *See* DANDO 372.

[38] RULES art. 121(1), supplementing CODE art. 146. The privilege against incriminating close relatives is also covered; CODE art. 147. RULES art. 121(2) requires that notice also be given to persons who may be able to assert one of the professional privileges authorized by CODE art. 149.

[39] CODE art. 223.

[40] CODE arts. 203-05.

[41] See authorities gathered in KATSURA & TAKEDA 86-104, and in *Tamiya* 78-79.

cannot become a witness in any formal sense makes it difficult to identify a "defendant" privilege distinct from a "witness" privilege. Also, under Japanese procedure there is not a clear, definite procedural break between presentation of the government's case and the opportunity to present material in defense.[42] As a consequence there is no clearly developed doctrine of waiver of privilege corresponding to that in the United States.[43]

There is, however, a functional equivalent to waiver in the case of a defendant. Article 311(1) of the Code of Criminal Procedure states that the defendant may remain silent. But article 311(2) provides that if the defendant does choose to volunteer an unsworn statement, the presiding judge may at any time thereafter question him about "necessary matters" *(hitsuyō to suru jikō)*. Article 311(3) extends the same power to an associate judge, public prosecutor, defense counsel, co-defendant or co-defendant's counsel if he first notifies the presiding judge of his desire to question. A similar result occurs under American procedure if the defendant takes the stand and "waives" his privilege, since no legal error is then committed by a prosecuting attorney, judge or co-defendant's attorney who questions the defendant.

However, the Japanese defendant still retains the right to refuse to answer any specific questions.[44] Because he is not a "witness" he cannot in any event be visited with the penalties provided in the Code for improper refusal to testify.[45] Therefore, he can lapse into protected silence at any time. The effect of "waiver" consequently is limited to the court's use of his volunteered statements as data leading to a conclusion of guilt.[46]

V. Problems of Interpretation

Three problems of interpretation are presented by the language of Article 38(1) itself: (1) What is the disadvantage *(furieki)* that the Constitution is intended to protect the citizen against? (2) What amounts to a declaration or statement *(kyōjutsu)* that cannot be exacted? (3) What constitutes the forbidden compulsion *(kyōyō)*?

A. Disadvantage

The Japanese text creates somewhat greater problems of interpreta-

[42] *See* Code arts. 292-312; Dando 372-76.
[43] McCormick 272-76.
[44] Dando 100-01.
[45] Code arts. 150-51, 160-61; Dando 279-81.
[46] *See generally* Katsura & Takeda 11, 85; F. Aoyanagi, Keijisoshōhō tsūron (Outline of the law of criminal procedure) 579-80 (1962).

tion than does the typical American constitutional provision. Despite the official English translation which uses the phrase "against himself," the Japanese term is *furieki,* which has a broader implication of "disadvantageous in general" than does the English phrase "testify against one's self." Nevertheless, the jurisprudence of both countries permits analysis on the basis of two questions: (a) what constitutes an incriminating statement, and (b) what is a penalty?

The test for incrimination under United States Supreme Court authority,[47] which is binding on the states under the fourteenth amendment due process clause,[48] is that:[49]

> To sustain the privilege, it need only be evident from the implications of the question, in the setting in which it is asked, that a responsive answer to the question or an explanation of why it cannot be answered might be dangerous because injurious disclosure could result.

The Japanese expression is interpreted to mean "facts that give rise to a fear that criminal liability may be imposed on the individual" *(jiko ga keijijō no sekinin o towareru osore aru jikō).*[50] This is taken to include not only facts tending to establish the material elements of the offense, but also factors that justify an increase in the weight of the penalties assessed. This view is explainable in part by the fact that Article 121(1) of the Rules of Criminal Procedure, in aid of Article 146 of the Code of Criminal Procedure, which in turn restates Constitution Article 38(1), comprehends both fear of prosecution *(keijisotsui)* and fear of receiving a judgment of guilt *(yūzaihanketsu)*; aggravating factors are to be expressly dealt with in the portion of the court's judgment relating to penalties.[51]

If the material elicited is incriminating according to these tests and obtained under "compulsion" and without a valid waiver of rights, it cannot be used in any aspect of the criminal case. If it is nevertheless used, a ground for reversal exists.[52] The American cases, however, go

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[47] Hoffman v. United States, 341 U.S. 479 (1951).

[48] Malloy v. Hogan, 378 U.S. 1 (1964).

[49] 341 U.S. at 487.

[50] Japan v. Kumagai, 11 Saikō saibansho keiji hanreishū [hereinafter cited as Keishū] 802, 805 (Feb. 20, 1957). *See also* KATSURA & TAKEDA 24, 40-45.

[51] CODE art. 335(2). *See* DANDO 237-38, 385; *Tamiya* 85.

[52] A derivative evidence rule is apparently part of the American privilege concept, Murphy v. Waterfront Comm'n, 378 U.S. 52, 79 (1964), so that if other evidence is discovered as a result of the compelled statement it must be excluded as well. *See generally* George, *The Fruits of Miranda: Scope of the Exclusionary Rule,* 39 COLO. L. REV. 478 (1967). Japanese courts, however, do not at present apply the requirement of exclusion to anything other than the compelled statement itself.

further to include loss of employment[53] and disbarment[54] as prohibited "penalties" within the fifth amendment. Civil liability is not included within the concept of penalty.

Under the Japanese Constitution, disadvantage *(furieki)* in a broad sense might comprehend loss of property, impairment of reputation or revocation of a permit or license to engage in a certain occupation or activity. To date, however, civil liability and impaired reputation have not been included by interpretation within the definition of *furieki,* though Article 280 of the Code of Civil Procedure permits a witness to decline to answer questions that may bring disgrace *(chijoku)* to him or persons in certain specified close relationships.[55] Problems arising from revocation of permits and the like will be discussed in greater detail below.[56]

A specialized problem of forbidden use of unlawfully extracted incriminating material is the invocation of a presumption that silence means guilt. In the American context, this has arisen in connection with comments on the defendant's silence by prosecutor, judge or even defense counsel.[57] The United States Supreme Court has held that it is a prohibited impairment of the privilege against self-incrimination as incorporated into the fourteenth amendment for the prosecutor to comment on the defendant's failure to take the witness stand on his own behalf,[58] and this no doubt will be taken to prohibit all comment by anyone: At the present time, however, there is no bar against using an inference if a witness claims privilege against giving testimony.

A comparative evaluation of the Japanese system is rendered difficult because the jury is not used in Japan;[59] manifestly no body of law has developed to govern formal instructions of law and arguments that may properly be submitted to lay jurors. Of course, the parties do conclude the proof process by presenting their views both on law and

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[53] Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 36 U.S.L.W. 4534 (June 10, 1968); Gardner v. Broderick, 36 U.S.L.W. 4536 (June 10, 1968); *cf.* Slochower v. Board of Educ., 350 U.S. 551 (1956).

[54] Spevack v. Klein, 385 U.S. 511 (1967).

[55] There is no equivalent provision in the Code of Criminal Procedure. However, physical examinations are to be conducted so as not to injure the reputation of the person examined. CODE art. 131(2).

[56] *See* text pp. 1163-65 *infra.*

[57] McCORMICK 276-81.

[58] Griffin v. California, 380 U.S. 609 (1965). Only if the court finds beyond a reasonable doubt that the error was harmless can comment be ignored. Chapman v. California, 386 U.S. 18 (1967). The Washington Supreme Court has held that if a prosecutor questions a witness who he knows will invoke the privilege, this is error because it denies the defendant his right of confrontation. State v. Nelson, 72 Wash. Dec. 2d 269, 432 P.2d 857 (1967).

[59] *See* DANDO 18, 41.

fact,[60] and so might comment on the defendant's claim of privilege either to remain silent or to refuse to answer specific questions. Some authority holds that if this occurs and is reflected in the court's judgment, it is error.[61] However, it is not treated as an error of constitutional dimensions, but rather as an abuse of the judges' power to evaluate the evidence freely in reaching their determination.[62] If nothing is said about the matter in the reasons stated for the judgment, it is probably as futile to speculate whether in fact the judges' reasoning was affected by the fact that the defendant failed to disclaim responsibility as it is when an American lay jury is involved.

B. Declaration or Statement

The problem of what amounts to the "testimony" or "statements" *(kyōjutsu)* that cannot be compelled is common to both systems. Under the American concept of privilege, it has been clear for a long while that any oral statement that is "compelled" and any documents required to be produced under court order are clearly within the coverage of the privilege. It has not been so clear, however, whether tangible evidence and physical evidence obtained from an individual's person are within the coverage of the privilege. This has constituted no real problem as far as taking property from the person or presence of a person is concerned, because the propriety of that conduct has been tested under the constitutional search and seizure provisions.[63] The search and seizure decisions, however, did not comfortably cover procedures like blood-testing, breath-testing, fingerprinting, photographing, lineups, and voice or handwriting tests. The *Rochin* decision[64] which brought extremely calloused methods of exacting evidence from the body within fourteenth amendment due process was very little availed of in federal and state courts.[65] As a result, cases and commentators were split badly over the application of self-incrimination to demonstrative evidence.

A series of recent decisions of the United States Supreme Court has at least temporarily settled the matter, by holding that the privilege against self-incrimination does not apply to blood-test evidence,[66]

[60] Code art. 293; RULES arts. 211-12; DANDO 376.
[61] *See* KATSURA & TAKEDA 68-71; *Tamiya* 83-87.
[62] *See* CODE art. 318; DANDO 203-07.
[63] U.S. CONST. amend. IV; Mapp v. Ohio, 367 U.S. 643 (1961).
[64] Rochin v. California, 342 U.S. 165 (1952).
[65] *See, e.g.,* Irvine v. California, 347 U.S. 128 (1954); Blackford v. United States, 247 F.2d 745 (9th Cir. 1957); *cf.* People v. Speaks, 156 Cal. App. 2d 25, 319 P.2d 709 (1958).
[66] Schmerber v. California, 384 U.S. 757 (1966); Breithaupt v. Abram, 352 U.S. 432 (1957).

courtroom identification procedures,[67] fingerprinting, photographing and lineup procedures,[68] and handwriting exemplars.[69] Since these decisions were all decided by a bare majority of the Court, changes in Court personnel may bring a reversal in or modification of this doctrine. Furthermore, the decisions leave open the question of whether it is proper to question a defendant or suspect as part of an expert examination. The polygraph is not a recognized form of adducing evidence for use in American courts,[70] and narcoanalysis has been prevented in the context of confessions.[71] However, psychiatric examinations involve questioning the subject about both acts and attitudes that bear on criminal charges, and on occasion hypnosis or narcoanalysis may be used as a diagnostic technique. If subsequent efforts should be made to use the subject's statements as incriminating admissions, they almost certainly would be rejected on the grounds that the examination was under court order and the answers were thus "compelled" in violation of the privilege,[71a] or conducted in violation of the rules regulating the obtaining of confessions, including requirements of voluntariness. If, however, the expert bases an otherwise relevant opinion on the defendant's or subject's statements plus all the other techniques of analysis and diagnosis, there probably is no "privilege against self-incrimination" problem.[72]

A somewhat parallel analysis is to be found in the Japanese legal

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[67] Holt v. United States, 218 U.S. 245 (1910), cited with approval in Schmerber v. United States, 384 U.S. 757 (1966).

[68] United States v. Wade, 388 U.S. 218 (1967). However, lineups were subjected to a special application of the sixth amendment right to counsel in *Wade*; Stovall v. Denno, 388 U.S. 293 (1967), applies a due process standard of fairness to lineups conducted before the effective date of the *Wade* doctrine.

[69] Gilbert v. California, 388 U.S. 263 (1967).

[70] McCORMICK 369-73; Skolnick, *Scientific Theory and Scientific Evidence: An Analysis of Lie-Detection*, 70 YALE L.J. 694 (1961).

[71] Leyra v. Denno, 347 U.S. 556 (1954). *See* Dession, Freedman, Donnelly & Redlich, *Drug-Induced Revelation and Criminal Investigation*, 62 YALE L.J. 315 (1953).

[71a] *See* Simmons v. United States, 88 S. Ct. 967 (1968), in which the Court held that it was a violation of fifth amendment privilege to use as a party admission at the trial statements about possession made by the defendant in testifying to his standing on an unsuccessful motion to suppress evidence. The Court stated:

> Thus, in this case Garrett was obliged either to give up what he believed, with advice of counsel, to be a valid Fourth Amendment claim or, in legal effect, to waive his Fifth Amendment privilege against self-incrimination. In these circumstances, we find it intolerable that one constitutional right should have to be surrendered in order to assert another.

Id. at 976.

[72] People v. Williams, —Ill. 2d —, 231 N.E.2d 646 (1967). Under a new competence to stand trial statute in Michigan, material used in the psychiatric evaluation cannot be submitted on any other issue but competence. MICH. STAT. ANN. § 28.966 (11) (4) (Supp. 1967).

literature.[73] If under a warrant authorizing a physical or mental examination, the defendant[74] was asked various questions about the activity underlying the criminal charges and the contents of his statements were offered as a confession, it would approach or constitute a forbidden extraction of incriminating testimony. In general, however, physical examinations, including blood, urine and breath tests for alcoholic intake, fingerprint and handwriting comparisons, photography of the defendant and many other forms of scientific forensic investigation are not generally considered as within the privilege because they do not involve declarations *(kyōjutsu)*. Efforts to use narcoanalysis to obtain a confession have been dealt with on the basis of the voluntariness of the confession and not on the propriety of the investigative procedure itself.[75] The status of polygraph examinations is not clear, but they seem to be viewed as a form of scientific analysis and not as a means of obtaining a confession. One may conclude that a psychiatric examination based on an interview with the defendant, even though ordered under Article 167, is probably constitutional. In addition, it is probable that an expert would be entitled to give his opinion in court and, if necessary, recount portions of the defendant's statements that support his opinion if the court does not use these statements as admissions or confessions but only as evidence supporting the expert's opinion. Resolution of these issues, however, awaits further adjudication in both Japan and the United States.

C. Compulsion

The third issue involves the meaning of "compulsion" *(kyōyō)*. This, too, is a problem shared by the two national systems. Until 1966, state and federal courts in the United States equated compulsion with judicial process; it was the judicial subpoena to produce documents, the court's approval of the prosecutor's request to summon the defendant to the witness stand, or invocation of the threat to impose contempt penalties if a witness persisted in his refusal to testify that constituted the compulsion which made the evidence or testimony unusable in a subsequent prosecution. Since the emphasis was on judicial misconduct, and the defendant privilege was considered to arise only after

[73] *See* KATSURA & TAKEDA 60-66; R. HIRANO, *supra* note 25, at 107; *Tamiya* 79-80; DANDO, *supra* note 26, at 256-57. The narcoanalysis problem can also be subsumed under the problem of compulsion, and within the scope of coerced confessions violative of Kempō (Constitution) art. 38 (2).

[74] CODE art. 167; DANDO 284-85.

[75] State v. Kimura, 5 Kōtō saibansho keiji hanreishū 2049 (Tokyo High Ct., Sept. 4, 1952).

formal charges, extrajudicial confessions were not viewed as within the concept of privilege. If they were coerced[76] or involuntary[77] they were inadmissible by virtue of due process requirements, and those requirements alone.

The *Miranda* decision[78] in 1966 and the decisions that followed it in 1967,[79] however, have drastically extended the coverage of the privilege against self-incrimination to include those who are questioned in police or other official custody or who are summoned during an administrative investigation. Because "the government seeking to punish an individual [must] produce the evidence against him by its own independent labors, rather than by the cruel, simple expedient of compelling it from his own mouth," the privilege applies to "informal compulsion exerted by law-enforcement officers during in-custody questioning."[80] To insure that the suspect knows of his right, the Court instituted requirements that the suspect be given warnings about the coverage of the privilege and of the right to counsel, and that if the suspect indicates a desire for counsel, all questioning be suspended until counsel is actually present. Though the Court recognized that waiver of both the privilege and the right to counsel is possible, it placed a "heavy burden" on the prosecution "to demonstrate that the defendant knowingly and intelligently waived his privilege against self-incrimination and his right to retained or appointed counsel."[81] It will take years to litigate all the many issues that *Miranda* and *Gault* raise, but it is eminently clear that the privilege concept will be radically expanded beyond its pre-1966 limits.

Japanese law corresponds closely with pre-*Miranda* American law. The term *kyōyō,* taken literally, can of course comprehend torture and physical or mental coercion. But that aspect of evidence-gathering is separately covered by the prohibition in Article 38(2) of the Constitution against using in evidence confessions obtained through compulsion, torture or threat.[82] Therefore, something different from this must have been intended under Article 38(1); because interrogation that may violate Article 38(2) takes place almost exclusively outside of

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[76] *See, e.g.,* Lyons v. Oklahoma, 322 U.S. 596 (1944); Chambers v. Florida, 309 U.S. 227 (1940); Brown v. Mississippi, 297 U.S. 278 (1936).

[77] *See, e.g.,* Escobedo v. Illinois, 378 U.S. 478 (1964); Haynes v. Washington, 373 U.S. 503 (1963); Rogers v. Richmond, 365 U.S. 534 (1961).

[78] Miranda v. Arizona, 384 U.S. 436 (1966).

[79] *In re* Gault, 387 U.S. 1 (1967); Garrity v. New Jersey, 385 U.S. 493 (1967).

[80] 384 U.S. at 460.

[81] 384 U.S. at 475.

[82] *See* DANDO 196-97.

formal proceedings, Article 38(1) is concerned mainly with formal proceedings.

Thus, in the case of a witness in a criminal matter, the compulsion is the penalty that can be imposed on him if he refuses to testify;[83] a witness may claim privilege against self-incrimination or other evidentiary privileges without fear of punishment, but an erroneous refusal to permit the claim would result in the use of "compulsion" in the constitutional sense.[84] A clear-cut example would be calling a co-offender as a witness after the case against him has been severed from the one in which he is called.[85]

In another setting, the question of compulsion is posed by the rejection of procedural documents or the taking of procedural steps adverse to the defendant, such as denying bail, because of his failure or refusal to file information demanded by a judge or public prosecutor. To date, the only cases have been those noted earlier involving refusal to give name, age and address in procedural documents. Because statements containing this information have not been held to be incriminating, the question of compulsion has not arisen. But it seems possible that under some circumstances certain steps—*e.g.*, termination of bail—based on a defendant's refusal to make a statement would be viewed as a form of compulsion.

Does fear of a perjury prosecution if a witness lies "compel" him to give truthful but incriminating testimony? Conversely, does the fact that truthful testimony will be incriminating justify the witness in lying? In the instance of an ordinary witness the answer is clear. If the truth is incriminating to the witness, or if it falls within some statutory privilege[86] he is protected against having to reveal the truth. But he does not have a privilege to testify falsely as an alternative to a claim of privilege or in the absence of a statutory privilege. In the case of a defendant, the problem is somewhat different because he cannot become a witness and so is not in a position to commit the crime of perjury even if he lies to the court. However, he can be prosecuted for subornation of perjury or for slander to a third party.[87]

Germs of *Miranda* in some fairly recent cases raise the question

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[83] CODE arts. 160-61.

[84] *See* DANDO 279-81. In addition to the privilege against self-incrimination, witnesses may claim privilege based on possession of official secrets (CODE arts. 144-45), possible incrimination of others in a close personal relationship (CODE art. 147), or receipt of information in a profession or counseling capacity (CODE art. 149; *cf.* CODE OF CIVIL PROCEDURE arts. 280-81).

[85] *See* KATSURA & TAKEDA 94-97.

[86] *See* note 84 *supra*.

[87] *See* KATSURA & TAKEDA 73-75, and authorities cited therein.

whether the privilege concept of *Miranda* will in time be imported into Japanese law. For example, the Supreme Court has said that though communication between a suspect and his attorney may be restricted before the filing of formal charges,[88] there can be no restriction after such filing. Therefore, if the defendant has been formally accused on one charge, no restrictions can be placed on the attorney-client contact even though they are intended to facilitate investigation of an offense with which the defendant has not yet been formally charged.[89] The Osaka High Court has also excluded a confession because the police officer conducting the questioning refused to convey the suspect's request for an attorney to a bar association, as he is required to do by law.[90] However, because Constitution Article 38(2) specifically covers confessions, it is likely that any developments in the law of confessions will take place as interpretations of that provision and Code Article 319, and not as expansions of privilege under Article 38(1).

VI. Administrative Regulations and the Privilege

Administrative regulations sometimes require the divulgence of information arguably within the privilege; a question is then raised whether loss of some privilege or right, which may result from noncompliance, can be viewed as compulsion under Article 38(1).

There is United States Supreme Court authority to the effect that records required to be kept by law do not as such come within the protection of the privilege against self-incrimination.[91] However, if the material sought is directly incriminating so that the very filing provides information helpful in proving state or federal criminal activity, then privilege may properly be asserted and no prosecution can be brought for failure to submit the information or register criminal activity.[92] Some cases also hold that under certain limited circumstances there may be comprehensive advance waiver of certain aspects of privilege,[93] and that a claim of privilege may itself be a sufficient

[88] Code art. 39(3); *see* Dando 109-10, 259.
[89] *In re* Kojima, Hanrei jihō (No. 453) 3 (Sup. Ct., July 26, 1966). *Cf.* Massiah v. United States, 377 U.S. 201 (1964).
[90] Japan v. Unknown, Hanrei jihō (No. 228) 34 (Osaka High Ct., May 26, 1960).
[91] Shapiro v. United States, 335 U.S. 1 (1948); *cf.* Spevack v. Klein, 385 U.S. 511 (1967).
[92] Marchetti v. United States, 390 U.S. 39 (1968) (federal wagering statutes); Haynes v. United States, 390 U.S. 85 (1968) (National Firearms Act). Payment of a tax on illegal gambling activity constitutes in itself an incriminating act, so that no prosecution for nonpayment or for conspiracy to defraud the government may be maintained. Grosso v. United States, 390 U.S. 62 (1968). The Court in all three opinions was careful to avoid any application of the new rulings to the *Shapiro* doctrine.
[93] *See, e.g.*, People v. Rosenheimer, 209 N.Y. 115, 102 N.E. 530 (1913); *see also* McCormick 283-84.

ground for administrative revocation of a permit or license, or termination of public employment.[94] Similar problems have arisen in Japanese law in cases involving (1) revenue laws, (2) alien registration, (3) narcotics control laws, and (4) traffic laws, particularly in the context of traffic accident reports.

A. Revenue Laws

Japanese revenue and customs legislation is comprehensive, as befits one of the world's leading urban and industrial nations. A feature common to all fiscal legislation is a requirement that persons subject to taxation maintain certain records and file specified returns.[95] Does the threat of punishment for failure to file amount to compulsion, so that all returns are coerced, and does this in turn mean that the contents are compelled statements obtained in violation of the right to remain silent?

In the case of corporations there appears to be no problem; most writers maintain that legal entities *(hōjin)* are not within the protection of Article 38(1).[96] But on occasion a private individual may attempt to invoke the constitutional right of silence as a basis for avoiding a conviction either for failure to file a return or for filing a fradulent return. To date, however, the cases, all of which have involved prosecution for failure to file returns, have upheld the constitutionality of the statutes as not compelling incriminating material in violation of Article 38(1).[97] Whether the contents of the return can be

[94] *See* Uniformed Sanitation Men Ass'n v. Comm'r of Sanitation, 36 U.S.L.W. 4534 (June 10, 1968); Gardner v. Broderick, 36 U.S.L.W. 4536 (June 10, 1968); Garrity v. New Jersey, 385 U.S. 493 (1967).

[95] Income Tax Law arts. 63, 69, 69-4, 70; Corporation Tax Law arts. 18, 21, 45, 46, 46-2, 48, 48-2, 49; Succession Tax Law arts. 27, 28, 60, 69, 70; Commodity Tax Law arts. 8, 17, 17-2, 19, 20; Liquor Tax Law arts. 53, 59.

[96] *See* Katsura & Takeda 14-15. Under United States law, neither a corporation, Campbell Printing Corp. v. Reid, 36 U.S.L.W. 4533 (June 10, 1968); Hale v. Henkel, 201 U.S. 43 (1904), nor a labor union or other unincorporated association, United States v. White, 322 U.S. 694 (1944), is within the privilege, though an official or employee of the above can claim privilege if corporate records also incriminate him as an individual, Curcio v. United States, 354 U.S. 118 (1957). *See* McCormick 262-63.

[97] *See* Katsura & Takeda 115-22. A related problem is beginning to emerge as an aftermath to the *Miranda* opinion, when the taxpayer is asked to appear at an Internal Revenue Service office and is questioned about his finances. The decisions to date have held *Miranda* inapplicable because the taxpayer is not in custody. Morgan v. United States, 377 F.2d 507 (1st Cir. 1967); United States v. Fiore, 258 F.Supp. 435 (D.C. Pa. 1966). However, the police officers in Garrity v. New Jersey, 385 U.S. 493 (1967), were not in custody when they appeared in an administrative investigation, yet the choice between confessing guilt and loss of employment because of their assertion of privilege was held to be inherently coercive, thus rendering their statements inadmissable in a criminal prosecution against them. The dilemma of the taxpayer is at least analogous. *See* Lipton, *Constitutional Rights in Criminal Tax Investigations,* 53 A.B.A.J. 517 (1967); Raymond, *Do Escobedo and Miranda Apply to Tax Fraud Investigations?* 45 Mich. St. B.J. No. 11, 10 (Nov. 1966); 43 Denver L.J. 511, 514-16

used in a prosecution for tax evasion remains to be litigated, but it seems likely that the alien registration and narcotics control cases, discussed below, will control, and that the filing of these records and official administrative or judicial use of their contents will be viewed as indispensable to operation of the revenue system. The American concept of "records required to be kept by law," mentioned above, can also provide a useful linguistic tool in translation.

B. Alien Registration Law

The Japanese Alien Registration Law requires all foreigners to register at ward or township offices if their stay extends beyond sixty days. At the time of registration, they must indicate the date and place of entry into Japan and the nature of the visa or entry permit on which their right to remain in Japan is based.[98] The alien is required on demand to present his registration certificate for inspection by a wide variety of public officials.[99] It has been asserted on occasion that the very requirement of registration itself is compulsion to admit criminal conduct in the case of an alien who has entered or remained in Japan illegally,[100] so that it should not be permissible under Article 38(1) of the Constitution to prosecute him for failure to report that fact to the appropriate local governmental office. It has also been maintained that the requirement that a certificate of registration be presented upon demand violates the constitutional right not to incriminate one's self, because the contents of the certificate of registration[101] may assist the government in proving either false registration or a violation of one or more of the statutory provisions governing an alien's status in Japan. With one or two exceptions, judicial decisions, including one Supreme Court decision,[102] have rejected both propositions, chiefly on the grounds that the descriptive material contained in the registration is not incriminating or that the information is essential to administration of the immigration laws.[103] There is considerable scholarly dissent, however.

(1966); Schwartz, *Tax Fraud—Miranda and Escobedo Decisions Apply to a Special Agent's Investigation of Tax Fraud Case Says Florida District Court*, 41 FLA. B.J. 337 (1967).

[98] *Gaikokujin tōrokuhō* (Alien registration law) arts. 3, 4 (Law No. 125, 1952); penalties are provided in art. 18(1)(i).

[99] *Id.* art. 13(2), (3); penalties are provided in art. 18(1)(vii).

[100] *Shutsunyūkoku kanrirei* (Emigration and immigration control order) arts. 3, 70(i), makes this a crime. *See* KATSURA & TAKEDA 123.

[101] *Gaikokujin tōrokuhō* art. 4 lists twenty items relating to status, etc., that must be entered in the registration forms.

[102] Japan v. Nashiyama, Keishū 1769 (Sup. Ct., Dec. 26, 1956).

[103] *See generally* KATSURA & TAKEDA 123-30.

C. Narcotics Control Law

The Narcotics Control Law contains elaborate provisions requiring a record of all transactions in regulated narcotics.[104] Can a dealer be prosecuted either for failure to maintain the required records or because of incorrect entries? In this context, too, as in the revenue and immigration areas it has been asserted that the statutes inherently violate Article 38(1); the Supreme Court has rejected the assertions.[105] Though the rationale of the decisions is not absolutely clear, in one of the leading decisions it appears as if the Court stressed the absolute indispensability of registration to the system of narcotics control.[106] In another[107] it based its reasoning on the importance of narcotics control to public health, coupled with the premise that one who chooses to engage in the strictly regulated business of dealing in narcotics relinquishes any right to object to requirements of registration and reporting.[108]

D. Road Traffic Law

The Road Traffic Law requires a vehicle operator to have his permit in his possession when he drives[109] and to show it to a police officer on demand.[110] Drivers also must make certain reports about accidents in which they are involved, either to any police officer who happens to be present or to the nearest police station. Under the version of the Law in force before 1960, the report was to include not only the names of the participants, the extent of injuries suffered and the circumstances requiring immediate action to prevent other accidents at the same spot, but also the "substance" or "details" *(naiyō)* of the accident; failure to report was specifically made an offense.[111] This requirement was promptly attacked as a violation of Article 38(1). After a series of lower court decisions, the majority of which upheld the legislation as constitutional, the Grand Bench of the Supreme Court sustained the

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[104] *Mayaku torishimarihō* (Narcotics control law) arts. 24-27, 37-41, 70, 71 (Law No. 14, 1953); penalties in arts. 64-75.

[105] Japan v. Uemura, 15 Keishū 763 (Sup. Ct., May 4, 1961); Japan v. Inouye, 10 Keishū 1173 (Sup. Ct., July 18, 1956); Japan v. Omori, 8 Keishū 1151 (Sup. Ct., July 16, 1954).

[106] Japan v. Inouye, *supra* note 105.

[107] Japan v. Omori, *supra* note 105.

[108] *See generally* KATSURA & TAKEDA 130-38.

[109] *Dōro kōtsūhō* (Road traffic law) art. 95(1) (Law No. 105, 1960); penalties in art. 121(1)(x), (2).

[110] CODE arts. 95(2), 67(1); penalties in CODE art. 120(1)(ix).

[111] *Dōro kōtsū torishimarihō* (Road traffic regulation law) art. 24 (Law No. 130, 1947), and *Dōro kōtsū torishimarihō sekōrei* (Implementing order on the road traffic regulation law) art. 67 (Order No. 261, 1948). These provisions were repealed in 1960 by the enactment of the new *Dōro kōtsūhō, supra* note 109.

constitutionality of the provision.[112] The decision was reached even though the report in this instance, in contrast to the other forms of regulatory legislation discussed above, was to be made to a police officer who had the power directly or indirectly to move the case along toward a prosecution for negligently inflicting death or bodily injury.[113] The rationale for sustaining the requirement as constitutional emphasized the nonincriminating nature of the information sought and its essentiality to a program of traffic accident prevention.

The problem has been dealt with legislatively. Under the 1960 revised law, the driver is to report the time and place of the accident and the fact of death or injury if that is the case, together with a description of the extent of injuries and the scope of any property damage resulting from the accident.[114] This appears to reflect a legislative judgment that the original form of the law was too broad and that less sweeping requirements were consistent with fair law enforcement. The constitutionality of the new version seems to be accepted by commentators.[115]

VII. The Future of the Privilege

It would thus appear that the great bulk of privilege problems that can arise in the context of ordinary civil and criminal proceedings have been solved, either by detailed provisions in the codes and implementing rules or through judicial decisions. Though scholars may debate the desirability of some of these legislative and judicial determinations, they nonetheless continue to be the law. The four special categories of administrative proceedings described above continue to present a number of problems to be resolved through legislative enactment or judicial interpretation. However, the probabilities are that official restraint in utilizing special administrative hearings or inquiries, coupled with a judicial recognition that regulation of the activity in question requires detailed reports by persons engaged in that special activity, will keep the solution within the area where administrative necessity and individual liberties functionally overlap.

Japan at the present time does not have the so-called "immunity legislation" by which a witness' testimony can be purchased at the price of his nonprosecution.[116] Legislation of this nature is not strongly

[112] Japan v. Saitō, 16 Keishū 495 (Sup. Ct., May 2, 1962).
[113] Japanese Penal Code arts. 209, 211.
[114] *Dōro kōtsūhō* (Road traffic law) art. 72 (Law No. 105, 1960).
[115] *See* Katsura & Takeda 138-56, particularly 155-56.
[116] *See* Katsura & Takeda 82-84. On the scope of the American law, see Murphy v. Waterfront Comm'n, 378 U.S. 52 (1964); McCormick 284-88.

needed as long as the great majority of Japanese evince a respectful and cooperative attitude toward officials in general, and the public prosecutor has the power to suspend institution of prosecution and place cooperative suspects under a type of informal probation.[117] The principles already laid down by Japanese courts, together with the analogies available in American law, are sufficient to enable the Japanese courts to administer immunity legislation if enacted.

The use of administrative tribunals as formal hearing agencies, not merely as evidence-gathering machinery, is at a much lower level in Japan than in the United States. As a result, fewer problems of privilege arise in Japan than in this country where intensive quasi-judicial investigative hearings are often a prelude to criminal prosecutions. In addition, legislative committees are used less as an aggressive investigating tool than as devices to ascertain personal opinions about the wisdom of pending legislation. Therefore, it is unlikely that Japan will experience the rash of legislative committee witness cases that in the United States have had an unfortunate impact on doctrines of privilege which must be administered in the criminal courts as well as before free-wheeling committees. Thus, it would seem that present Japanese doctrines of privilege are adequate to meet current needs.

That there is no burning dissatisfaction with the existing doctrines is evidenced by the fact that there were no serious efforts made in the deliberations of the Commission on the Constitution *(Kempō Chōsakai)* to reconsider the specific form of Article 38(1). The few questions raised about that provision were lumped together with many others to be debated under the general question whether it was sufficient to leave to legislation and court rule most of the constitutional provisions bearing on procedural rights.[118]

Consequently it is a safe assumption that in major outline and in most details, the concept of a privilege to remain silent has proven acceptable both to the Japanese public and the legal profession. Experience with the privilege supports the premise that features of an

[117] Code art. 248; *see* Dando 344.

[118] *See* Kempō Chōsakai, *supra* note 26, at 339-46, and Kempō Chōsakai, Kokumin no Kenri Oyobi Gimu, Shihō ni Kansuru Hōkokusho (Fuzokubunsho dai 8-gō) (Report of the Commission on the Constitution, Supplement No. 8, on the rights and duties of nationals) 76-78 (1964); Uematsu, Kuroda, Sato & Tanaka, *Kempō chōsakai no saishūhōkoku o owatte* (Completing the final report of The Commission on the Constitution), Jurisuto (No. 303) 10, 16 (1964). This may be because Socialist Party members of the Diet boycotted the work of the Commission, and were joined in this by the intellectuals of the left. *See also* Ward, *The Commission on the Constitution and Prospects for Constitutional Change in Japan*, 25 J. Asian Studies 401, 417-18 (1965).

alien procedural and constitutional system of law can be grafted onto a body of procedural law entirely different in origin and can survive and flourish without detrimental effect upon the form and operation of that procedural system as a whole.