Interrogation of Criminal Suspects in Japan –
the Introduction of Electronic Recording

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Introduction

The Japan Federation of Bar Associations (JFBA) is the peak professional body for Bar Associations and lawyers (attorneys) in Japan, encompassing about 20,000 lawyers. It is an active member of the International Bar Association (IBA), the world’s largest association of lawyers, with membership of 194 Bar Associations and Law Societies representing over 2.5 million lawyers and over 16,000 individual members from 183 countries.

The IBA is a non-political, professional association. It has a Human Rights Institute (HRI) which assists the IBA in actively promoting the application of the just rule of law in legal systems around the world.

The JFBA has established a Working Group on the introduction of electronic recording of the process of the interrogation of persons suspected of the commission of crime in Japan. The Working Group requested the IBA to research the issue, report and make recommendations as considered appropriate. The IBA was requested to draw upon its knowledge of this area gained from the research conducted in 1994-95 into the *daiyo kangoku* system of pre-trial detention in Japan (see report of the HRI: *The Daiyo Kangoku (Substitute Prison) System of Police Custody in Japan – Appendix E*) and the activity was undertaken by the HRI.

On 15-19 November 2003 the HRI sent two researchers on a mission to Japan, supported by the JFBA, to investigate and report to the IBA on their findings and to make preliminary recommendations. They were Nicholas Cowdery AM QC, Director of Public Prosecutions for New South Wales, Australia (and author of the *daiyo kangoku* report in 1995), and Stefan Kirsch, a German criminal defence lawyer also working as a defence lawyer at the International Criminal Tribunal for the Former Yugoslavia in The Hague, The Netherlands. Their *curricula vitae* are attached as Appendix A.
Executive Summary

The Preamble to the Constitution of Japan includes the following statement by the Japanese people:

‘We desire to occupy an honoured place in an international society striving for the preservation of peace, and the banishment of tyranny and slavery, oppression and intolerance for all time from the earth.’

That worthy and legitimate desire will be more difficult to fulfil if Japan cannot show an appropriate responsiveness to international developments in the area of the enforcement of fundamental human rights. Nowhere are human rights more relevant, in peacetime, than in the operation of a system of criminal justice.

The Constitution contains two further provisions of particular relevance to the matters the subject of this Report.

Article 34 provides: ‘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’.

Article 38 provides: ‘No person shall be compelled to testify against himself. Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence. No person shall be convicted or punished in cases where the only proof against him is his own confession’.

Every nation has a responsibility to continually review, update and modernise its criminal justice system and processes.

At the beginning of those processes lies the function of police investigation of the commission of criminal offences. An important part of such investigation is the interviewing (or interrogation) of persons suspected of having committed criminal offences. The community knows that. The community also expects that in the course of such interrogation the human rights of all those involved in the process will be protected.

The purpose of such interrogation is to obtain, in that particular form and from that particular source, relevant evidence that may be admissible in court proceedings for the prosecution of an alleged offender. The evidence may take the form of a confession, or admission against the interest of the suspect (and later defendant, or accused person). The interrogator must begin by according the suspect the presumption of innocence and the right to silence. So much is required by Article 14 of the International Covenant on Civil and Political Rights, to which Japan is a party. The suspect must also be accorded the right to legal advice.

It is not the role of the interrogator to extract by all means available a confession to the crime alleged. Experience has shown that involuntary confessions carry an
unacceptable risk of unreliability. Excessive reliance on confessions can also lead to injustice if other relevant evidence is accorded a lower priority at the investigation or adjudication stage.

For many years the JFBA has been concerned about the lack of transparency in the process of police interrogation in Japan. A lack of transparency increases the risk of an inability to hold official conduct appropriately accountable in those circumstances. These concerns were found to have substance in the International Bar Association’s report on the daiyo kangoku system of pre-trial detention issued in 1995 and the situation has not changed materially since then. Indeed, the incidence of successful challenges in the courts to the voluntariness of confessions for the reasons identified in the 1995 Report has increased over time.

A major concern has now become the method by which the voluntariness and reliability of confessions may be assessed by the courts and other legitimate participants and observers. This is a particular concern in a system where no contemporaneous objective record is kept of the conduct and content of interrogation, where according to law defence attorneys are not allowed to be present and where the only official account given is a version written by the interrogators.

One way of ensuring an objective and complete record of events during interrogation is the electronic recording of proceedings by audio and/or videotape and the JFBA supports such a proposal.

The Japanese Government has considered this question in the course of the present review of the criminal justice system undertaken by the Justice System Reform Council; but it is opposed to such a measure, at least for the present.

This IBA mission has considered a great deal of written material relevant to the issue and has had the advantage of interviewing personally representatives from all sides of the argument. The mission is of the view that the issue of electronic recording of interrogations, at the very least should be urgently examined by the Japanese Government in a spirit of genuine inquiry (including examination of the processes adopted in other jurisdictions); but, on the basis of information already available, there is no compelling reason why the electronic recording of the interrogation of suspects should not be introduced in Japan. Many practical benefits may flow from such a procedure.

Accordingly, the IBA:

(1) supports the proposal made by the JFBA for a system of electronic recording by audio or video recording of all interrogations carried out by police and prosecution. This would ensure that the appropriate tribunal — the Court — could more efficiently assess issues such as the extent to which confessions have been coerced and the grounds of complaint by citizens in respect of police questioning of suspects;

(2) welcomes the proposed reform programme of the saiban-in system — being a modified jury system in which lay persons are drawn from the community as assessors to assist judges;
(3) endorses the opinion of the JFBA that the need for electronic recording of interrogation would become even greater if and when the projected saiban-in Courts are established;

(4) further suggests that the Government of Japan should consider initiating without delay a comparative study of interrogation procedures internationally with a view to ultimately establishing the most appropriate system for Japan; and

(5) considers that there are benefits to be achieved for the criminal justice process by the immediate introduction of a regular system of audio taping and video recording of the entire process of police questioning of suspects including the following:

- creation of an objective and complete record of proceedings that is more reliable than other means of reporting and that remains available for later examination and application as required;
- protection of suspects from the fabrication of false confessions;
- reduction of the likelihood of ill-treatment of suspects by police;
- fewer allegations of impropriety by officials, resulting in improvements in morale and public standing;
- less time and expense on the interrogation process and on police preparation for and appearance in court; and
- improvements in the delivery of justice to the community.
Mission to Japan

On Saturday 15 November 2003 Messrs Cowdery and Kirsch arrived in Japan. Their meetings and inspections were confined to Tokyo and the immediate surroundings, but the criminal laws and procedures are uniform throughout Japan.

The President of the IBA had written to officials to be consulted by the mission and a copy of the letter of introduction to the Supreme Court is attached as Appendix B, by way of example.

Mr Kirsch met with members of the JFBA Working Group on 15 November and discussed his experience with audio/video recorded statements at the International Criminal Tribunal for the Former Yugoslavia (ICTY) at The Hague, The Netherlands. Messrs Cowdery and Kirsch met with members of the Working Group on 16 November before interviewing individual detainees who had experienced the process of police interrogation. Members of the Working Group accompanied the mission throughout its work.

That evening there was a discussion with legal academics (Professors Akira Goto and Atsushi Fukui) and others on the issues of principles raised.

On 17 November the mission met with the President of the JFBA, Mr Tohru Motobayashi, and visited representatives of the Tokyo District Court, the Ministry of Justice, the National Police Agency and the Supreme Court. It then held a well-attended media conference at the JFBA headquarters in which the nature of the mission was explained and the issues identified for discussion and report.

Mr Cowdery was then obliged by existing professional commitments to return to Australia; but Mr Kirsch interviewed another detainee in Chiba Detention Centre on 18 November and inspected a police station in Chiba Prefecture before departing Japan on 19 November.

The mission wishes to record its appreciation and thanks to all who assisted during the visit to Japan. Without in any way overlooking the many contributions by others, it mentions particularly Mr Masanori Ono (Chair of the Working Group), Mr Kazuyuki Azusawa, Mr Masashi Akita, Mr Nibe, Mr Shunji Miyake, Ms Fukui and the interpreters Ms Yabe and (throughout the mission) Ms Kodera.
Summary of Materials Provided

I. The mission was provided in advance with the following materials (as described by the JFBA in the accompanying list of contents) in electronic form and hard copy. They are reproduced in Appendix D.

Chapter 1: Overview of discussions on audio/video tape recording in Japan

(1) Practice of police interrogation in Japan;
(2) Obligation to be interrogated;
(3) Why Japanese lawyers ask for video/audio tape recording before attorney’s presence at interrogation; and
(4) Arguments against video/audio tape recording of police/prosecutor interrogations in Japan.

Chapter 2: Government opinion about video/audio recording of investigation process

(1) Proposal concerning means of improving and expediting criminal proceedings (excerpt) 15 July 2003 — Supreme Public Prosecutors Office;
(2) Minutes No 20 of the House of Councillors Committee on Judicial Affairs, 156th Diet, 8 July 2003 (excerpt) (The view of the Office for Promotion of Justice System Reform under the Cabinet);
(3) Minutes of the 53rd meeting of the Justice System Reform Council on 27 March 2001 (excerpt) (The view of the National Police Agency);
(4) Comment on saiban-in system (The view of Ministry of Justice). Outline of saiban-in system (The view of the Office for Promotion of Justice System Reform under the Cabinet);
(5) Written interpellation on the introduction of audio recording and video recording for the purpose of ensuring transparency in interrogations and excluding closed, secret interrogation sessions submitted by Munenori Ueda, Question No 48, presented on 13 December 2002;
(6) Response to the Interpellation. Response document is dispatched to state the position of the defence. Cabinet Interpellation at Diet 155, No 48, 28 January 2003, Prime Minister Junichiro Koizumi; and
Chapter 3: Japan Federation of Bar Associations’ opinion

(1) Resolution requesting transparentisation of investigations through video and audio recording of entire investigation process, as of 17 October 2003;

(2) JFBA opinions on ‘transparentisation of the interrogation process’, as of 14 July 2003; and

(3) JFBA President’s comment: ‘The need for a more transparent interrogation process’ as of 14 July 2003.

Chapter 4: Case studies

Case 1  Mt Koya Arson Case
Case 2  Kabutoyama Case
Case 3  Violence by Osaka Police
Case 4  Statement Produced by a Word Processor
Case 5  Drug Smuggling by British
Case 6  Matsumoto Sarin Case
Case 7  Uwajima Case
Case 8  Interrogations in the Recruit Scandal
Case 9  Pakistani Arson Case
Case 10 Soka Case

II. The following additional materials were provided in hard copy only and, except for the first item, are not reproduced in this Report.

- The Daiyo Kangoku (Substitute Prison) System of Police Custody in Japan — Report by the International Bar Association, 1995;

- Resolution of the International Bar Association on the abolition of the system of daiyo kangoku;

- The Penal Code of Japan;

- The Code of Criminal Procedure of Japan;

- The Rules of Criminal Procedure of Japan;

- Outline of Criminal Justice in Japan by the Supreme Court of Japan, 2003;

- Criminal Justice in Japan by the Ministry of Justice, to 1985;

- Summary of the White Paper on Crime, 1999 — Research and Training Institute of the Ministry of Justice of Japan;
• Recommendations of the Justice System Reform Council — For a Justice System to Support Japan in the 21st Century, 2001;

• Japan’s Fourth Periodic Report of States Parties to the ICCPR, 1997;

• Alternative Report to the Fourth Periodic Report of Japan on the International Covenant on Civil and Political Rights, 1998 — Japan Federation of Bar Associations; and

• Concluding observations of the Human Rights Committee of the UN: Japan, 1998.
Meetings

Representatives of the JFBA

The mission met with members of the Working Group of the JFBA on 15, 16 and 17 November 2003. In an extended meeting on 16 November it was explained that a process of judicial reform is presently under way in Japan and that the JFBA would like to see the proposal for the electronic recording of interviews of suspects included in that process. It is an overdue reform, in any event, but if the saiban-in system (included in the proposed reform programme) is to be introduced — being a modified jury system in which lay persons drawn from the community sit, more or less as assessors or a modified jury, with judges — then the need for an objective and more reliable means of proving what occurred during interrogation will become even more pressing.

Before the Second World War, Japan’s justice system was inquisitorial, drawn from ancient Japanese procedures with overlays of French and (especially in the criminal justice process) German practices. After the Second World War under American occupation the procedures became essentially adversarial, but there have been no juries.

Since the 1960s there have been discussions about reform. (It is important, of course, that justice systems everywhere be continually updated and modernised.) In 1999 a Justice System Reform Council was established, being an advisory council to the Japanese Cabinet. It undertook a programme of review and made recommendations in 2001 – see Appendix D.

Another legislative body has been preparing Bills during 2003 and they are expected to be introduced into the Diet in the first half of 2004. Although the electronic recording of interrogations is not included in the draft Bills, the JFBA is pressing for the issue to be included in debate. The Government is opposed to the proposal, but there is some support among Members of the Diet.

There was some discussion of the materials provided to the mission and of the processes that might be followed for the IBA to support the initiative of the JFBA, if that course was determined.

Also present at these meetings as an observer was Associate Professor David Johnson of the University of Hawaii, a fluent Japanese speaker, who has lived, worked (including in prosecution offices) and studied in Japan for many years and has written extensively on the criminal justice process (eg D T Johnson, The Japanese Way of Justice — Prosecuting Crime in Japan, Oxford University Press, 2002). He contributed very helpful factual accounts, insights and analyses to the discussions.
Ministry of Justice

On 17 November 2003 the mission met with members of the Ministry of Justice (prosecution service). The following questions had been submitted in advance.

Questions for the Ministry of Justice

(1) How do investigators record statements made by suspects and circumstances of interrogation? Do investigators record questions and answers word by word? Why do investigators not record the questions in the written statements?

(2) How do prosecutors prove in the trial process the voluntariness and credibility of statements made by suspects and circumstances of interrogation if they are challenged by suspects (defendants) in the trial process?

(3) Is the Ministry of Justice opposed to video and/or audio recordings of interrogation? If so, why?

(4) Do investigators continue interrogation if the suspect remains silent?

(5) Do suspects in custody have the duty to stay in the interrogation room? Do suspects in custody have the duty to be interrogated?

(6) Do investigators stop the interrogation immediately when the suspects ask for the counsels?

(7) When suspects maintain silence regarding the facts of a crime or deny the charge, do investigators consider it to constitute ‘reasonable ground enough to suspect that the suspect may destroy evidence’ as per Article 89 Section 4 of the Code of Criminal Procedure?

The questions were answered in the following way.

The representatives of the Ministry of Justice (principally through Mr Shinji Ogawa, Counsellor, Criminal Affairs Division) stated that they were providing the official Government view in responding to the questions asked.

The present system provides for a statement to be compiled by the interrogator. The form of the statement varies — sometimes it might be in question and answer form, sometimes with only some questions recorded, sometimes in narrative form with the suspect’s words only. The decision of how the record will be made is a matter for the discretion of the interrogator.

It is conceded that electronic recording would enable everything to be recorded, but that is not presently the case. Electronic recording of interrogation is not prohibited under the present law and there are recordings made (audio recordings) in a small number of cases. However, Mr Ogawa stated: ‘It is not appropriate at this time to immediately introduce electronic recording’.

There has been discussion of the suggestion among officials and opinions vary. It is considered that it is appropriate to decide the issue in the future.

It was stated that electronic recording is not presently appropriate for the following reasons:
(1) The investigator tries to establish with the suspect a human relationship based on trust. This has given rise to the present very comprehensive procedures and very detailed interrogation.

(2) When a suspect talks to an interrogator, there are some things that he does not want other people (even a lawyer or family members) to know. So there is a need to establish trust.

(3) There is a lot of ambivalence on the part of the suspect and internal conflict in many cases.

(4) Interrogators talk about their own life experiences, their ways of thinking, in order to gain the trust of the suspect.

(5) Electronic recording would lead to everything being recorded. That would make it difficult to build trust in circumstances where the suspect might not want accomplices, criminal organisations, family and so on to know what is being said.

(6) Interrogation is an important process in the finding of facts. There is a public expectation that it will be used for that purpose. Electronic recording would make it difficult to enable the finding of facts.

Under the current system of trial procedure, if a confession is challenged as to its authenticity or voluntariness: the defendant makes a claim; the attorney, prosecutor and judge question the defendant about the claim; the interrogators are called as witnesses; any other relevant evidence is introduced. Sometimes objective circumstances of the interrogation are in issue and the written record of events can be tendered. If the claim is of physical violence, there may be physical evidence, medical evidence, or records of interviews with attorneys available. Judges must resolve competing claims.

Even if the saiban-in system is introduced, the same procedure will be followed.

The number of contested admissions is not small and they take time and effort to resolve in the justice process. It is true that the burden on prosecutors will increase under the saiban-in system and that more streamlined procedures will be needed, but the Ministry is still opposed to the use of electronic recording as an aid to this process for the reasons already given.

A new system will be introduced of recording the objective facts of interrogations — the mechanical steps, times, etc.

While a suspect may request legal advice, the presence of an attorney during interrogation is not allowed, unless the interrogator considers it appropriate. The interrogator may allow it if the suspect requests the presence of an attorney.

**National Police Agency**

On 17 November 2003 the mission met with a representative of the National Police Agency, Superintendent Shigeyuki Tani. The following questions had been submitted in advance.
Questions for the National Police Agency

(1) How do investigators record statements made by suspects and circumstances of interrogation? Do investigators record questions and answers word by word? Why do investigators not record the questions in the written statements?

(2) How do investigators prove in the trial process the voluntariness and credibility of statements made by suspects and circumstances of interrogation if they are challenged by suspects (defendants) in the trial process?

(3) Is the National Police Agency opposed to video and/or audio recordings of interrogation? If so, why?

(4) Do investigators continue interrogation if the suspect remains silent?

(5) Do suspects in custody have the duty to stay in the interrogation room? Do suspects in custody have the duty to be interrogated?

(6) Do investigators stop the interrogation immediately when the suspects ask for the counsels?

(7) When suspects maintain silence regarding the facts of a crime or deny the charge, do investigators consider it to constitute ‘reasonable ground enough to suspect that the suspect may destroy evidence’ as per Article 89 Section 4 of the Code of Criminal Procedure?

The questions were answered in the following way.

(1) There is no obligation under the present law to record interrogation. The investigator makes a report on the interrogation. From April 2004 there will be a new system of recording the progress of an investigation, including interrogations. The reports will include the investigator’s name, places, times of events, the number of statements made, etc. The suspect’s story is written by the investigator as an investigation statement, in story (narrative) form. If the investigator considers it necessary, he can write the questions and answers delivered. The statement can be used in the trial — it need not be a record of what was said, word for word.

(2) Investigators are thoroughly trained, but in ‘not a few’ cases suspects claim that the confession is not voluntary. The onus of proof of voluntariness is on the prosecutor. Interrogators are trained in preparation for and the giving of evidence, but sometimes the defence claims that they are not creditworthy.

(3) The Superintendent was not familiar with what happens in other countries; but interrogation is important in Japan. It would be detrimental to the investigation and proof of crime not to have a statement from the suspect; therefore interrogators make their utmost efforts to get confessions. However, most suspects are not anxious to confess. The illegal obtaining of statements is not tolerated in the police. Interrogators therefore ‘try to construct a one-to-one human relationship based on trust to get a confession statement’. A relationship of trust is built up in which the investigator tries to understand the other party and get inside his or her mind. If there are obstructions and hindrances, the investigator tries to build a relationship. The official position of the National Police Agency is that recording the interview would be a hindrance to this process and detrimental to the investigation. It has been decided that recording is an issue to be looked at in the future.
The law does not state that interrogation should cease if the suspect wants to remain silent. The interrogator may stop the process if he chooses.

A detainee cannot refuse to be interrogated.

No.

The court decides bail and it is the prosecutors, not the investigators, who are asked their views.

The Superintendent also said that police do investigate all aspects of a crime and do not rely only on confessions; however, if there is no confession there is an extra burden on investigators.

Asked about the possibility of allowing defence attorneys to be present during interrogation, the Superintendent added that the presence of third parties (even lawyers) would be detrimental to the investigation process.

**Supreme Court**

On 17 November 2003 the mission met with representatives of the Supreme Court, particularly Mr Ito, a Counsellor of Criminal Affairs Bureau of the General Secretariat of the Supreme Court. The following questions had been submitted in advance.

*Questions for the Supreme Court*

(1) Do suspects in custody have the duty to stay in the interrogation room? Do suspects in custody have the duty to be interrogated?

(2) How do courts handle challenges to the voluntariness and credibility of statements made by suspects and circumstances of interrogation?

(3) What kind of evidence is available when courts judge the voluntariness and credibility of written statements?

(4) When defendants maintain silence or contest offence charged, do courts or judges consider it to constitute ‘reasonable ground enough to suspect that the suspect may destroy evidence’ as per Article 89 Section 4 of the Code of Criminal Procedure?

These questions were answered in the following way.

(1) Article 198(1) of the Criminal Procedure Law provides that a suspect may be asked to attend for interrogation but can refuse or leave at any time unless arrested or under detention. There is no Supreme Court judgment on this issue; but four years ago a Grand bench pronounced on this aspect in connection with a case under Article 38 of the Constitution (which relates to the deprivation of liberty). The Court held that imposing an obligation to attend and to stay for interrogation — in effect, forcing a statement from a suspect — does not constitute the deprivation of liberty against the will.

(2) The burden is on the prosecution to prove voluntariness (Article 322 of the Criminal Procedure Law).
(3) Statements by suspects and interrogators, the record of events, statements made by detainees to their attorneys, and reports by officials to the Court are available.

(4) No.

Mr Ito stated that he was not aware of any statements in judgments concerning a need for change in existing procedures. It is not within the power of the judiciary to recommend or order change — that is a legislative matter. Mr Ito expressed his personal view (not the Court’s view) that recording interrogations would make judgments easier for the courts; but investigators say that it would make their job more difficult.

There is no Supreme Court judgment on the presence of attorneys at interrogations.
Inspections

Tokyo District Court

On 17 November 2003 the mission met with Judge Osamu Ikeda, Deputy Chief Judge of the Tokyo District Court, and inspected one of the five interview rooms in the basement of the Court building. Detainees are brought here during detention in *daiyo kangoku* for extension of the period of detention at the request of prosecutors.

Questioning by judges (in the absence of prosecutors or police) is usually brief — no more than 20 minutes) and the rooms are used every day, especially between 10am and 3pm and again in the evenings.

There are no facilities for the recording of interviews or for the playing of electronic recordings from elsewhere. Judge Ikeda did express the personal view (not an official view of the courts) that the judges’ task at trial would be facilitated by having access to a recording of exactly what had happened during detention and interrogation.

Ministry of Justice

On 17 November 2003 at the Ministry of Justice the mission also inspected an interview room as used by prosecutors.

Again, there were no facilities for recording interviews (except by hand — or by laptop computer if a prosecutor so chose) or for playing any recordings made elsewhere.

Police Investigation Rooms

On 18 November 2003 Mr Kirsch met with officers of the Narashino Police in Chiba Prefecture and inspected two police investigation rooms.

As in the District Court and the Ministry of Justice, there were no facilities for recording interviews or for playing any recordings.

One of the rooms was lined with sound-absorbing material. The mission was denied permission to take pictures of that room.
Case Studies

As noted elsewhere in this Report, the JFBA provided ten case studies to the mission for consideration (see Appendix D).

In addition to the case studies provided in writing, the mission gathered the following information about those five cases in discussions with persons involved.

(1) Kabutoyama Case

The defendant, Ms Yamada and her attorney, Mr Takano were interviewed. During her interrogation after arrest, Ms Yamada was interviewed by police in the mornings and prosecutors in the afternoon (sometimes at the police station and sometimes at the prosecutors’ office). The police told her not to tell the prosecutors anything different from what they had told them, otherwise the prosecutors would become angry. Police demanded that she prove an alibi for the 15-20 minutes, one month before, when the offence was committed, otherwise they would arrest her because she was the only person who could not prove an alibi. Police had given the wrong time for which an alibi was required, which created more confusion. She was told that if she could prove an alibi she would be released. Ms Yamada could not account for that time period by other evidence.

She was told that she had the right to remain silent; but she was also told that she must prove an alibi, otherwise she must be the offender. They said: ‘Unless you talk, we cannot believe you are innocent’. She was also told that while she had the right to counsel, an attorney would be very expensive.

Police and prosecutors conducting interrogations made no record of the proceedings, by notes or otherwise.

Ms Yamada said that she could not complain to the judge reviewing her detention because police were sitting right behind her (cf. Judge Ikeda’s assertion that prosecutors and police do not attend such interviews).

After hours of interrogation police prepared statements with reference to notes compiled by other police present during interrogations. Sometimes police read the statements before she signed them.

Police also asked about conversations she had with a lawyer. They submitted her to a polygraph test, refusing to provide the results but stating that the result was bad on an important point.
(2) Matsumoto Sarin Case

The mission interviewed the suspect, Mr Yoshiyuko Kono. He had also been subjected to a polygraph test but was not given the results. He was told that some response(s) had been unfavourable.
Following a sarin gas attack 25 metres from his home, in which many people were killed and injured, Mr Kono was hospitalised for 33 days. He was not arrested, but answered questions voluntarily in the hospital and went voluntarily to a police station for interrogation for two days following discharge from hospital.

Over police objection, Mr Kono made his own written record of the investigation and he intends to publish his account.

He was told by police: ‘You have to prove your innocence’. No written statement was produced while he was at the police station.

Mr Kono later received an official apology and he is now a member of the Nagano Prefecture Security Council, dealing with complaints about, *inter alia*, the police agency that interrogated him.

(3) Violence by Osaka Police

Attorney Sadato Goto was interviewed about this case. It arose out of events on 3 February 1999 involving organised crime gangs and there were 33 trials of an average length of three hours. There were allegations of police mistreatment that led to the making of involuntary admissions. A chart of the allegations was prepared by a judge in the matter, demonstrating the timing of periods in custody, the personnel involved in interrogation and the allegations of mistreatment. A copy of the chart has been provided in writing to the HRI (it not being available electronically) and it forms part of the materials considered, but not reproduced in this Report.

The evidence concluded in October 2002 and judgment (of 97 pages) was given in March 2003. The court rejected the testimony of police, saying that police evidence that there was no violence was not credible. The court had a doubt about the voluntariness of confessions and refused to admit them into evidence.

(4) Mt Koya Arson Case

There was an admission to police in this case, but denials to prosecutors. The prosecutor in charge advised the police to record the confession in that case. There was a tape recording in which the suspect confessed to three arson events, but not to the fourth.

At the hearing the confessions were rejected as not voluntary and the accused was acquitted.
Audiotapes had been provided and the suspect was obliged to share the cost of transcription with the prosecution.

(5) Soka Case

The mission interviewed Mr Shimizu, lawyer in the Soka case. In July 1985 a high school girl was murdered. Six minors aged 13-15 were interviewed by police. Confessions were obtained and convictions followed.

A civil case was brought in due course and 15 years later acquittals were ordered.

A significant aspect of the evidence was the finding of blood type AB that was thought to have come from the offender(s). The six suspects were individually type A or type B. Prima facie, therefore, police were on notice that they had the wrong suspect(s). Instead of treating that as an indicator of innocence, they set out to get inculpatory evidence by way of confession in order to overcome this inconvenience. There was no objective record kept of what happened during the interrogations, but coercion was alleged and the final civil judgment found that violence had been used.

Incredibly, prosecutors advanced the proposition that the blood type AB that had been found was a mixture of the blood from the suspects, being respectively A or B. Whether or not prosecutors believed this ignorant nonsense, the court at the first trial accepted the proposition in the face of scientific evidence that it was absurd.

(6) Drug Smuggling Case

Mr Baker met with Mr Kirsch at the Chiba Detention Centre on 18 November 2003. The discussion took place in the presence of Mr Baker's lawyer.

Mr Baker stressed that he was informed neither of the right to remain silent nor of the right to counsel when he was first questioned by the Customs officer at Narita Airport. He was also not informed about the fact that he was being questioned as a suspect. Therefore, Mr Baker did not think that the interrogation was important. When his fingerprints were taken, Mr Baker was not told and was not aware that this was done in order to seal a statement. He thought that the officers wanted to check whether his fingerprints were the same as those which were to be found in and on the suitcase.

Mr Baker pointed out that after his arrest he was brought to a police station and he asked for counsel. However, he was told that he could not meet a lawyer. Not a single statement was written in English. Therefore, Mr Baker did not have the opportunity to check the content of the statements.
Mr Baker said that the police had lied to him. The police promised him that he would be released if he signed a statement, whereas he would be detained if he refused to sign it.

The significance of this case to the present mission is the importance that can attach to the translation of interrogation in the case of a foreign language speaker. Unless there is an objective record of what was said on all sides (eg by electronic recording of all speakers), the accuracy of translation cannot be satisfactorily assessed.
Position of the Government of Japan

It can be seen especially from the responses by the Ministry of Justice and the National Police Agency that the official Government view is that electronic recording of interrogations should not be introduced, at least for the present. This is reinforced by the statement of Prime Minister Koizumi on 28 January 2003 (see Appendix D) and other reports provided.

There does seem to be some scope, however, for an official examination of the issue at some time in the future.

Little regard seems to have been paid to the experience of other jurisdictions in this process and no empirical study seems to have been undertaken into its efficacy elsewhere.

The basis for the present opposition to the electronic recording of interrogation of suspects by police or prosecutors appears to be as follows. Investigators are engaged in a search for the truth and the community expects them to find it by all means properly at their disposal. The person who is in the best position to describe the truth of events is the person who was involved in them. Investigators have the best chance to have that truth told if they can establish a relationship of trust with the interviewee in which the interviewee will feel comfortable with revealing truthful information to the interrogator. Sometimes that relationship is aided by the interrogators giving something of themselves to the process, by way of personal disclosure and engagement.

That process would be impeded if the participants on both sides knew that everything they said was being recorded and might be played to persons, with some of whom the participants might not be comfortable sharing such information.

It is because of the perceived capacity of electronic recording to interfere with the extraction of the ‘truth’ that there is official opposition to it in Japan.
Position of the Japan Federation of Bar Associations

For very many years the JFBA has been concerned about the lack of transparency in the process of the interrogation of criminal suspects by police and prosecutors in Japan. In the absence of an appropriate degree of transparency, there is a reduced prospect of proper accountability for official conduct.

This is particularly important where the liberty of the subject is at stake and where official impropriety may have serious and far-reaching consequences for citizens.

The JFBA asserts that with the Japanese experience of successfully challenged ‘confessions’ by suspects in official custody, it is time to introduce procedures that will enable an objective and complete record to be made of interrogations so that the appropriate tribunals — the courts — can more efficiently assess issues that may legitimately arise (including the voluntariness of confessions and the grounds for complaint by citizens). The most effective way of doing that is by electronic recording of interrogations, by audio and/or video recording.

The need for such a standard will become even greater if the projected saiban-in courts come into being.

The JFBA asserts that international experience supports such a course.

The JFBA also points to the fact that Japan is a party to the International Covenant on Civil and Political Rights, but does not presently guarantee to those within the jurisdiction of police and the courts the rights provided by Article 14.

The function of police (in the present context) is to investigate and to discover evidence relevant to the commission of a crime — whether that evidence be inculpatory or exculpatory. The role of prosecutors is to fairly present the prosecution case to the court and to seek to ensure that justice is done in each case. Prosecutors must respect the human rights of defendants in so doing.

The official Government view (see above) seems to be premised on a larger role for police and prosecutors than they should properly pursue. The official opposition to electronic recording is based on the unstated assumptions that all persons suspected by police (and/or prosecutors) are offenders and that the role of police and/or prosecutors is not only to investigate and prosecute but to ensure conviction as well.

Thus, the presumption of innocence, right to silence and burden of proof on the prosecution are very often more honoured in the breach than in the observance when it comes to confessions.

The JFBA primarily seeks justice in all cases — justice according to the rule of law and with respect for the fundamental human rights of all involved.
International Experience

Germany

There is no provision in the German Code of Criminal Procedure (*Strafprozessordnung*) that requires the recording of the interrogation of a suspect or a witness and there seems to be no movement either officially within the jurisdiction or within the legal profession to require that.

Apart from the fact that the criminal procedure in Germany is inquisitorial and the method of gathering evidence is therefore different from that in the adversarial system, the need to record interrogations might be regarded as a low priority due to the fact that in Germany a suspect is usually accompanied by a defence counsel during the interview. That minimises the risk of police impropriety.

Australia

Since about 1990 in all jurisdictions in Australia there has been a requirement that for an admission to be legally admissible it must be electronically recorded or acknowledged. (It is noted also that in the United Kingdom, from whence came Australia’s legal system, there are analogous requirements.)

The most common method used is the video taping of interviews with suspects. If admissions are made away from electronic recording facilities, they must be adopted later electronically in order to be admissible. There are limited exceptions that allow non-recorded admissions to be admitted (eg if police can establish that they had reasonable cause for not using a recorder in the particular circumstances). These requirements are legislated in the various criminal statutes.

This situation has been created by legislation; but the initial impetus was provided by the courts, including the High Court (the ultimate court of appeal for Australia), concerned at the number of cases of police impropriety resulting in the rejection of tendered confessions.

A summary of the situation in New South Wales follows, prepared by a NSW police officer. Similar provisions apply in the other Australian jurisdictions.

New South Wales Police
Electronic Interviews with Suspected Persons System —ERISP

The ERISP (Electronic Recording of Interviews with Suspected Persons) is a joint development of the New South Wales Police, the Attorney General’s Department and the Office of the Director of Public Prosecutions. Other bodies in the planning and implementation were the Law Society, Public Defenders and the Law Reform Commission.
The ERISP system of recording interviews effectively deals with the shortcomings inherent with typewritten records of interview by providing courts with an unabridged account of the actual conversation between police and suspects being interviewed. The electronic recording of interviews provides courts with a window into the interviewing process, allowing for an objective assessment to be made of the prevailing circumstances surrounding the interview and the substance of any confession or admission arising therein.

The system has been utilised across New South Wales since the early 1990s and has led to a dramatic reduction in allegations against police of impropriety in the conduct of interviews, with a consequent reduction in court time in dealing with these allegations. There was also certainly a reduction in the number of not guilty pleas (unfortunately not quantifiable, as the introduction of ERISP coincided with other reforms and initiatives in the criminal justice system).

**Objectives for electronic recording of interviews**

The objectives of police carrying out interviews with persons suspected of committing criminal offences did not change with the introduction of the ERISP system. Police are entitled and indeed have a duty to ask questions of any person whether suspected or not for the purpose of discovering the author of a crime.

The objectives of ERISP as an electronic system for recording interviews are to provide a reliable and credible account of police interviews with suspects. The four principal objectives of the system are:

1. to deter and/or prevent the use of unfair practices by the police prior to, during and after interviews;
2. to deter the making of unfair and false allegations of improper behaviour by the police;
3. to provide an objective means of resolving disputes about the conduct and substance of police interviews; and
4. to provide the courts with a reliable account of statements made by persons accused of crime whilst in police custody.

In seeking these objectives it must also be ensured that the police are not unduly hampered in the proper investigation and prosecution of criminal offences.

**Benefits of ERISP from the police perspective**

Some of these benefits are as follows:

- raised credibility of police witnesses in courts and in the public perception;
higher guilty plea rate;

- less time expended on interviews;

- less time spent on preparing and giving oral evidence of the interview; and

- fewer *voir dire* hearings on the issue of voluntariness of confessional evidence.

Contrary to some prior expectations:

- very few suspects refuse to be electronically recorded;

- admissions continue to be made on both major and minor offences; and

- guilty pleas have increased, due to defence counsel being given a more objective view of what actually happened in the interview.

**ERISP system overview**

Two standards of interview recording equipment are in use. The first and preferred recording equipment is a combined video and audio recording system. These are referred to as ‘hybrid’ recorders. Hybrid recorders produce three master audio recordings on compact cassettes together with one master video recording in VHS format.

The second standard of equipment is an audio only recording system. This is known as a ‘triple audio system’. These units create three master recordings on audio cassettes simultaneously. Triple audio units are to be deployed at sites which are incapable of successfully supporting hybrid systems or in a briefcase portable form for use in the field or outside of police premises.
Suspect sits here, directly in front of camera.

Police sit here, and are caught by wide angle lens.

Police sit here, and are caught by wide angle lens.
Features of ERISP system

Integrity

An underpinning feature of the ERISP system is the recording of three simultaneous master recordings. These recordings are distributed to a:

- sealed master which is sealed in the presence of the interviewee;
- interviewee master, which is handed to the interviewee immediately on conclusion of the interview; and a
- police working master, which is used by the investigating police.

The handing of a master to the interviewee, thus negating any opportunity for allegations of tampering by police with the recording, has prevented the incidence of any such allegations.

Transcription

All ERISP recorded matters which become pleas of not guilty or which are to be subject of a paper committal are centrally transcribed by a contracted panel of transcription agencies. On completion of a transcript, it is e-mailed to the officer in charge for checking and certification to accuracy.

Transcription is the greatest single cost in the administration of the ERISP system, with the demand for transcript increasing over the years at a higher rate than the number of interviews, due to court and legal profession requirements.

Acceptance

ERISP as a concept and in its execution has had complete acceptance by all in the New South Wales Justice System.

Future

There is a business case in at present as a joint cross agency initiative between the Office of the Director Of Public Prosecutions, Police, Legal Aid and the Attorney General’s department to migrate the ERISP recording equipment and relevant playback equipment to DVD standard.
United States of America

Electronic recording is not provided for in most American States. The only State jurisdictions where it is required are Alaska, Minnesota and Illinois.

In the first two the initiative was advanced almost 20 years ago by the Supreme Court of the State. In the third the State legislature took the initiative earlier this year and it will be implemented in respect of homicide cases in 2005.

It is noted that in New Jersey there is presently a move by the Attorney General, Peter Harvey, to require statements given by suspects to be electronically recorded. Mr Harvey has said that such a requirement would help to ensure that confessions used in court are voluntarily given and accurately recount the defendant’s words. He intends to implement these procedures within a year and New Jersey will be the first State to do so by directive of the Attorney General. A New Jersey court is yet to rule in a case on whether or not confessions may not be used at trial unless they have been videotaped. Submissions were made in that case by intervenors (including prominent law schools) that ‘the problem of false confessions is systemic, [in part because of] current psychological interrogation techniques’. Mr Harvey has said that the procedure would ‘ensure voluntariness and accuracy’. He has expressed the view that routine taping of suspects’ statements will benefit police and prosecutors because a videotaped confession is powerful evidence. The words are recorded and the demeanour can be observed. He has said that taped confessions will minimise, although not eliminate, allegations that police did not correctly remember or deliberately mischaracterised what a suspect said. He said: ‘I think there are going to be more convictions, and more convictions that are sustained on appeal’. [See article in the New Jersey newspaper, the Star-Ledger, 25 November 2003.]

There are also some smaller areas/jurisdictions (at the county or city level) where electronic recording of admissions is required: eg San Diego; most of the State of Hawaii and parts of Florida.

Surveys of police conducted in those jurisdictions where electronic recording is required reveal a marked improvement in procedures and morale after the introduction of recording and an improvement in the standard of interrogations and their use in evidence.
Recommendations

The International Bar Association:

(1) supports the proposal made by the Japan Federation of Bar Association for a system of electronic recording by audio or video recording of all interrogations carried out by police and prosecution. This would ensure that the appropriate tribunal — the Court — could more efficiently assess issues such as the extent to which confessions have been coerced and the grounds of complaint by citizens in respect of police questioning of suspects;

(2) welcomes the proposed reform programme of the saiban-in system — being a modified jury system in which lay persons are drawn from the community as assessors to assist judges;

(3) endorses the opinion of the Japan Federation of Bar Associations that the need for electronic recording of interrogation would become even greater if and when the projected saiban-in Courts are established;

(4) further suggests that the Government of Japan should consider initiating without delay a comparative study of interrogation procedures internationally with a view to ultimately establishing the most appropriate system for Japan; and

(5) considers that there are benefits to be achieved for the criminal justice process by the immediate introduction of a regular system of audio taping and video recording of the entire process of police questioning of suspects including the following:

- creation of an objective and complete record of proceedings that is more reliable than other means of reporting and that remains available for later examination and application as required;
- protection of suspects from the fabrication of false confessions;
- reduction of the likelihood of ill-treatment of suspects by police;
- fewer allegations of impropriety by officials, resulting in improvements in morale and public standing;
- less time and expense on the interrogation process and on police preparation for and appearance in court; and
- improvements in the delivery of justice to the community.
## Appendices

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<td>Letter of Introduction</td>
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<td>C</td>
<td>Schedule of Meetings and Inspections</td>
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<td>D</td>
<td>Materials Provided to the Mission (a selection)</td>
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<tr>
<td>E</td>
<td><em>Daiyo Kangoku</em> Report</td>
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</table>
Appendix A

Nicholas Cowdery AM QC BA LLB has been the Director of Public Prosecutions for the State of New South Wales (NSW), Australia since 1994. His Office is the largest prosecuting agency in Australia. [See www.odpp.nsw.gov.au]


From 1975 until 1994 he was in private practice at the Sydney Bar, where he practised largely in criminal law (prosecuting and defending), common law, administrative law and some commercial law. He appeared in most Australian jurisdictions. He is also a member of the Irish Bar.

In 1987 he was appointed one of Her Majesty’s Counsel (QC).

He was an Acting (‘Associate’) Judge of the District Court of NSW for periods in 1988, 1989 and 1990.

He has been President of the International Association of Prosecutors since 1999. [See www.iap.nl.com]

He is a member of the Council of the Human Rights Institute of the International Bar Association and was Co-Chairman of the HRI from its creation in 1995 until 2000. (The IBA is the world’s largest association of lawyers, representing 2.5 million practitioners.)

He is Chairman of the Criminal Law Committee of the Section on Legal Practice of the IBA. [See www.ibanet.org]

He is Adviser on Human Rights Issues to the Law Council of Australia.

He is also an officer or committee member of human rights bodies in the International Commission of Jurists (Australian Section), Amnesty International, LAWASIA and the NSW Bar Association.

In 1990 he was an observer at the trial of the Vice-President of the Malaysian Bar Council in Kuala Lumpur, Malaysia.

In 1994-1995 he investigated and reported upon (on behalf of the International Bar Association) the daiyo kangoku system of pre-trial detention in Japan (see Appendix E).

He has participated in numerous programmes of human rights training for lawyers, particularly prosecutors, in many countries.

He was co-editor of the International Association of Prosecutors’ Human Rights Manual for Prosecutors (2003).
Stefan Kirsch is an Attorney and partner in the law office of Hamm, Michalke, Koeberer, Pauly and Kirsch in Frankfurt am Main, Germany. He studied law in Frankfurt am Main and in Lausanne, Switzerland. He worked as an assistant to Professor Dr Walter Kargl of the chair of Philosophy of Law, Theory of Law and Criminal Law at the J W v Goethe University Law School in Frankfurt am Main before being admitted to the Bar in 1997.

He practises exclusively in the field of criminal law and specialises in business crimes, foreign trade offences and international criminal law.

He has been assigned as defence counsel in three cases at the International Tribunal for the Former Yugoslavia (ICTY) in The Hague, The Netherlands and is presently appearing as co-counsel in the case of Blagojevic et al. (IT-02-60) (‘Srebrenica’) and as lead counsel in the case of Halilovic (IT-01-48).

Mr Kirsch is Vice President of the Association of Defence Counsel practising before the ICTY (ADC-ICTY) and is also a member of the Europa Committee of the Federal German Bar (Bundesrechtsanwaltskammer). He is member of the Executive Committee of the Deutsche Strafverteidiger e.V. and was appointed to represent the Deutsche Strafverteidiger e.V. in the process of the foundation of the International Criminal Bar (ICB). He is also a member of the International Criminal Defense Attorneys’ Association (ICDAA).
Appendix B

Mr. Ichitarou Ohono
Director General of Criminal Affairs Bureau
General Secretariat
Supreme Court of Japan
4-2, Hayabusachou,
Chiyoda-ku, Tokyo 102-8651

Fax: +81 3 3264 4697 29 October 2003

Dear Mr. Ohono,

We should like to advise that Nicholas Cowdery, QC and Stefan Kirsch will be visiting Tokyo from 15-19 November 2003 as representatives of the International Bar Association (IBA).

Nicholas Cowdery is Director of Public Prosecutions for New South Wales, Australia, President, International Association of Prosecutors, and former Co-Chair of the IBA’s Human Rights Institute. Stefan Kirsch is an Attorney and Partner in the law office of Hamm, Michalke, Koeberer, Pauly & Kirsch in Frankfurt am Main, Germany. He is also a member of the Executive Committee of the Association of Defence Counsel practising before the International Criminal Tribunal of Yugoslavia (ICTY).

The IBA is a federation of 194 Bar Associations and Law Societies, themselves representing over 2.5 million lawyers and in excess of 16,000 individual member lawyers from 183 countries. I should like to emphasise that the IBA is a non-political, professional organisation.

Mr. Cowdery visited Japan in 1994, held a wide range of meetings to discuss the operation of the Daiyo – Kangoku system, and returned in 1995 with the IBA President to participate in a seminar focussing on Criminal Pre-trial and trial procedures. The IBA has remained interested in this issue and has invited Mr. Cowdery and Mr. Kirsch to visit Japan to learn more about proposed changes to the interrogation process.

The IBA representatives would very much welcome the opportunity to meet you during their visit to gain your insight into these changes. The Japan Federation of Bar Associations is organising the schedule and will be in touch with your office.

Thank you for your consideration.
Respectfully yours,

Ambassador Emilio Cárdenas
President
International Bar Association
# Appendix C

**IBA Survey on Interrogations in Japan**
– The Necessity of Audio/Video Recording –

**Final Schedule**

Mr. Nicholas Cowdery and Mr. Stefan Kirsch

<table>
<thead>
<tr>
<th>Date</th>
<th>Time</th>
<th>To meet with</th>
<th>Location</th>
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<tr>
<td>15 Nov. (Sat.)</td>
<td>15:55</td>
<td>Stefan to arrive at Tokyo Narita Airport</td>
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<td>Flight No: LH 9790 (Code-sharing flight with ANA(NH))</td>
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<td></td>
<td>18:30-20:00</td>
<td>Briefing &amp; Dinner</td>
<td>Meeting Room D on 5th Floor, Imperial Hotel</td>
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<td>JFBA WG Members</td>
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<td></td>
<td>19:00</td>
<td>Nick to arrive at Tokyo Narita Airport</td>
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<td>Flight No: QF 179</td>
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<td>16 Nov. (Sun.)</td>
<td>9:30-10:30</td>
<td>JFBA Presentation</td>
<td>Meeting Room D on 5th Floor, Imperial Hotel</td>
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<td>10:30-12:00</td>
<td>Preliminary Meeting</td>
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<td>13:00-15:00</td>
<td>Individual Interviews</td>
<td>Meeting Room D on 5th Floor, Imperial Hotel</td>
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<tr>
<td></td>
<td></td>
<td>- Mr. Kono (Matsumoto Sarin Case)</td>
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<td>- Ms. Yamada &amp; her lawyer, Mr. Takano (Kabutoyama Case)</td>
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<td>Coffee Break</td>
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<td>15:30-17:30</td>
<td>Presentations of &amp; Group Discussion with Defense Lawyers</td>
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<td>- Mr. Goto (Mt Koya arson &amp; Police Violence Case)</td>
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<td>- Mr. Shimizu (Soka Case)</td>
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<td>- Mr. Miyake (Drug Smuggling Case)</td>
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<td>- Mr. Matsushita (Pakistan Case)</td>
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<td>19:00-20:30</td>
<td>Discussion &amp; Dinner with Criminal Law Scholars</td>
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<td>Prof. Fukui, Prof. Goto</td>
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<tr>
<td>Date</td>
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<td>17 Nov. (Mon.)</td>
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<td>Judge Ikeda, Tokyo District Court</td>
<td>Inquiring Room for detention</td>
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<td>Field Investigation Hearing (Fixed)</td>
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<td>Officers of Ministry of Justice</td>
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<td>Mr. Ogawa, Mr. Nakamura, Mr. Ishiyama, Mr. Shirai</td>
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<td>14:00-14:30</td>
<td>Officers of National Police Agency</td>
<td>National Police Agency Criminal Department</td>
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<td>Hearing (Fixed)</td>
<td>Mr. Tani</td>
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<td>15:00-15:30</td>
<td>Officers of Supreme Court</td>
<td>Supreme Court Criminal Department</td>
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<td>Hearing (Fixed)</td>
<td>Mr. Ito, Mr. Yano</td>
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<td>16:00</td>
<td>Press Conference (TBD)</td>
<td>Room 1705, Bar Associations Building</td>
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<td></td>
<td>20:20</td>
<td>Nick to depart from Tokyo Narita Airport for Sydney, Australia</td>
<td>Flight No: QF 22</td>
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<td>Dinner</td>
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<td>18 Nov. (Tue.)</td>
<td>10:00-12:00</td>
<td>Interview with a detainee</td>
<td>Detention center</td>
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<td>12:00-13:00</td>
<td>Travel Time</td>
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<td>13:00-14:00</td>
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<td>Police Investigation Room</td>
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<td></td>
<td>Dinner</td>
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<td>10:40</td>
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Appendix D

27 October 2003 version

The IBA Survey on Interrogation in Japan
- The necessity of audio/ video tape recording -

November 15 to 18 2003

JAPAN FEDERATION OF BAR ASSOCIATIONS

JFBA Working Group on IBA research mission
Chapter 1: Overview of discussions on audio/video tape recording in Japan

1) Practice of Police Interrogation in Japan

2) Obligation to Be Interrogated

3) Why Japanese lawyers ask vide/audio tape-recording before attorney’s presence at interrogation?

4) Arguments Against Video/Audio Tape-Recording of Police/Prosecutor Interrogations in Japan

Chapter 2: Government opinion about video audio recording of Investigation process

1) Proposal concerning means of improving and expediting criminal proceedings (excerpt) July 15, 2003 Supreme Public Prosecutors Office

2) Minutes No. 20 of the House of Councilors Committee on Judicial Affairs, 156th Diet July 8, 2003 (excerpt) (The view of the Office for Promotion of Justice System Reform under the Cabinet)

3) Minutes of the 53rd meeting of the Justice System Reform Council on March 27, 2001 (excerpt) (The view of the National Police Agency)

4) Comment on ‘Saiban-in’ system (The view of Ministry of Justice)
Outline of ‘Saiban-in’ system (The view of the Office for Promotion of Justice System Reform under the Cabinet)

5) -Written Interpellation on the Introduction of Audio-recording and Video-recording for the Purpose of Ensuring Transparency in Interrogations and Excluding Closed, Secret Interrogation Sessions Submitted by Munenori Ueda, Question No. 48, Presented on December 13, 2002

6) -Response to the Interpellation
Response document is dispatched to state the position of the defense. Cabinet Interpellation at Diet 155, No. 48, January 28, 2003
Prime Minister Junichiro Koizumi

7) Recommendations of the Justice System Reform Council- For a Justice System to Support Japan in the 21st Century – (excerpt) June 12, 2001

Chapter 3: Japan Federation of Bar Associations’ Opinion

1) Resolution Requesting Transparentization of Investigations through video and Audio recording of entire investigation process, As of October 17, 2003
2) JFBA Opinions on ‘transparentization of the interrogation process’, As of 14 July 2003

3) JFBA President comment ‘The need for a more transparent interrogation process’ as of 14 July 2003

Chapter 4: Case

Case 1) Mt. Koya Arson Case
Case 2) Kabutoyama Case
Case 3) Violence by Osaka Police
Case 4) Statement Produced by a Word Processor
Case 5) Drug Smuggling by British
Case 6) Matsumoto Sarin Case
Case 7) Uwajima Case
Case 8) Interrogations in the Recruit Scandal
Case 9) Pakistani Arson Case
Case 10) Soka Case
Chapter 1: Overview of discussions on audio/video tape recording in Japan

24 October 2003
Working Group on IBA research mission
Japan Federation of Bar Associations

1) Practice of Police Interrogation in Japan

In Japan, the police are permitted to detain a suspect in detention cell for up to 23 days for each case and conduct a thorough investigation. The interrogation often lasts for more than ten hours, from around 9 a.m. until late evening every day. The hours become longer especially when the suspect denies the charge. Should the suspect be charged with several cases, the interrogation often lasts for a few months. In the Mt. Koya Arson case (Case 1) provided in the case report, a suspect, who was a minor, was interrogated on three cases of arson for several hours a day, every day, for three and half months. In the Kabutoyama case (Case 2), the suspect, who was twenty-two year old nursing school teacher, was interrogated for a long hours almost everyday during twenty three days detention.

What is more distressing is that the interrogation takes place behind closed doors, without the presence of an attorney or the use of video or audio recording. Some investigators even specify the time and/or cap the hours when the suspect may speak to an attorney.

Due to such prolonged interrogation behind closed doors, claims of forced confession from suspects and their attorneys are common. Numerous claims have been made of threats and undue influence, such as ‘Admit to the crime, receive a lenient punishment, but deny the crime, receive a heavy punishment’, or ‘Deny the crime, and you will be kept in detention, but admit to the crime, and you will be released.’ (see Mt Koya Arson case (Case 1)) Some suspects have even complained that they were subject to severe violence from police officers (Violence by Osaka Police (Case 3)).

In Japan, a large number of suspects are later proven to have been falsely accused. (In Japan, four suspects sentenced to death were later found innocent in retrials.) It is claimed that most of these cases involved confessions forced by threats, undue influence, or violence.

Despite repeated complaints of illegal, forced confessions in interrogation, the Ministry of Justice, National Police Agency, and other investigative agencies have adamantly opposed the use of video and audio recordings to make interrogations more transparent. Their reasoning is that if video or audio recording were permitted, the suspect would be conscious of the recording and would not tell the truth. However, there is no evidence to support that the use of video or audio recording would prevent the suspect from making a confession. Furthermore, the reason given by investigative authorities loses validity if the suspect requests for video or audio recoding. At the very least, the reason does not justify investigative authorities from refusing video or audio recording in every case of interrogation.
We feel that the true reason that they (investigative authorities) refuse video and audio recordings is their fear that it would prevent them from continuing the interrogation practice unique to Japan.

Interrogation lasting for twenty or more days, ten hours each day for investigation of a single case is due to the uniqueness of the Japanese method of interrogation. A Japanese investigator repeats the same question on the smallest of details over and over again. The investigator then adds his or her words to those spoken by the suspect to form the confession statement. The statement is written in a style as if the suspect had spoken every word (Statement Produced by a Word Processor (Case 4)).

For example, let us assume that a suspect is arrested for bodily assault with a knife. During the investigation, the investigator may question the suspect on his intent as follows:

Investigator: What were you thinking of when you stabbed the victim?
Suspect: I was frantic, so I don’t remember.

A Japanese investigator would not be satisfied with such a dialogue. The following dialogue is sure to follow:

Investigator: What do you mean you don’t remember? You stabbed the victim in the chest. Since you stabbed him in the chest, you did think he would die, didn’t you?
Suspect: No. I had no time to think of anything like that.

Investigator: I don’t believe your excuse. What do you think happens when you stab someone in the chest?

Suspect: (Silent)

Investigator: He would die, right?

Suspect: May be.

Investigator: You do understand that’s what would happen, right?

Suspect: Yes.

If such a dialogue takes place in the interrogation, the Japanese investigator would write the following confession statement:

‘I was fully aware that the victim would certainly die if I stabbed the victim in the chest. At the time, however, I did not care if the victim died, and I stabbed the knife into the victim’s chest with all my might.’

As this example illustrates, confession statement prepared in interrogation in Japan are not accurate transcripts of the suspect’s confession. A composition is created by combining the words of the suspect and those of the investigator that emerge from the
long hours of interrogation. Confession statements, therefore, contain a lot of information added or fabricated by the investigator.

Japanese investigators believe that a confession statement of a suspect must include not only the minute details from the beginning to the end of the case, but also the personal history of the suspect and background of the case. Therefore, the questions are many and extremely detailed. Excessive amount of time is also required for organizing the information and preparing the written statement. Therefore, an extraordinary amount of time is required for interrogation.

Confession statements prepared through such interrogation contain information not given by the suspect but added or fabricated by the investigator. It is inherently irrational to use the contents of such a confession statement as evidence of confession by the suspect. In fact, an extremely large number of claims have been made in Japanese courts that the contents of confession statements were fabricated by investigative authorities and are not transcripts of the spoken confessions of suspects. As a result, trials are often prolonged as the prosecutor and defendant argue whether the confession statement is an accurate record of the spoken confessions of the suspect.

Japanese courts, however, rarely believe the suspect’s allegation that the confession was forced or fabricated, and tend to believe the testimony of the investigator that the confession is genuine. In addition, rarely will a Japanese court rule a confession statement inadmissible. On the contrary, judges have placed a great deal of weight on such confession statements as vital evidence that prove the suspect guilty. As a result, investigators have worked feverishly to obtain confessions from suspects even if they must resort to fabrication.

If video and audio recordings were permitted in interrogation, it would completely reveal the creation of such irrational confession statements. Investigative authorities adamantly oppose to the video and audio recoding of interrogation because they would be at a loss if their interrogation practice were revealed.

This problem is not merely a domestic one. Amidst the wave of internationalization, many foreign nationals stand trial for criminal cases in Japan. Their human rights are equally at risk. An American soldier indicted for rape in 2003 is pleading innocence by criticizing the interrogation in Japan without the presence of an attorney. In a case where a British national indicted for attempting to smuggle narcotics into Japan is pleading innocence (Case 5), the confession of the defendant in the investigation stage of the case is an important focal point of the case. Because the interrogation was not video taped or recorded, however, the defendant was sentenced to 14 years in prison in the first trial before the accurate details of the confession could be proven.
2) **Obligation to Be Interrogated**

Why is it possible for Japanese investigation authorities to interrogate a suspect for up to ten hours a day?

A suspect who is physically confined is deemed to have the obligation to be interrogated. The investigator can then interrogate the suspect in the questioning room as long as he or she feels is necessary.

Even if the suspect requests to see his or her attorney, the investigator is not required to suspend the interrogation. The investigator can freely question the suspect until the attorney arrives at the police department. Moreover, Article 39, Paragraph 3 of the Code of Criminal Procedure grants the investigator the right to limit the duration of consultation provided by the attorney to the suspect by citing that the suspect is being interrogated. Therefore, the investigator may, at times, intentionally postpone the meeting between the suspect and the attorney, or limit its duration to about 15 minutes.

Even if the suspect were to exercise his or her right to remain silent, the investigator is allowed to keep the suspect detained in the interrogate room and continue the interrogation.

Subjecting suspects to the obligation to receive such an interrogation severely restricts their right to remain silent. Therefore, some scholars advocate dismissing this obligation. As Article 198, Paragraph 1 of the Code of Criminal Procedure stipulates, ‘a suspect may, except the case where he is under arrest or under detention, refuse to appear or after he has appeared, may withdraw at any time,’ however, the common interpretation is that a suspect cannot refuse interrogate if he or she has been arrested or detained. The Supreme Court ruled in banc on 24 March 1999, ‘Obligation of the suspect to appear and stay (before the investigation authority) does not mean violation of his right to refuse any statement’. In practice, too, it is actually impossible for a suspect who is physically confined to refuse an interrogation.

This holds true, however, even when the suspect is not detained. Even if the suspect who is not physically confined is questioned, the provision, ‘a suspect may refuse appearance and, even if he does appear at the police, he may leave the police at any time, unless he has been arrested or detained,’ is rarely employed (the suspect is not notified of such a right), and the suspect is forced into confession. This problem is exemplified by the Matsumoto Sarin case (Case 6) and Uwajima case (Case 7).
3) Why Japanese lawyers ask vide/audio tape-recording before attorney’s presence at interrogation?

If the right to the presence of attorney in interrogate is permitted in Japan, and attorneys are actually allowed to be present, it would be impossible for investigators to conduct illegal interrogations. Japanese attorneys have naturally demanded for the right of presence.

Japanese attorneys are demanding for video/audio tape-recording of interrogates ahead of the right of presence because of the reasons below. Japanese investigation authorities have a strong dislike for attorneys, and are extremely reluctant to allow presence of attorneys in interrogations. In reality, investigation authorities at times even attempt to restrict contact between an attorney and the suspect alleging it interfere their interrogation. In light of this current state of investigation, even if attorneys immediately demand for the right to be present in interrogations, the investigation authorities are unlikely to accept the demand. On the other hand, the video/audio tape-recording is a means of ensuring transparency of an interrogation and clarifying the truth in the process. Therefore, it is a demand that would be difficult for investigation authorities to refuse. It is more convincing to investigation authorities and a more feasible demand than is the right to presence.

The right to presence is also hampered by a practical problem. In Japan, an interrogation can last for up to 23 days from the time of arrest. In a serious case, the interrogation may be held everyday during this period. Interrogation on any given day can last from morning to afternoon and at times until late into the night. Some interrogations can be as long as ten hours per day. There are, however, only approximately 20,000 attorneys for the national population of 120 million, and most of these attorneys are concentrated in large cities. Furthermore, only a limited number of these attorneys are capable of serving as criminal attorneys.

Even if attorneys were permitted to attend interrogations, it would be unrealistic for the limited number of attorneys to accommodate the need. Therefore, as the next best solution to the right to presence, we are demanding for the video/audio tape-recording of interrogations. The acceptance of video/audio tape-recording of interrogations should encourage investigation authorities to shorten interrogations and serve as a prerequisite for permitting attorneys’ presence.
4) Arguments Against Video/Audio Tape-Recording of Police/Prosecutor Interrogations in Japan

Japanese investigation authorities are strongly opposing video/audio tape recording of their interrogation. Official view of Japanese government states ‘In order to ensure the complete uncovering the truth in criminal cases, the criminal investigation agency in fact undertakes an extremely detailed investigation after having built a relationship of mutual trust with a suspect. Under such conditions, when making audio and/or video recording of a questioning is obligatory, it becomes difficult to build a relationship of mutual trust with a suspect because the entire questioning is being recorded, and this becomes a factor in the suspect’s hesitant about making statement. As a result, there are questions about the great expenditures of time, labor, and money for reproduction and transcriptions, as well as the danger that it may be impossible to get at the complete truth.’ Concerning video/audio tape-recording of investigation interrogations in foreign countries, the Government states ‘With respect to the questioning of suspects such as the use of audio and/or video-recording, this is a matter that requires careful consideration within the framework of the entire criminal procedure system of Japan. It is inappropriate to make a simple comparison between foreign countries and Japan, which has a different criminal procedure system’ (Reply of the Prime Minister Junichiro Koizumi dated 8 January 2003 in response to the interpellation from the Congressman Munenori Ueda).

The Government provides no further comment on the reason why it opposes video/audio tape recording. The following three points, however, are coming up when we carefully study this Prime Minister’s reply, articles published by ex-prosecutors, and the government view at the proposal of recording of interrogation circumstances in writing.

(1) The suspect would not tell the truth if the interrogation were recorded on video or audio tape
(2) Video/audio tape-recoding of interrogation is not compatible with the ‘precise’ judicial system of Japan
(3) The reproductions and transcriptions of the recorded tapes consume tremendous time, labor and money.

We explain these arguments further as well as our criticism below.

(1) The suspect would not tell the truth if the interrogation were recorded on video or audio tape
Why does the opposite view allege that a suspect would not tell the truth if the interrogation were audio/video recorded?

(i) Trust
The official view of the Government states that video/audio recording of the interrogation makes it impossible to establish mutual trust between the interrogator and the suspect. An article by an ex-prosecutor extends discussion on this point as follows;

‘Until a suspect who has committed a crime tells the truth, he or she struggles with various emotions including pride, shame, uncertainty, fear, craftiness, remorse, and
repentance. To receive a true statement from such a suspect, the police investigator must develop a relationship of trust with the suspect and convince the suspect by appealing to the conscience and honesty of the suspect. In this process, the suspect reveals the truth only after he or she gains a sense of respect for the investigator. If all the exchanges in the investigation were recorded to be disclosed at a future trial, both the suspect and the investigator would be conscious of themselves knowing that every word will be played back at a future trial. Under such a circumstance, it would be impossible to expect the suspect to tell the truth.'

Our rebuttals are as follows. The assumption that the suspect will tell the truth if a ‘relationship of trust’ is developed between the investigator and suspect is either erroneous or unproven. On the contrary the ‘relationship of trust’ that develops between the investigator, who has a tremendous influence on the suspect’s life through physical confinement and criminal punishment, may very well be because of the suspect’s flattery to the investigator, and the statement by the suspect, we believe, is likely to be a false statement based on flattery.

Even if a ‘relationship of trust’ between the investigator and suspect were necessary in investigation, it is absurd to claim that recording the interrogate on a video or audio tape would prevent the ‘relationship of trust’ from developing. On the contrary, the investigator should openly develop a relationship of trust and video/audio tape-record its process so that it can be verified in court.

Even if a ‘relationship of trust’ between the investigator and suspect were necessary, without a video or audio tape-recording of the interrogate, it would be impossible to verify whether a ‘relationship of trust’ truly developed in the interrogate. Furthermore, it would be impossible to verify whether the suspect made the statement based on this ‘relationship of trust’.

In essence, the statement by the suspect may not be based on a ‘relationship of trust’, but the product of a “deal” with the investigator or that of threat or violence. The statement may not have been made by the suspect at all, but merely an essay composed by the investigator.

If one were to assume that a suspect does tell the truth based on a relationship of trust with the investigator, the suspect would not reverse his or her statement. In reality, however, many suspects reverse their statements, claiming a case of a deal, violence, threat, or fabrication. Never has reported that an investigator called as witness to establish voluntariness of the confession made a convincing case of ‘relationship of trust’.

At the very least, the cited reason does not justify the investigation authorities from refusing to record the interrogation on video or audio tape when the suspect asks for it.

In conclusion, the assertion that a suspect would not tell the truth if the interrogation were recorded on video or audio tape due to a relationship of trust is not reasonable.

(ii) Refusal of making a statement in a case involving organized crime
As the second reason for alleging a suspect would not tell the truth if the interrogation were tape-recorded, some argues that in organized crime, a suspect may refuse to have the statement recorded that would prove that he or she confessed before accomplices for fear of retaliation by the organization. They assert further that if the interrogate were recorded on video or audio tape, a suspect in this situation would not make a true statement.

We, however, do not think this argument is proper. First, there is no evidence to support that an individual in such a circumstance would not make a true statement if the interrogate were recorded on a video or audio tape. Even if some suspects are reluctant to make a statement due to the relationship with the crime organization, the argument that those suspects will tell the truth behind the closed door where nobody can verify what had been done is not reasonable. On the contrary interrogation behind the closed door involves a greater risk of forced confession for the inside information of the crime organization. In fact a lot of claims on forced confession were made in organized crime cases (Violence by Osaka Police (Case 3)).

Issues relating an organized crime do not justify refusal of video/audio tape-recording in an ordinary crime case. At the very least, the cited reason does not justify the investigation authorities from refusing to record the investigation on video or audio tape when the suspect asks for it regardless of whether involving an organized crime or not.

(2) Video/audio tape-recording of interrogation is not compatible with the ‘precise’ judicial system of Japan.

It is strongly asserted that video/audio tape-recording of interrogation is not compatible with the real practice of Japanese criminal justice system. This view alleges, for example, that ‘Since Japan has a “precise” judicial system, which requires the prosecution to establish extremely detailed background information of the case and to prove the facts by a stricter standard. Since the need to obtain a statement from the suspect who knows the truth is much greater than it is under the Common Law, the video/audio tape-recoding system under the Common Law should not be hastily introduced’.

We, however, do not think this argument is proper. First, if necessary, to establish extremely detailed background or to use a stricter standard on burden of persuasion absolutely does not justify refusal of video/audio tape-recording of the suspect’s investigation. Detailed confession taken in the closed door help proving of the facts neither precisely nor highly probably.

On the contrary the reality of Japanese investigation technique is that the investigation authorities crafts a detailed crime story without evidence, and coerce the suspect into a confession to fit the story (Statement Produced by a Word Processor (Case 4)). Fact finding based on such confessions should rather than be ‘precise’, extremely non-scientific. In Japan sloppy investigation relying on such confessions is rampant.

(3) Reproductions and transcriptions of audio/video tape-recording consumes much time, labor, and money.
The government argues that when the interrogation process is tape-recorded, reproductions and transcriptions of such recording consumes tremendous time, labor, and money.

This is clearly wrong. If the interrogation is tape-recorded, what the suspect have made a statement in fact before investigation authorities will be rarely contested and, therefore, cases in which reproductions and transcriptions of tape-recording will rarely occur. Forcing confession behind the closed door and questioning the suspect by a number of interrogators for a number of days to fabricate a written confession for just a one case should be much more ineffective and resource-consuming.

In addition, voluntariness or credibility of confessions are frequently contested at a trial since they are taken in a closed room where any verification is impossible. In such cases, examinations of witnesses are conducted at a trial lengthy and fruitlessly. It is clear that the time and money spent on such examinations are much greater than those of reproductions and transcriptions of tape-recording. The issue of cost does not justify refusal of audio/video tape-recording of interrogations.
Chapter 2: Government opinion about video audio recording of investigation process

1) Proposal concerning means of improving and expediting criminal proceedings (excerpt)
15 July 2003, Supreme Public Office

IX. Establishment of the voluntariness of confession

1. Examination of the voluntariness of confession

Public prosecutors should be careful at all times to ensure the voluntariness of confession in the investigation stage, and question suspects with keeping them free from any influence by any preceding interrogation that may be found to have been unjustly carried out, as has been the case in the past.

In the Japanese criminal justice systems, questioning suspects about the actual facts is very important in uncovering the truth. If greater emphasis is placed on the principles of directness and orality in a trial, confessions will nonetheless be important in determining whether the suspect should be indicted, whether the suspect is guilty, and what sentence is reasonable.

A true confession is made when the interrogator confronts the suspect with supporting evidence and the suspect, in the course of personal exchange with such interrogator, reflects on what he or she did, feels anguish, and voluntarily tells the truth.

The introduction of a uniform system that may allow suspects to have other thoughts and calculations during the interrogation process and prevent sincere personal communication between the interrogator and the suspect, thereby potentially discouraging the suspect from telling the truth, is highly likely to constitute a serious obstacle to the realization of truth-based criminal justice, and is unreasonable as a matter of course.

Each and every investigative agency has endeavored to interrogate suspects properly but, as discussed above, given the importance of confessions in criminal justice, public prosecutors should be careful at all times to ensure the voluntariness of confession, to thoroughly scrutinize, as part of their duties, interrogations conducted by primary investigation agencies such as the police, and to impartially and on their own responsibility determine the admissibility of written statement based on confessions. Should circumstances exist that lead public prosecutors to cast doubt on the voluntariness of the confession made in the interrogation by the primary investigation agency, the prosecutors should, as a matter of course, take action to completely eliminate the influence of such confessions and question the suspect in person with an open mind, ensuring the voluntariness of the confession completely.

If public prosecutors find any inadequacy with respect to the interrogation by the primary investigation agency, they should advise the agency of such inadequacy and consult with the agency concerning improving the situation.
2. Means of objectively ensuring the voluntariness of confession in the investigation stage

In order to objectively ensure the voluntariness of confession in the investigation stage, public prosecutors should take the following actions:

(i) ensure proper operation of a system for recording the interrogation process/conditions in writing, a system for which will be introduced in the future;
(ii) gather materials concerning ensuring the voluntariness of confession;
(iii) give due consideration to the suspect’s consultation with his defense counsel; and
(iv) be as flexible as possible with respect to disclosure of the accused’s written statements.

The Justice System Reform Council states in its written opinion that it cannot deny the fact that ‘there are actual cases in which placing too much emphasis on the suspect’s confession resulted in an improper interrogation’, thereby confirming the importance of suspect interrogation in the criminal justice system. This statement is basically intended to point out that confession in the interrogation stage is not voluntary in some cases, but can be interpreted to mean that objective measures should be implemented to ensure the voluntariness of confession in the investigation stage. In addition, it is necessary to take the Council’s statement seriously that in some cases the court still cannot convince itself of the voluntariness of confession after a reasonable effort has been demonstrated. Based on these statements, public prosecutors should take appropriate measures on a case-by-case basis to ensure the voluntariness of confession in the investigation stage.

(i) As regards the system for recording the interrogation process/conditions in writing, its specifics are to be made public soon. This system has been proposed as an important objective system for ensuring proper interrogations of suspects, which reflects the Justice System Reform Council’s deliberations on transparentization of the interrogation process. Public prosecutors should gain a good understanding of the system and endeavor to ensure its proper operation with respect to the preparation, maintenance, disclosure, and the like of records.

(ii) Appropriate measures to ensure the voluntariness of confession should be taken on a case-by-case basis. Such measures may include instructing the suspect him or herself to make a drawing of the scene/situation of the crime or to write a statement in handwriting. In some cases, the suspect giving directions or explanations of the crime scene may be recorded on videotape or audiotape if it is necessary and reasonable and has no harmful effect. In any case, it is important to examine every possible measure for gathering material that ensures the voluntariness of confession, and to implement them properly, taking the investigative burden and the like into consideration.

(iii) Consistent with the purpose of the proviso of Article 39, Paragraph 3 of the law, public prosecutors have properly accommodated requests for consultation of the detained suspect with his or her defense counsel whenever possible in investigation stage. Public prosecutors should take this opportunity to acknowledge once again that consultation with the defense counsel are important opportunities for the suspect to obtain appropriate advice from his or her counsel, and are important in ensuring the voluntariness of confession. Public prosecutors should also give more consideration to consultation of the
suspect with his or her defense counsel, in order to ensure that they will not be in conflict with the investigative needs.

(iv) Deliberations on the disclosure of evidence are under way at the Consultation Group of Experts of the Office for Promotion of Justice System Reform and a new legal system will be introduced, on the basis of the results of its deliberations, for the disclosure of defendant’s written statements. Public prosecutors should examine the content of the new system and be flexible in accommodating requests for disclosure so as to ensure proper interrogation and prove the voluntariness of confession clearly in a trial.

3. Issues concerning the voluntariness of confession and means of establishing it in a trial

In cases where written confessions are taken, specific arguments to be made for the voluntariness of confession should be revealed in preparatory procedure for a trial or other proceedings.

The voluntariness of confession should be established using as much objective and clear evidence as possible. Examinations of the interrogator as a witness should be concrete and related to how the confessions were made.

One of the reasons that so much time is required to prove the voluntariness of confession is that the issue of voluntariness is discussed without clarifying the specific issues involved. Issue identification is indispensable if the court is to try the case adequately but quickly, conduct trials that are easy for the public to understand, and create an overall trial schedule, and should occur in the preparatory procedure or around the opening date of the first trial.

The effort to prove the voluntariness of confession should begin with the questioning of the defendant. In more than a few cases, such questioning makes it clear that the challenge to voluntariness is not to the point.

If voluntariness is not proved satisfactorily through such questioning, the effort to establish it should be made through the presentation of objective materials firstly. Such materials may primarily include ‘written records of the investigation process/conditions’, but the various other materials set forth in Section 2 of IX should also be used to avoid needless disputes over objective, external facts whenever possible.

Then, if necessary, the interrogator is examined as a witness. It is crucially important to check the interrogator’s memory carefully in the preparation for the examination of a witness. It is also necessary to ask such questions in the trial as will clarify the specific situation concerning the interrogation, such as those concerning why the suspect changed his or her position from denial to admission, the conditions under which the suspect made the confession, and what the suspect said and did following his or her admission.

If the voluntariness of a written statement given before a public prosecutor is contested and the examination of a witness is required, voluntariness should be
proved, whenever possible, through testimony given by the public prosecutor who carried out the interrogation, though it depends on the point at issue.
2) Minutes No 20 of the House of Councilors Committee on Judicial Affairs, 156th Diet 8 July 2003 (excerpt)

(The view of the Office for Promotion of Justice System Reform under the Cabinet)

FUKUSHIMA Mizuho, Diet member: To expedite the court proceedings, as Mr. Fujii said this morning, it is necessary to disclose all evidence in advance and transparentize the investigation process. It is already clear what is needed to expedite the court proceedings and, though this may be a somewhat different topic, it is also clear that these two factors are indispensable for the introduction of a ‘Saiban-in’ system. Why are you still hesitating to make a commitment concerning such disclosure and transparentization?

In today’s discussion of the bill regarding the acceleration of court proceedings, I request that you provide us with clearer answers concerning the full disclosure of evidence and transparentization of the investigation process.

Government witness (YAMAZAKI Ushio, Director of secretariat of the Office for Promotion of Justice System Reform): There were questions concerning the disclosure of evidence during the last session, which I feel I answered. At the moment, we are examining two ideas carefully, though this does not mean that we will not accept any other ideas. We are working on the basis of deliberations of the Consultation Group of Experts and if we, as the secretariat, make a commitment to certain ideas, we would be criticized for having taken the lead improperly. Therefore, for the moment I would like to refrain from answering such questions.

As for transparentization of the investigation process, as set out in the plan, a legal system that requires, for each investigation, the recording in writing of the circumstances under which the suspect is examined, is now under consideration by the relevant government agencies, and I expect that some conclusion will be reached in the not-too-distant future.

There is one more point I would like to make. I understand that the proposed transparentization includes the recording of the investigation process on videotape or audiotape. With regard to this point, as you may know, the Justice System Reform Council also discussed this issue and concluded that it is difficult at this stage to reach a conclusion concerning whether it is appropriate to introduce such a system, and that this issue should be a subject of future examination, citing it as the main reason that careful consideration should be given to the functions and roles of suspect interrogation in the entire criminal proceedings.

Thus, the transparentization or recording on audiotape or videotape of the investigation process is not on our agenda, and therefore has not been discussed by the Consultation Group of Experts. However, the government considers it a subject requiring future examination.

FUKUSHIMA Mizuho: It is said that a ‘Saiban-in’ (semi-jury) system will be introduced, but of course this is currently under consideration. The court-proceedings acceleration bill has been introduced first. You have stated that the transparentization
or recording on audiotape or videotape of the investigation process is not on your agenda. Therefore, if a ‘Saiban-in’ system is introduced and it is necessary to expedite the court proceedings, you would not be able to readily verify whether a confession in the investigation stage was voluntary or forced.

Thus, the prerequisites for the introduction of a ‘Saiban-in’ system and the acceleration of court proceedings are lacking. What is your opinion on this?

Government witness (YAMAZAKI Ushio): I know that some people hold such an opinion. However, such transparentization is said to involve several disadvantages that must be discussed in detail.

Of course, if a ‘Saiban-in’ system is introduced, it would be necessary to ensure that the ‘Saiban-in’ can readily understand the case. Our Consultation Group of Experts is now carefully examining what measures are available for doing so. We are currently holding the first session of the second round. By this coming fall, we will have completed the second session and will be able to present a more developed idea for further discussion. As some course of action will become clear soon, I would like to refrain from any further comment today.
Lastly, I would like to discuss interrogation. I understand that the Council has also been discussing issues concerning interrogation but, just for your information, I would like to briefly explain the nature of police interrogation.

We, the police, consider interrogation to be one of the most difficult investigation skills or activities, as the interrogator must devote him or herself to eliciting the truth from the suspect. Of course, interrogations are carried out at the police station as well, but for cases investigated at the police headquarters, one of the most important investigative decisions is who will interrogate the suspect. That’s how important interrogation is. In a short detention period, as I have previously mentioned, we must establish a good relationship with the suspect, whom we have never met before, and achieve communication with him or her. In this way, a dialogue begins. To understand the suspect, we would ask him or her about his or her personal history, family, friends, and life; in some cases, we would even discuss our own personal histories to gain his or her sympathy. Furthermore, we would discuss the suspects that we had examined in the past or those who are in jail, in an attempt to awaken a desire for rehabilitation in the suspect. We try to create such a relationship, so capable interrogators say they can’t sleep the night before interrogation overwhelmed by their task, and interrogation techniques differ among interrogators. In cases in which we, as management, opened the door to the interrogation room, the interrogator usually yelled, despite the fact that the person opening the door is higher-ranking than the interrogator: ‘What are you doing here? I’m just trying to establish a good relationship with the suspect.’ Interrogation is a very delicate task. It is therefore one of the most difficult investigative decisions to change the interrogator during an investigation.

Different interrogation techniques are required for different crimes. To elicit the truth from a suspect in a case involving white-collar theft or official corruption case, a series of logical questions would be necessary and explicit evidence would be important. Alternatively, it would be effective to arouse a sense of civic responsibility in him or her. However, most murder suspects feel that if they say even a single word, it will be all over for them. In such a case, we would attempt to arouse a sense of remorse in the suspect. There is a striking contrast between murderers and thieves in this sense. Most habitual thieves do not feel guilty about what they have done. The more chronic they are, the less evidence they tend to leave. Interrogators feel that the questioning of thieves requires a totally different set of skills from questioning of a murderer, for example.

Interrogation of a gang member is technically very difficult, as the interrogator would fear the group’s retaliation or a scapegoat is often used very cleverly to protect those who committed the crime.

In short, no real statement will be made by the suspect unless the suspect feels compelled to do so; so the aim of interrogation is to bring this about by any means.
possible. If we can’t uncover the truth and obtain a full picture of the case, society at large would not be appeased.

For example, in the AUM case, it was not until several key suspects made confessions that we obtained a full picture of the organization and the crimes. If we hadn’t been able to obtain those confessions, the public’s anxiety would still remain today. In the Asama-sansou case, it was also not until we arrested members of Rengo-Sekigun and caused them to make confessions that we gained a full understanding of that brutal beating death.

As another example, in a case in which a hitman hired by a gang attacked a movie director and a case in which a gang member attacked a company executive, the suspect refused to talk about his accomplice and we were unable to identify the person or persons whose orders he was carrying out. The real facts of these cases remain unknown. As a result, those involved may still live in fear.

This is often true in cases of poisoning with aconites, potassium, or arsenic, and in cases of random killings. In many other cases as well, under the Japanese penal code as it currently stands, the offense of which the suspect is to be accused and the severity of the sentence would vary depending on whether the suspect’s purpose, motive, and the like could be revealed. Therefore, the case could not be established with lack of evidence and the sentence could not be decided without gaining an understanding of what was going on inside the suspect’s mind.

The current legal system emphasizes such subjective elements, or there are no legal provisions for inference of such subjective element. The trials of cases in which suspects deny the charges require a great deal of time, as they are conducted very carefully. In addition, the outcry for the real facts of such crimes only grows. We must therefore object to the attempt to partly modify the investigation process without changing the entire investigation system.
4. How to enable the relevant systems to substantiate the principles of directness and orality in a trial

(1) Substantiation of the principles of directness and orality in a trial
In cases where the defendant denies the charge in part or in full, the contested portions of written statements are usually not consented by the defense, and the examination of a witness plays a central role in a trial. In addition, the admissibility of a written statement that is not consented to by the defense is determined after it is examined carefully, through the questioning of a witness or the defendant in a trial, whether the stringent statutory requirements are satisfied. Overall, the principles of directness and orality are being followed.

Thus, to further substantiate those principles or improve the trial procedure, as suggested by the Council, it must be ensured that the parties will make effective arguments or demonstration efforts concerning clearly identified issues in an intensive trial. To this end, it would be necessary to encourage lucid arguments for demonstration, examine witnesses primarily concerning the points at issue, and introduce other operational innovations.

(2) Admissibility of written evidence
Some argue that upon the introduction of a ‘Saiban-in’ system, the hearsay rule should be enforced more strictly by denying the admissibility of written statements such as written confessions and written statements given before public prosecutors. However, the ‘Saiban-in’s’ participation alone does not justify the categorical denial of the admissibility of written statements, and it does not stand to reason that uncontested facts must also be proved through the examination of witnesses.

As a matter of fact, witnesses often do not tell the truth in the court room due to nervousness, poor memory, or because they are facing the defendant, and defendants often deny in a trial the statements they made in the investigation stage, giving unreasonable excuses for doing so. Given this fact and the need to uncover the real facts of a case, it is not necessary or appropriate to set more stringent requirements for the admissibility of written evidence.

(3) Utilization of trial records
In connection with substantiation of the principles of directness and orality, some insist that the judges and ‘Saiban-in’ should be prohibited from reading trial records outside the court room. However, it is not possible for either the ‘Saiban-in’ or the judges to memorize all of what they hear sitting in the courtroom for an extended period, including the testimony and written statements of witnesses, or to be convinced of the truth of the case through comparison with other evidence. In some cases, testimony (such as an expert opinion) may be so complicated that no one could understand it immediately.

Therefore, the judges and ‘Saiban-in’ should be allowed to review not only written evidence such as written statements admitted as evidence, but also records of the testimony of witnesses. If they are not permitted to do so and are required to be
convincing of the truth of the case only through the trial in the courtroom, the parties involved would focus on making a favorable impression on the judges and ‘Saiban-in’, potentially resulting in increasing the theatricality of trials and leading the judges and ‘Saiban-in’ to be misled into declaring the suspect guilty or not guilty.
Outline of ‘Saiban-in’ system (excerpt)
(The view of the Office for Promotion of Justice System Reform under the Cabinet)

(7) Examination of evidence, etc.

A. Opening statement
The public prosecutor and the defense counsel must make opening statements based on the results of issue identification in the preparatory procedure for a trial, and their relationship to the evidence examined must be specified.

B. Examination of evidence, etc.
The question of how evidence can be examined promptly and in such a way as to enable the ‘Saiban-in’ to understand it easily and to allow the ‘Saiban-in’ to play a substantial role in the trial must be examined together with the following, and necessary actions must be taken:

- The examination of evidence must be focused on the point at issue to enable the ‘Saiban-in’ to understand it easily, and the evidence so examined must be carefully selected.

- The examination of evidence relating exclusively to sentencing must be separated from the examination of evidence which proves whether the facts charged exist.

- The examination of evidence must be conducted systematically on a point-by-point basis.

- Evidential documents must contain a clear and lucid description of the facts to be proved.

- In the examination of evidence, its relationship to the point at issue must be made clear.

- The examination of witnesses and the like must be brief and focused on the point at issue.

- The cross-examination of witnesses and the like must, in principle, be conducted immediately after the direct examination.

- The credibility and the like of written statements, including the circumstances under which they were made, must be proved in such a way as to enable the ‘Saiban-in’ to understand such statements easily and make an accurate judgment.

- Greater use must be made of the examination of witnesses by the judges prior to the first trial date.

- Factual provisions for expert examination that require a certain amount of time must be made prior to the trial whenever possible.

- The trial must be so conducted that it is prompt and easy for the ‘Saiban-in’ to understand.

- A proper trial record must be taken during trial held on consecutive days.

- The prosecutor’s and defense counsel’s closing statements must be made immediately after the examination of evidence.

- The prosecutor’s and defense counsel’s closing statements must be lucid, and their relationship to the evidence examined must be specified.
Written Interpellation on the Introduction of Audio-recording and Video-recording for the Purpose of Ensuring Transparency in Interrogations and Excluding Closed, Secret Interrogation Sessions

There is a tendency to emphasize ‘confessions’ under Japan's investigative procedures. This tendency produces forced confessions and false testimony in order to avoid detention and interrogations. To a suspect, the audio- and video-recording of interrogations is his greatest protection and this may exclude the possibility of induced confessions, ‘accidents’ occurring during interrogations, and the manipulation of written statements. I am asking these questions from the standpoint of ensuring the objectivity and accuracy of records and to seek fair investigations.

1 The other day, the Yokohama District Court convicted of professional negligence resulting in death, holding that a suspect died by the accidental discharge of a handgun during an interrogation by the Kanagawa Prefectural Police. Some juvenile cases such as Soka and Ayase cases where the ‘false charges’ arisen out of induced confession as well as the case of molester where the defendant, detained for a long time denying the existence of his criminal act, found not guilty show the adverse effects of an "excessive emphasis on confessions" regardless of the seriousness of the crime. The Justice System Reform Council has discussed the introduction of the audio- and video-recording of interrogations. However, even without waiting for the findings of the Justice System Reform Council, it is a fact that the transparency and objectivity of interrogations are not ensured. If ‘recordings’, such as the audio- and video-recording of interrogations that is conducted in other advanced countries were instituted, cases in which there are doubts about the ‘credibility of confession’ due to ‘closed, secret interrogation sessions’ would clear.

I would like you to clarify admissibility with respect to the introduction of recordings of interrogations made by audio- or video-recording.

Many views regarding the introduction of audio and video recordings were given at meetings of the Justice System Reform Council in order to ensure the fairness of interrogations and the objectivity and accuracy of records. However, committees representing dissenting views, the witnesses of the National Police Agency etc., presented reasons against this move, stating that if audio- and video-recording systems were introduced, that would impede investigating officials and interrogators from building a relationship of mutual trust with the suspects, it would become more difficult to elicit statements from suspects, because suspects would be conscious of the audio- or video-recording. In the UK, the progress of an interrogation is recorded synchronously, even in investigations of minor cases of flagrant delict that are thought not to require interrogative techniques. The techniques used in interrogations in the UK may seem to be the same as in Japan; however, are you aware of any cases in foreign countries of obstructions to interrogations being caused by the introduction of audio- and video-recording?
3 I have heard that there are cases in which the interrogation process is recorded by video- or audio-taping by the police and prosecutors. I would like you to state what kind of cases these were and what the purpose of the video- and audio-taping was. Moreover, were there any adverse effects as a result, impeding relationships of mutual trust with the interrogators?

4 In Japan, the suspect is not guaranteed a court-appointed defence counsel and the attendance of the defence counsel at the questioning of a suspect is not allowed. Under such circumstances it is said that the right to defence of suspects in Japan secure insufficiently. Is there recognition of the need for improvement in order to ensure the fairness of interrogations and the objectivity and accuracy of records, especially in juvenile cases in which a particular emphasis is placed on confessions? In addition, what sort of measures is regarded as necessary in the future? I am asking the questions mentioned above.
6) **Response document is dispatched to state the position of the defense.**

*Cabinet Interpellation at Diet 155, No 48, 28 January 2003, Prime Minister Junichiro Koizumi*

Position Statement of the Defense regarding the Issue of the Introduction of ‘Recordings’ or ‘Video Recordings’ for Maintaining Transparency and Excluding Secrecy in Response to the Question of Member of the House of Representatives Munenori Ueda

With respect to questions 1 and 4

In order to ensure the complete uncovering the truth in criminal cases, the criminal investigation agency in fact undertakes an extremely detailed investigation after having built a relationship of mutual trust with a suspect. Under such conditions, when making audio and/or video-recordings of a questioning is obligatory, it becomes difficult to build a relationship of mutual trust with a suspect because the entire questioning is being recorded, and this becomes a factor in the suspect’s hesitant about his/her testimony. As a result, there are questions about the great expenditures of time, labor, and money for reproduction and transcriptions, as well as the danger that it may be impossible to get at the complete truth. On the other hand, written statements can be read by or to the person who makes the statement, corrections can be made if any statements need to be supplemented, and he/she can sign and seal the statement after having confirmed that the contents were accurate. If the voluntariness or credibility of the testimony is contested in the courtroom, the public prosecutor has the responsibility to prove it, and the decision as to accepting or rejecting it is entrusted to the court. Therefore, it is thought that measures are adequate to ensure the voluntariness of statement and its credibility. In addition, the Recommendations of the Justice System Reform Council submitted to the Cabinet on 12 June 2001 stated the following with respect to the audio and/or video recording of the investigation process: ‘It is difficult to decide with certainty whether to introduce such measures at this stage because careful attention should be paid to such measures with regard to the function and significance of questioning of suspects in the whole structure of criminal procedure. Therefore these should be regarded as matters to be considered in the future.’ The government does not at the present time intend to introduce the mandatory audio and/or video-recording of the investigation process.

In that Recommendations, as ‘issues related to custody of suspects and of defendants’ it said, ‘insofar as the mission of the Japanese criminal justice system is to get the truth of cases under the guarantee of due process of low, questioning of suspects must not be improper, and measures to prevent improper questioning naturally are necessary.’ Further more the Recommendations proposed ‘a system should be introduced that imposes the duty of making a written record, for every occasion of questioning, regarding the process and the circumstances of the questioning.’ In order to ensure the proper investigation of a suspect even more, a cabinet decision was made by the government on 19 March 2002 regarding a plan to promote Justice System Reform. Under this plan, a system imposes the duty of making a written record for every occasion of questioning regarding the process and the circumstances of the questioning was to be introduced by mid-2003 along with all necessary accompanying measures.

With respect to question 2
It is unknown whether there are cases in foreign countries where the audio and/or video-recording of the investigation process has caused impediments in the investigation process.

With respect to the questioning of suspects such as the use of audio and/or video-recording, this is a matter that requires careful consideration within the framework of the entire criminal procedure system of Japan. It is inappropriate to make a simple comparison between foreign countries and Japan, which has a different criminal procedure system.

With respect to question 3
With respect to the presence or absence of adverse effects on individual, actual cases from the presence or absence of audio and/or video recordings of the status of investigations by police officers or the public prosecutor, we seek to refrain from answering because this is a matter that will affect the evidence relationships in actual cases.

Generally speaking, when it is recognized that there will be few adverse effects on the investigation of a suspect due to the audio and/or video recording of the circumstance of questioning and when there is particular need of proof reflecting the characteristics of the case, the evidence relationships, and other aspects of the individual situation, police officers and public prosecutors may do so. However, the situation is different, when there is a framework that requires by all means making an audio and/or video record of the circumstance of questioning, then there will be concern that it may become difficult to ensure the uncovering truth of criminal cases, as was mentioned in replies 1 and 4 above.
The Justice System Reform Council

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Introduction

The Justice System Reform Council was established under the Cabinet in July 1999, for the purposes of ‘clarifying the role to be played by justice in Japanese society in the 21st century and examining and deliberating fundamental measures necessary for the realization of a justice system that is easy for the people to utilize, participation by the people in the justice system, achievement of a legal profession as it should be and strengthening the functions thereof, and other reforms of the justice system, as well as improvements in the infrastructure of that system’ (Article 2, Paragraph 1 of the Law concerning Establishment of the Justice System Reform Council).

Since its inception, this Council has held over sixty meetings. In proceeding with investigations and deliberations on various measures for reform, this Council has recognized deeply the indispensability of reinforcing the function of justice in the increasingly complex and diversified Japanese society and at the same time always has kept in mind the view that an accessible and user-friendly justice system should be realized that can respond to the expectations of the people and meet their trust.
At the outset of the Council's examinations and deliberations, the Council's understanding of issues and the agenda of matters to be deliberated were arranged. These then were assembled in ‘The Points at Issue in the Reform of the Justice System’ (December 1999). Thereafter, the Council proceeded with examinations and deliberations on each issue set forth in that document. The order was as follows:

Based on the recognition that, in order to reinforce and strengthen the justice system, it is indispensable to achieve a legal profession that is rich both in quantity and quality, the Council first considered issues relating to the human base, such as the necessity for reinforcing the human organization of the justice system, including the lawyers who constitute the vast majority of the legal profession, and how the legal training system should be. After a certain level of directionality was achieved on these matters, the Council next conducted discussions regarding various issues concerning the institutional base. Then, in November 2000, the Council arranged the results of its deliberations up to that point, assembled its way of thinking regarding the fundamental direction for consideration on each issue, and published this as an ‘Interim Report’, which it also submitted to the Cabinet. A great number of varying opinions were received from all fields and classes with regard to the Interim Report.

This Council then proceeded with even more in-depth deliberations on each issue, taking into account these opinions. In addition, in parallel to its meetings, the Council received opinions and requests by mail and e-mail, and held public hearings at four locations throughout the country (Tokyo, Osaka, Fukuoka, and Sapporo). In these and other ways, the Council at all times has sought to ensure that the voices of the people, who are the users of the justice system, are reflected in the deliberations. In particular, a large-scale interview survey targeting those involved in civil litigation was undertaken for the first time, enabling us to grasp users' evaluations of the litigation system empirically. Furthermore, in order to grasp present conditions accurately, we conducted fact-finding inspection visits to justice-related organizations in several local areas and heard on-the-spot opinions of people. In addition, we conducted research visits to several foreign countries (the United States, the United Kingdom, Germany, and France) and also exchanged opinions with people concerned in the administration of justice in each of those countries in order to deepen understanding of their justice systems.

Through investigations and deliberations of the type described above, the Council came to acquire conclusions concerning reform of the justice system. Based on Article 2, Paragraph 2 of the Law concerning Establishment of the Justice System Reform Council, the Council hereby submits its ‘Recommendations’ to the Cabinet. This Council feels proud that, in these Recommendations, we have been able to delineate clearly a justice system that will become a foundation supporting Japanese society filled with future possibilities. These Recommendations are the Council's opinion to the Cabinet, but at the same time they are the Council's message to all the people of Japan. We sincerely hope that the people's broad understanding and support can be achieved, that the various reforms the Council proposes in these Recommendations will be strongly promoted, and that the ideal justice system for which we should strive is realized expeditiously.
(2) Issues Related to Custody of Suspects and of Defendants

- Consideration should continue to be given to the reform and improvement of both the systemic and operational aspects, within criminal procedure as a whole, in order to prevent and rectify the improper custody of suspects and of defendants.
- A system should be introduced that imposes the duty of making a written record, for every occasion of questioning, regarding the process and the circumstances of the questioning, in order to ensure the propriety of questioning of suspects.

a. Measures to Resolve Problems that Have Been Pointed Out Regarding Custody of Suspects and of Defendants

Various concerns have been pointed out regarding the custody of suspects and of defendants, such as how *daiyo kangoku* (use of custody facilities in police stations in lieu of detention facilities) should be, possible introduction of pre-indictment bail system, how defense counsel's right to meet with suspects in detention should be, issuance of warrants, and how determinations with respect to requests for post-indictment release on bail should be (Recommendation of the United Nations Human Rights Committee, etc). It is difficult to reach a concrete immediate conclusion on these matters, because there are various ways of thinking arising from differences in assessments of the current state of affairs. Nevertheless, insofar as the mission of the Japanese criminal justice system is to get to the truth of the cases under the guarantee of due process of law, it is a matter of course that improper custody of suspects and of defendants must be prevented and rectified. While carefully examining the causes underlying the concerns that have been pointed out, consideration should continue to be given to the reform and improvement of both the systemic and operational aspects, within the whole structure of the criminal procedure.

b. With Regard to Measures to Ensure the Propriety of Questioning of Suspects

The questioning of a suspect, so long as it is conducted properly, contributes to the discovery of the truth, and, in the event the suspect who actually committed the crime truly regrets the crime and confesses, it also contributes to his or her rehabilitation. On the other hand, however, it cannot be denied that there are in reality some cases where questioning lacks propriety, arising out of an excessive emphasis on confessions of suspects. Insofar as the mission of the Japanese criminal justice system is to get to the truth of cases under the guarantee of due process of law, questioning of suspects must not be improper, and measures to prevent improper questioning naturally are necessary.

Accordingly, a system should be introduced that imposes the duty of making a written record, for every occasion of questioning, regarding the process and the circumstances of the questioning. In connection with the introduction of such a system, necessary measures must be established to secure the accuracy and objectivity of such records (for example, an approach may be considered in which the matters to be recorded are specified, those matters are recorded on a form, and the record is then stored safely under a proper control system that prevents anyone from altering or revising the record at a later time).
In addition, while there are some opinions that audio and video recording of the questioning itself and the attendance of the defense counsel at the questioning are necessary, it is difficult to decide with certainty whether to introduce such measures at this stage because careful attention should be paid to such measures with regard to the function and significance of the questioning of suspects in the whole structure of the criminal procedure. Thus, these should be regarded as matters to be considered in the future.

Regardless of one's views on these various measures, an important point is that the establishment of the aforementioned public defense system for suspects will contribute to ensuring the propriety of questioning, through sufficient meetings between suspects and defense counsel. From this perspective, as well, the reinforcement of the public defense system should be undertaken.
Chapter 3: Japan Federation of Bar Associations’ Opinion

1) RESOLUTION REQUESTING TRANSPARENTIZATION OF INVESTIGATIONS THROUGH VIDEO AND AUDIO RECORDING OF ENTIRE INVESTIGATION PROCESS

17 October 2003
46th Convention on the Protection of Human Rights
Japan Federation of Bar Associations

Criminal trials in Japan depend heavily on written confessions by suspects that are created during investigations behind closed doors at the investigatory stage. The process of creation of these reports cannot be verified with objective evidence. This fact causes unfair investigations to arise, through such things as coercion by investigators, and has been the cause of numerous miscarriages of justice resulting from false confessions. In order to improve this situation in criminal trials, Japan Federation of Bar Associations has for some time been strongly requesting the transparentization of investigations through video and audio recording of the process of investigations of suspects.

Transparentization of investigations of suspects has been widely implemented in foreign countries; the United Nations Human Rights Committee also ‘strongly recommends that the interrogation of the suspect be recorded by electronic means.’ Transparentization of interrogation of suspects should comprise one of the rights of suspects under the International Human Rights Law, the Constitution, and the Code of Criminal Procedure, and should also be guaranteed as such.

Incidentally, the ‘Saiban-in’ (a semi-jury) system is to be introduced under the current criminal justice reform. Under the ‘Saiban-in’ system, it’s a requirement that trials be easily comprehensible to the public, and in addition, submission of evidence as clear as possible is to be ensured so that ‘Saiban-in’ (semi-jurors) are not overly burdened. Concerning the voluntariness and credibility of confessions, it will be impossible to conduct lengthy witness examinations, so such problems of verification must be resolved by transparentization of the entire investigation process. Transparentization of the entire process of investigation of suspects is an indispensable condition to the ‘Saiban-in’ system.

Additionally, the ‘Law on Speedy Trials’ has gone into effect, and in order to achieve the purpose of said Law that adequate trials in which facts are swiftly elucidated while guaranteeing the rights of suspects or defendants, the transparentization of the entire process of investigations of suspects is necessary.

Therefore, Japan Federation of Bar Associations hereby requests:
1. that the Government, subject to the enforcement of the Law on Speedy Trials, prepare legislation promptly, or at the latest by the time of the introduction of the ‘Saiban-in’ system, in which video or audio recording of the entire process of investigations of suspects is required, and failing to record denies the admissibility of written confessions or calls their voluntariness into doubt, and
2. that the Public Prosecutor General and the Director-General of the National Police Agency issue thorough instructions, until the enactment of the above legislation, such that at least when so requested by suspects during the actual
investigative operations of each investigating institution, video or audio recording of the entire process of investigations of suspects will be implemented immediately, and, additionally, in order to realize the transparentization of the entire process of investigations of suspects by video or audio recording, Japan Federation of Bar Associations has determined to exert its utmost efforts.
2) **Opinions on ‘transparentization of the interrogation process’**

14 July 2003

The Japan Federation of Bar Associations

**Section 1 – Our opinion**

The Japan Federation of Bar Associations (hereinafter referred to as the JFBA) believes that a system for the audio taping or video taping (hereinafter referred to as ‘taping’) of the entire process of police questioning of suspects should be established simultaneously with the introduction of the semi-jury (‘Saiban-in’) system.

**Section 2 – Reasons for our opinion**

1. **Background**

Japanese criminal trials depend heavily on written statement based on confessions given in the investigation stage. Such written confessions, however, is taken behind closed doors. This practice makes it completely impossible to verify events that occurred in the course of interrogation using highly reliable evidence. The current situation allows Japanese police to use coercion and inducement in the course of questioning. False confessions remain a possibility under such circumstances. In an attempt to rectify this situation, the JFBA has repeatedly and strongly asserted the need to audio/video tape-record police interrogations of suspects in their entirety (hereinafter referred to as ‘transparentization of the interrogation process’). The JFBA has based this assertion on its view that taping is one of the top priorities in the ongoing effort to reform the Japanese criminal justice system.

Reforms have already made the taping of interrogations a compulsory police practice in several U.K. counties, several states in the US, and Italy and Taiwan. The United Nations Human Rights Committee made a special reference to the problems found in the Japanese system for questioning suspects, and recommended “electric recording” of the interrogation process. As is widely known, the Japanese government’s Office for Promotion of Justice System Reform System has been discussing means of drastically reforming the Japanese judicial system. The Office is expected to announce concrete reforms by the end of the current fiscal year. The JFBA believes that it is time for Japan to realize ‘transparentization of the interrogation process’, as a cornerstone of the judicial system, and save its reputation as a civilized nation.

The JFBA attempts to explain the significance of transparentization of the interrogation process and clarify its position on this subject in the following.

2. **The interrogation process must be transparentized simultaneously with the introduction of the semi-jury (‘Saiban-in’) system.**

The semi-jury (‘Saiban-in’) system will be established as part of the judicial system reforms currently under discussion. Ordinary citizens decide whether the accused is guilty in this system, which has been designed as part of the program for involving citizens in the administration of justice. Needless to say, the ‘Saiban-in’ system calls for procedures ordinary citizens can understand. The parties must do their best to
submit clear, easy-to-understand evidence and free jurors from unnecessary burdens. The success of the ‘Saiban-in’ system depends on this point.

Whether the accused voluntarily made a confession before investigation authority (‘voluntariness of confession’) becomes a key point of contention in many criminal trials. This point often causes the prosecution and the defense to engage in a heated battle. However, the current practice does not require the prosecution to submit clear evidence to the court in connection with this important issue. In most trials, the defendant maintains that investigators coerced or induced a confession and investigators claim otherwise. Such an exchange produces a ‘war of verbal evidence’ only. In other words, the absence of conclusive evidence has transformed courtrooms into places for ‘endless disputes’. Judges must draw conclusions on the basis of evidence that is not particularly trustworthy under such circumstances. The need to make decisions on such a basis has been one of the causes of erroneous convictions.

Introduction of the ‘Saiban-in’ system must accompany a change in this situation. The JFBA believes that this point requires no further explanation.

Preparing clear, easy-to-understand evidence of events that took place in interrogation rooms is extremely easy. Police can produce such evidence simply by audio/video taping their interrogation from beginning to end. Such tapes will enable jurors to circumvent a “war of verbal evidence” between the defendant and investigators and produce a correct verdict without much difficulty. Taping of the interrogation process is an obvious solution.

3. Transparency of the interrogation process will produce many positive results

1) Transparency will make it easier for public prosecutors to prove the voluntariness of confessions.

Needless to say, audio/video taping of the interrogation process makes it extremely easy for public prosecutors to prove the voluntariness of confessions. The practice will virtually eliminate disputes over the voluntariness of confessions, as it did in the U K. The defense will stop insisting that ‘police records of interrogation contain fabricated remarks’. The allegation that investigators did not inform suspects of their rights or that they committed other violations of law in the course of interrogation will be heard less frequently. In other words, taping will give the accused no chance of bringing groundless arguments into the courtroom provided that police interrogate suspects properly. This system will free investigators from false accusations. It will protect investigators who conduct proper interrogations.

2) Transparency will dramatically decrease cases of illegal interrogation.

Transparency of the interrogation process will dramatically decrease the possibility of investigators to performing illegal acts. Audiotapes or videotapes of the interrogation process will be kept as evidence when an illegal interrogation practice comes to light. Tapes will dramatically decrease the danger of the court admitting confessions into evidence that should not be admitted because of doubt on voluntariness of confessions. In other words, the practice will dramatically reduce the danger of convicting innocent individuals. Cases of illegal and improper interrogation accompanied by violence still exist today. Recent judicial precedents that
acknowledged the presence of such interrogation practices attest to this situation. The Japanese government must eliminate this type of interrogation through judicial system reforms currently under discussion.

4. *All arguments against transparentization are baseless*

1) Transparentization will not obstruct discovery of the truth. There are those who oppose ‘transparentization of the interrogation process’ on the grounds that taping makes suspects unwilling to reveal what actually happened and prevents discovery of the truth. This is an entirely baseless argument.

There is no corroborative evidence for the view that people tell the ‘truth’ only when locked in rooms that make the objective verification of oral statements impossible. In addition, there are no experiences to support this view. The JFBA believes that the view that the ‘truth’ is told only in locked rooms goes against the principle of directness and the hearsay rule under the adversary system that support the modern court trial. A number of audiotapes and videotapes that preserve parts of the interrogation process already exist in Japan. The JFBA finds it extremely odd for investigators to oppose transparentization of the process.

The act of taping does not change the nature of one-on-one exchanges between investigators and suspects. The point is whether concerned persons remain conscious of the fact that the taping is in progress. The JFBA believes that those involved will eventually become used to this practice and stop being conscious of the audio taping and videotaping. Reports from The UK indicate that interrogators and suspects eventually stopped being conscious being recorded. These reports substantiate the JFBA’s opinion. The level of recording technology available now makes it extremely easy for investigators to tape oral statements made by suspects without them being uncomfortable.

The argument that suspects ‘feel reluctant to tell the truth when they are being taped’ does not justify police rejection of suspects’ requests for taping of the interrogation process under any circumstances. This is another obvious point.

Taping eliminates the possibility of fabrication and deception by preserving the interrogation process with no modification. Clearly, the practice will reduce the volume of false statements found in the police records of interrogations. The JFBA believes that tapes will contribute to discovery of the truth in the case by clarifying the conditions under which interrogation was carried out and showing the “truth” regarding the interrogation process. The JFBA concludes that the argument that taping of the interrogation process will obstruct discovery of the truth is completely fallacious.

2) Transparentization will not change the structure of investigations in any way. Some people base their negative opinions on transparentization of the interrogation process on the effects this action may have on the structure of criminal actions. There are different views on the structure of investigations include an inquisitorial view, adversarial view, and procedural and structural view on investigation. Transparentization per se has neutral value. Transparentization of the interrogation process does not affect the structure of investigation, regardless of one’s standpoint.
There are no grounds whatsoever for the argument that transparentization will change the structure of investigations.

5. Written records are insufficient and confusing

There are people who favor the establishment of a system in which the interrogation process is recorded in writing. It is said that such a system will be enforced in the near future. This is an attempt to establish the ‘table of interrogation progress’ as a system. This table has occasionally been submitted to trials. Under the new system, the interrogation process will be recorded in this table on a real-time basis which may be submitted to the court later. The new system can be considered a step in the right direction.

However, the JFBA does not believe that such documentary records can realize adequate, substantial, and intensive trials (intensive trials that are accurate and easy to understand) under the jury system. Investigators cannot be expected to voluntarily state on the record that ‘I obtained the confession with threats.’ This means that the dispute over the voluntariness of confessions will continue. A document-based recording system does not guarantee the proper interrogation of suspects. In addition, such a system does not provide important evidence. These are crucial shortcomings. Documentary records will only serve to make ‘endless disputes’ in the courtroom more detailed. Such records may make jurors even more confused. The JFBA believes that it is possible that documentary records may extend the period required for proceedings.

It all comes down to the fact that there is no substitute for objective and direct evidence, specifically interrogation records in the form of audiotapes and videotapes. There is an additional point to be made, however. The production of written records requires an enormous amount of labor. Taping is simple and easy. It requires only the switching on of a recorder. Taping will increase the operational efficiency of investigating authorities. This is an important point. The JFBA believes that taping will enable judicial authorities to reduce costs considerably and save resources.

6. The interrogation process must be taped in its entirety

Some people favor partial recording of the interrogation process. The JFBA does not believe incomplete records will adequately transparentize the interrogation process.

Let us explain our opinion using an example. Suppose that there is a suspect who has reversed his initial denial and confessed to a crime. Tapes of post-confession interrogation are not sufficient for determining the truth in this case. This is obvious. The important point here is what actions investigators took in the interrogation room before the suspect made his confession. Taping will be meaningless unless it eliminates the ‘war of verbal evidence’ and ‘endless disputes’ over the portion of the interrogation that produced the suspect’s confession.

Unrecorded portions of interrogations will inevitably lead to disputes over what actually took place in such periods. The dispute will lead to the submission of unreliable evidence concerning events that allegedly took place in the concerned periods. Such evidence will greatly slow proceedings.
This danger makes it obvious that the complete taping of interrogations from the beginning to the end is essential. The ‘entire interrogation process’ must be taped in order to enable accurate, easy-to-understand, and intensive hearings.

The JFBA believes that confessions should not be accepted as evidence unless the interrogation process is taped in its entirety. Investigators will stop attempting to tape the entire interrogation process if taping parts of the process is enough to make confession-based interrogation records admissible as evidence. The voluntariness of confessions must be called into question whenever it becomes clear that tapes do not cover the ‘entire interrogation process’. The JFBA believes that suspects must receive copies of the concerned audiotapes and videotapes. These copies must reach the hands of the accused immediately or upon the institution of an indictment, at the latest. These measures are necessary for ensuring the practical functions of the system of taping the ‘entire interrogation process’.

Taping the entire interrogation process is extremely easy. Anyone can do it simply by switching on a tape recorder when investigators enter the interrogation room with a suspect. When the interrogation is interrupted, it will be proper to turn off the recorder after announcing the interruption. When the interrogation is resumed, an announcement should be made to that effect just after the recorder is turn on again.

7. Tapes should be used to decide the admissibility of confessions for the mean time

The JFBA believes that audiotapes and videotapes of the interrogation process should be submitted to the court in order to determine the admissibility of confessions. The JFBA believes that, for the time being, tape use should be limited to the establishment of interrogation conditions and the interrogation process. Some argue that the prosecution should be permitted to use tapes as evidence of guilt. However, the JFBA believes that tape use in trials should be limited to this level in the initial stage.

The judge should permit to use tapes to support or rebut credibility of confessions by showing conditions and process of interrogations. The judge should also allow the defense to use tapes to establish the consistency of testimony of the defendant.

It is possible to argue that the decision of the admissibility of confession should be made by judge in preparatory procedure for trial since those tapes must be used only for determination of its admissibility. However, JFBA believes that the defense should be able to move to suppress the confession in a trial proceeding involving jurors and request the play-back of such tapes. Whether the suspect made a confession of his or her own free will is a matter fact rather than a matter of law. It is improper to exclude jurors from deciding this issue.

8. Constructive effort should be made to transparentize the interview of witnesses

There are arguments for and against transparentizing the police questioning of witnesses. The JFBA believes that Subsection 2, Section 1, Article 321 of the Code of Criminal Procedure should be deleted to drive home the importance of the principles of directness and orality. We believe that proceedings based entirely on courtroom testimony should be assumed. There are those who cite as problems the difficulty of
recording interrogations of witnesses ‘entirely’ and the absence of record reviews by the counsel.

However, there is absolutely no reason to ban the taping of statement given by witnesses. Confessions by accomplices in particular involve many problems. There is an almost equal need to tape the interrogation of main suspects and their accomplices. The JFBA believes that the concerned authorities should seriously consider the establishment of a system for taping of the interviews of witnesses.

9. Closing

For the reasons explained above, the JFBA is resolved to call on its members to take action and do everything in their power to realize transparentization of the interrogation process simultaneously with the introduction of the ‘Saiban-in’ system.
3) **Presidents comment: ‘The need for a more transparent interrogation process’**

14 July 2003

Tohru Motobayashi, President
Japan Federation of Bar Associations

The governments of Japan and the United States are now discussing the judicial procedures for US service personnel under the Agreement Regarding the Status of United States Armed Forces in Japan. According to reports, US government officials have pointed out, in the course of this discussion, that Japanese police officers question suspects in a highly closed environment that can lead to violence and forced confessions.

Interrogation behind closed doors can lead to misjudgments and ultimately miscarriage of justice. This practice has been questioned for many years, but the situation still remains unchanged. Further, in case of the criminal trials that tend to last for a considerable period of time, many hours are often spent to determine whether the written confession before investigation authorities are really voluntary and credible. Interrogations held behind closed doors are a major obstacle for speedy trials.

The issue of such interrogations has also been raised internationally. The United Nations Human Rights Committee studied the status of implementation of the International Covenant on Civil and Political Rights in Japan and issued its concluding observation in November 1998. In this document, the UN committee expressed deep concerns over the insufficient guarantee of items stipulated in the covenant and strongly advised the Japanese government to carry out swift reforms concerning the following points: (1) the continuous, long-term detention of suspects under police custody for a maximum period of 23 days prior to indictment; (2) no bail being granted to suspects during the said 23-day detention period; (3) the absence of rules concerning hours and periods of interrogation; and (4) interrogation in the absence of counsel appointed by suspects.

At the international conference during the 20th Judicial Symposium held on 21 June 2003, Professor Stephen Thaman of the Saint Louis University School of Law delivered a report entitled *The Saiban-in System: A Global Perspective*. In this report, Thaman noted that not only the United States but also The U.K., France, Italy, many countries in western Europe, and Russia adopt the Miranda Rule as a minimum standard. The Miranda Rule gives suspects in custody the right to request their counsel’s presence during interrogation, and a number of states in the United States have begun requiring police to record their interrogations on audiotapes and videotapes. Italy disqualified police interrogation records unaccompanied by audiotapes and videotapes from trial use, while France requires police to videotape the interrogation of minors. As moves like these suggest, there is a worldwide trend to make the interrogation process more transparent.

The JFBA has sought improved transparency of the police interrogation process for many years. At the public defense symposium held on 8 May 2003, the association once again confirmed its policy to seek improved transparency of police questioning.
practices. The UK required the police to record the entire process of questioning on audio tapes in 1984 following a case of miscarriage of justice as a result of a forced confession. Now Japan must learn from the British experience, and the JFBA maintains that improved transparency of the interrogation process is indispensable in realizing criminal justice reforms.

The House of Councilors Committee on Judicial Affairs resolved to ‘advance examination of the interrogation system and its application for improved transparency in the process and establishing its credibility from an objective viewpoint… to achieve the goals of speeding up the court procedure and enriching its contents’ in an additional resolution it passed in connection with a bill aimed at increasing the speed of court procedures on 8 July 2003.

We cannot tolerate the crimes committed by US service personnel in Japan and do not accept that those personnel should receive special treatment under Japanese criminal procedures. We believe that Japanese criminal procedures shall be applied without bias to all people in the territory of Japan. However, the US government has repeatedly refused to turn suspected US service personnel over to Japanese authorities prior to indictment. The reason for the US stance, as well as the logical grounds for this practice, deserve careful study from an international perspective. The JFBA takes the view that improved transparency of police interrogations is indispensable in raising Japanese judicial procedures to global standards and in speeding up Japanese trial proceedings. The JFBA proposes that the Japanese government immediately re-examine criminal procedures by taking into full consideration the 1998 recommendation of the UN Human Rights Committee, as well as recent global trends.

Note: ‘Saiban-in system’ wherein laypersons would also serve as members of a judicial panel.
Chapter 4: Case Studies

Case 1) Mt Koya Arson Case

1. Outline of the Case

This case concerned a series of arsons that took place from 1987 to 1988 in a famous Japanese temple at Mt Koya.

On July 16, 1988, a 19-year-old juvenile male was arrested (in Japan, all offenders less than 20 years old are treated as juvenile). During the investigation, a statement was made recording the defendant's confession to three arson cases, and he was indicted for those three cases of arson. Although the defendant admitted to two of the three cases of arson, he pleaded not guilty to the third case, claiming that the police used violence, threats, and inducements to obtain the plea from him.

The trial lasted more than five years and six months. On March 15, 1994, the court found that there were doubts suggesting that the police may have forced the accused to confess to the contested case of arson. Finding that there were doubts as to whether many of the statements recording his confession were made voluntarily, the court refused to receive them in evidence. The court also denied the credibility of some of the statements that were allowed into evidence, and the defendant was found not guilty regarding the one case of arson that he had denied to commit.

2. The circumstances of the questioning

The questioning of that case was as follows.

The defendant was arrested and detained three times, and interrogations were conducted concerning the three cases of arson. The indictment of all three cases was completed on November 1st, after about three and one-half months. During that time, he was confined in Juvenile Classification (a detention center for juveniles) for about 20 days and for about ten days in an adult detention institution. The remaining time he was in custody in a substitute prison in a police station.

While the suspect was in custody for three-and-a-half months before the indictment, the police officers interrogated him almost every day. In the substitute prison in particular, the interrogation mostly ran from 09:00 through 17:00, with lunch sandwiched in between. This continued for a long time. There were 17 times in which the interrogation continued to 18:00, six times past 21:00, and four times past 22:00. The longest lasted till 23:05.

The defendant claimed that the police used violence, threats, and inducements during the interrogation, including the following.

(1) Violence

- They pulled his hair.
- Kicked him in the side.
- Beat his shoulders and head.
- Hurl a ballpoint pen at him.
- Made fists as if to strike him.

(2) Threats

- The police threatened to kill him.
Claimed ‘we [the police] can make violent acts against anyone because nobody ever comes into the interrogation room.’
‘You will never get out unless you admit [to the crime].’
‘We will make you take a polygraph test. If you lie under the polygraph, you'll suffer pain throughout your body.’
‘We will make an inspection of evidence at the scene in front of many spectators.’
(During the interrogation in the detention center) ‘If you deny the crime, you'll be sent back to the substitute prison.’
‘You will receive heavier sentence if you listen to what the defence counsel says.’

(3) Inducements
‘If you plead guilty, you'll be released on bail, but if you deny it, you won't get out.’

3. Tape Recording of a Part of the questioning and the Decision of the Court

The defendant repeatedly pleaded guilty and not guilty during the interrogation. During the investigation by the public prosecutor and the interrogation by the police in the detention centre for juveniles the defendant pleaded not guilty, he, however, made confession immediately after being returned to the substitute prison.

In addition, the defence counsel repeatedly protested to the public prosecutor regarding the coercion of confession against the accused by the police. For this reason, the public prosecutor instructed the police to start taping the questioning halfway through the investigation, and part of the questioning by the police was then recorded on tape. The recording started when the investigation was already in progress, and a total of 48 tapes were later submitted to the court. The tape recording submitted to the court begins with the middle of the questioning. They seem unnatural because of starts and stops, leading to suspicions of manipulation by police officers in the editing of the tapes. And there were no recordings showing clear violence and threats. Nonetheless, there were conversations recorded in which the police attempted inducements on the defendant, saying: ‘You will be released on bail if you admit [the crime] but you'll not be released if you deny it.’

Having found that there were doubts about whether the defendant's confessions were forced, the court denied the voluntariness and credibility of most of the statements recording confessions by the defendant because the defendant had repeatedly denied having confessed, the recordings were unnatural, there was a possibility that the threats of violence had been made in the parts that had not been taped, and the remaining conversations revealed attempts at inducement.

4. Issues

In this case, it was clear that the police had actually attempted inducements, according to the tapes of part of the interrogation. The defence lawyer in charge of this case reported that taping of the interrogation was an effective means of identifying illegal techniques used in investigations. Since that case, no cases of investigating officials
taping interrogations has been reported. This is thought to be because it has become clear that the recording of interrogations is disadvantageous to official investigators. In addition, only part of the interrogation was tape recorded in this case. There is a high possibility that illegal forced confessions were obtained in the part that was not taped, which became an issue in this case. Moreover, the court found the illegality of the interrogation in this case. Japanese courts take a negative and serious attitude toward accepting illegalities. In this case, most of the five and one-half years of the trial were spent on the issue of whether there had been breaches of the law in the investigation. If the entire interrogation had been videotaped or audio-taped, the trial probably would not have been prolonged so long.

This case example and others have convinced us that video or audio recordings of the entire investigative process should be mandatory.
Case 2) An Outline of the Kabutoyama Case

Report on the Kabutoyama Case

Yoshio Takano, Attorney-at-Law

1. This incident occurred in March 1974. The bodies of two pupils who had been missing were discovered drowned in a sewage treatment tank at Kabutoyama Gakuen, a facility for mentally challenged children. The police decided that the culprit was a worker at the facility, and the defendant, who was a worker there at that time, was arrested by reason of having a weak alibi. However, the Public Prosecutor’s Office dropped the case in September 1975 due to insufficient charges grounds. Thereafter, a Public Prosecutor’s Office board of review reached the determination that dropping the case had been unwarranted, and the Public Prosecutor’s Office had the suspect re-arrested in February 1978 and prosecuted said.

In October 1985 the first trial in the Court of first instance returned a not-guilty verdict, and this was nullified and overturned in 1990 by the first trial in the High Court. In 1998 the second trial in the Court of first instance returned a not-guilty verdict, and in September 1999 the second trial in the appeal court rejected the appeal and returned a not-guilty verdict, 25 years after the occurrence of the incident, and 21 years and six months after the indictment, a trial of extraordinary length.

2. One of the main points of contention was the issue of the voluntariness and reliability of the confession. The suspect at the time was a 22 year-old female, who after being arrested and detained, was interrogated without a break of even one day by three men from around 9:00 am to 11:30 pm, at the latest. The suspect had made a number of telephone calls before and after the incident, and although the suspect had bravely attempted to assert her innocence on the grounds of such phone calls, the examiners had falsified the time of the final call, and moreover they had deceived the suspect by telling her that these calls should have been over in ten minutes at the longest. As a result, the suspect lost confidence in her memory, and began to believe that there had been an interval of time that was unexplainable. Additionally, the examiners had told such lies as ‘the children saw you doing it, and children don’t lie,’ and furthermore they lied in telling her that her own mother had suffered memory loss while giving birth to the suspect, and made the suspect come to believe that the suspect had also suffered from a memory loss disorder. The suspect was induced to be in the psychological state wherein she had done the killing and had completely forgotten it, and made a false confession.

3. One of the main reasons for the prolongation of the trial was the five witness investigations, on fourteen court dates, with regard to the situation of the examination of the suspect by the police (the suspect maintained her denial of the accusation to the Public Prosecutor’s Office).

Report Outline for IBM Investigative Committee
Relating to the Visualization of Criminal Investigations dated 16 November 2003

Etsuko Yamada
It can be said that the existence of justice subsumed into the culture of an entire country is embodied in the country’s criminal justice system through the relation to law, and at the same time, protection of the liberty of the people against the power of the state is reflected therein.

The daiyo kangoku (substitute prison) system, which forms the foundation for Japan’s criminal justice system, abuses the human rights of arrested persons, causes frequent occurrence of incidents of false accusations, and causes phenomena contradictory to the idea of criminal justice that there must be ‘no punishment for the innocent’. Japan’s daiyo kangoku system is a complete regression from the indispensable idea for human society of respect for human beings that mankind has in recent times learned from two world wars, and notwithstanding the fact that such has been criticized inside and outside the country, the status quo has been maintained for a century without change. This is a system that is contradictory to a justice, the likes of which can certainly not be observed in advanced countries.

In contradiction to the basic principles of contemporary judicial systems, the judicial system in Japan, under which it is possible to hold suspects in police substitute prisons close at hand to the police and to interrogate them over 23 day periods, gave rise to a case of false accusations, the Kabutoyama Case. In hope of realizing the visualization of investigations, I mention an outline of my personal experience as the party concerned to the Incident.

Visualization of investigations is not a simple issue just confined to the investigation room, but is one that must be thought of as being linked to the living environment of suspects during the period when they are undergoing investigation. One might ask why this is a problem, and the answer is that because the right to live of suspects in substitute prisons is controlled by the police, suspects are trapped in a situation in which they cannot approach investigations in a normal psychological state.

When suspects give false confessions, or ‘fall’, it’s never something that depends just on the investigation room. The existence of suspects inside the building police utilize is controlled, not only by the interrogating detectives but by all the related police personnel, and these are the oxygen supplied to the investigation room and supplied to suspects, damaging suspects as human beings, and playing roles of supporting the detectives in causing the suspects to ‘fall’.

Specific Example of My Experience Under the Daiyo Kangoku System

- The first step in the existence of a suspect in the substitute prison system begins with a naked full body inspection, and all personal belongings are confiscated. To become completely naked, on top of the shocking event of being arrested, the human personality is injured. The denial of personality signifies that the energy to confront injustice is stolen from the human being.
- An environment where everything is controlled, where it is possible that the things necessary for existence be awarded at the whims of detectives, results in the creation in suspects of a psychological state of ingratiating themselves to the investigation according to police aims. Even items for menstruation are
limited. Watches are confiscated so the sense of time is lost, and a sense of unease sets in.

- In this existence with the police, an environment is created in which time, outside of sleep times, is spent with the detectives, and a dependent relationship is always created in which a suspect’s existence is based on the existence of the detective. Suspects become unable to refuse offers of dispensation of favors from detectives based on these dependant relationships. The dispensations of favors that were performed on me were as follows.
- On occasions when we went to the District Public Prosecutors’ Office to undergo prosecutorial investigation, we had lunch at restaurants in the city, and visited, near the District Public Prosecutors’ Office, the private residence of a company president who was an acquaintance of the detective, where tea and cakes were brought out, and where I was permitted to watch TV. On top of this, I was taken to a coffee shop where there was a grand piano and drank coffee there. And on top of this, the detective even gave me bread with sweetened bean-paste filling.

As I have stated here, things that can never be seen inside the investigation room support investigations by detectives. Unless the situation of controlling suspects that happens outside the investigation rooms is gotten rid of, it can be said that the visualization of investigations under Japan’s criminal justice will not actually be something that can be realized.
Case 3) Violence by Osaka Police

In connection with a fight in Osaka between gang groups in 1998, the headquarters of the Osaka Prefectural Police had its Section 4, which is in charge of organized crime, investigate the fight and it arrested seven gangsters, each of whom later alleged that they had received severe violence and intimidation from police officers during interrogation. For example, the gangsters alleged they were:

- Slapped;
- forced to get their hands straight up and keep the same posture for a long time;
- strangled from behind;
- forced to stand on a chair, naked;
- threatened with death;
- hit in the abdomen and kicked in the thigh;
- trampled in the face;
- forced to lie on the floor with an arm twisted by a police officer;
- grabbed in the testes by a bare hand of a police officer;
- forced to lie on the floor with a police officer on the top who stamped down hard on the neck to cause suffocation; and
- pushed hard in the back while seated on a round chair.

On more than 50 trial dates over about three years after indictment, the police officers who were in charge of questioning and interrogating the accused gangsters were examined as witnesses. As a result of this examination, the court made the decision in November 2002 that it would not accept as evidence the statements taken from the defendants because there was a suspicion that police had used violence and intimidation to obtain those statements. In March 2003, the court pronounced acquittal for two of the defendants.

We keep hearing about allegations of violence and intimidation by investigators during interrogations behind a closed door. A great many such allegations come from suspects who have connections with organized crime groups. Counsel believes that this kind of case is just the tip of the iceberg and that such violence and intimidation by the police is nothing unusual.
Case 4 ) Statement Produced by Word Processor

In February 2000, the accused, who had become the object of investigation in a certain case, was indicted on charges of witness intimidation and compulsion for having threatened a friend to testify a falsehood to the police in order to cover up his own crime.

At the investigatory stage, police officers and the public prosecutor took a statement of confession from the suspect in which he admitted to having threatened his friend. The confessional statement of the suspect taken by the public prosecutor consisted of 49 pages composed on a word processor. However, at the trial, the defendant denied that he had threatened his friend, although he admitted that he had asked his friend to testify to a falsehood.

The defendant insisted that he had signed the false written statement at the mercy of the interrogator, because the police offered the inducement that he would be released on bail if he signed the written statement composed by the police. In addition, the statement recording the confession of the defendant, which had been taken by the public prosecutor, had been composed based on the short questioning, only about ten minutes. Therefore, he argued, the statement did not record his own testimony. For this reason, the issue at the trial was the circumstances of the questioning of the defendant carried out by the public prosecutor, and the prosecutor in charge was examined as a witness. As a result, it was found that the statement of confession of the accused taken by the public prosecutor was actually an inappropriate re-use of the word processing file of the statement made by the friend who was the victim. The statement of the defendant had been composed by transposing the subject. Thus it was found that the majority of those written statements did not record the defendant’s real statement.

The court found the possibility that bail was offered as an inducement at the time of the interrogation by the police officers and that there were doubts regarding the voluntariness of the confessional statement composed by the police officers. Therefore, the court did not admit the statement into evidence. The court also ruled that the questioning by the public prosecutor had been conducted without considering the possibility of such an inducement having been offered by the police officer. Therefore the statement recording the confession, which had been composed by the public prosecutor, was not adopted as evidence either. As a result, the court denied the fact of a threat by the defendant and reduced the sentence (29 June 2001 judgment rendered by the Osaka District Court).

In Japan, there are a great many case examples that investigation authorities compose statements in their own words, which contain what accused has not stated, as indicated by this case.
Case 5) Drug Smuggling by British

1. Outline and Proceedings of this Case

Defendant (Born in December 1970, nationality: UK) was arrested by Chiba Prefectural Police (New Tokyo Airport Police Department) on April 13, 2002 on suspicion of smuggling narcotics into Japan and indicted at Chiba District Court on May 2, 2002. Facts constituting the offence charged in the indictment are as follows: Defendant left Brussels National Airport in Belgium on April 12, 2002 (local time), and passing through London’s Heathrow Airport on the way, arrived at Narita Airport (New Tokyo International Airport) around little past 11:00 am on April 13 (Japan time). Then, upon entering Japan he smuggled, in conspiracy with a person whose name is unknown, 41,120 tablets of the narcotic commonly called ‘Ecstasy’ (or, commonly-called MDMA), and 992.5 grams of cocaine, hidden inside a checked suitcase. The way this case came to light is that the above-mentioned narcotics were discovered when Defendant offered the suitcase for a luggage search by a financial affairs officer in charge of inspection at Terminal One of Narita Airport on 13 April 13.

From the first trial date on 16 July 2002 until the trial was concluded on 18 March 2003, Defendant consistently asserted that the suitcase belonged to a friend of his (born in March 1962, nationality: UK), ‘A’, who had accompanied him and that it had been in the possession of said person, and that upon the request of A he had, with no suspicion, merely provided the suitcase to baggage inspection, and he himself had possessed no awareness of the contents, narcotics. Defense counsel asserted in this case that the friend, “A” was the real culprit and that A was a person who had deceived and used Defendant, who was unaware of the situation, and had Defendant undergo the luggage inspection, therefore that the Defendant was innocent.

Nevertheless, Defendant was declared guilty on 12 June 2003 at Chiba District Court, and a sentence was handed down of 14 years imprisonment (maximum statutory penalty being 15 years) with five million yen fine (maximum statutory fine being five million yen). Defendant appealed to Tokyo High Court on 13 June 2003, the next day of sentence date, and on 17 September 2003, after over three months from the pronouncement, was granted an authentic copy of the judgment from Chiba District Court. The record of the case was finally sent to the High Court; the first trial date for the appeal trial has, however, not been designated yet.

2. Explanations by Defendant

Defendant arrived at Narita Airport with his friend A around 11:00 am on 13 April 2002; thereupon, after some time, they went through immigration, and at about 11:30 am of said day, went to the carousel in the checked luggage reception area. Thereupon A, who had previously arrived at the area, asked Defendant to take the suitcase that was lying at A’s foot and line up for the luggage inspection area. Then, A said that when the blue sports bag of Defendant came out on the carousel, A would pick it up and join Defendant, and that this would be an effective means of avoiding congestion at the inspection area. So Defendant, trusting what A said without any doubt, took A’s suitcase and stood in a line at the luggage inspection area. While Defendant was waiting for A to join him, his turn came, he moved on to the inspection table, then started responding to the questions by the financial affairs
officer. Presently, Defendant saw A going through the exit in front of him, but with no suspicion, signaled to A to wait for him outside, by holding up his hand, and continued to undergo luggage inspection without mentioning the movements of A to the financial affairs officer. After a while, because of its weight of approximately 31 kg and because the size of the suitcase and its internal capacity seemed to differ, the financial affairs officer suspected the possibility that the suitcase might have a false bottom. Shortly afterward, as a result of consequent x-ray inspection of the suitcase performed in another room, it was verified that the suitcase did have a false bottom and that some unidentified objects existed inside. Shortly, the false bottom was taken away and tablets and powder were discovered inside. It was at this time of the x-ray inspection that Defendant realized the extraordinary nature of the situation and until that time he had known nothing at all of the existence of the double shell and contents.

3. Points at issue in this case

This case has a variety of points at issue. They include:
1) Who had the control over the suitcase, Defendant or A, and in relation to this point, had the key for the suitcase found inside it been there from the beginning, or did the Defendant put it into the suitcase while undergoing inspection?
2) Did the Defendant have no motives strong enough to take upon himself such an extremely risky business as that of narcotic transportation, as he has a beloved wife and a one-year-old son both of whom are very dear to him, as well as a sufficient income which amounted up to 27,656 pounds in the period from April 1, 2001 to March 31, 2002?
3) The Defendant checked under his own name the both pieces of luggage, namely the suitcase carried by A and the blue sports carried by the Defendant when he checked in with A at Brussels National Airport, the place of departure. The Defendant also underwent customs inspection separately from A, who came to Japan in the same aircraft. While doing so, he showed no suspicious behavior until the X-ray inspection revealed the extraneous objects. Nor was there any change in his physical appearance, such as sweating or a flush on the face until then. Is it not very unlikely that someone who was aware that the suitcase had a double shell and that there were narcotics hidden there would act in the way the Defendant did?
4) Did the Defendant not have a sufficiently reasonable purpose for coming to Japan to prepare for the World Cup Soccer Tournament that was to be held in June 2002?
5) Later on 9 May 2002, A was arrested with three other persons (nationalities: UK) who were accompanying A, under suspicion of narcotic smuggling through them. While the three others were released soon afterwards presumably because of no awareness of narcotics, A alone was officially indicted. Does not the common nature of modus operandi in these cases support the Defendant's explanation?

However, the biggest issue is the following:
6) Was the Defendant understood accurately by the financial affairs officer, police officers and prosecutors in charge of inspection or interrogation without any misunderstanding, despite his English with a very strong accent?

The financial affairs officer in charge of the initial inspection at the luggage inspection area, and the subsequent x-ray inspection and suitcase dismantling in another room, was not sufficiently competent in English (he had only a Level 3
Certificate of the English proficiency examination in Japan known as ‘EIKEN’, given to a junior high school graduate's level of competence). Nonetheless, said officer went on questioning Defendant without using an interpreter. Said officer reported the situation to the other financial affairs officers, police officers and prosecutors who later took up the investigation of Defendant. Said officer eventually gave testimony at the trial as well. The credibility of the testimony given by this financial affairs officer can be greatly contested as the content of the testimony was obtained without an interpreter.

The point at greatest issue here is that there may have been problems in the interpretation by the interpreters used by other financial affairs officers, police officers and prosecutors in charge of interrogation of Defendant during the periods from 13 April (day of arrest) to 2 May (day of indictment), and additionally until 10 June (surprisingly period from day of indictment until the first trial date!). These officers and prosecutors used interpreters as they themselves do not speak English. Defendant consistently explained that the suitcase did not belong to him, and that he was not aware that narcotics had been hidden in the double shell of the suitcase. However, in the written statements of Defendant produced as a result of interrogation, somehow, here and there are references that indicate that

(1) The Defendant admitted that he himself had purchased the suitcase in England five years ago, and moreover that
(2) The Defendant had been aware of the narcotics inside the suitcase. When premised on the Defendant's allegations, one cannot but think that interpretation mistakes led to the production of inaccurate written statements.

4. Vulnerability of the written statement production processes

Written statements of foreign defendants who do not understand Japanese are produced following process as outlined below. Investigators, namely financial affairs officers, police officers or prosecutors, conduct interrogations using Japanese, summarize the statements obtained from defendants in foreign language through interpreters and made them into written statements in Japanese. Then, at the final stage of interrogation, the full text is read aloud through the interpreter in foreign language and after the trueness of contents is confirmed with the defendant, without distribution of any translation paper in foreign language, finally the signature and the fingerprints of the defendant are affixed to the written statement written in Japanese.

Problems in the sequence of such interrogations are as follows:

Firstly, (1) essentially written statements are hearsay evidence in the sense that statements by defendants are written down by investigators. When interpreters participate in the process, since interpretation by interpreters are added both at the stage of questioning defendants in Japanese and at the stage of answering to investigators by defendants in foreign language, it can but be said that such written statements are doubly and triply hearsay evidence.

Additionally, (2) when a written statement is produced in a summary format, rather than recording each question and subsequent answers, the ‘hearsay-ness’ grows even further, for the process on the part of the investigators to perceive, to become aware
of, to remember, to reproduce, to understand, to summarize and finally to express what a defendant states is added to the whole procedure.

Moreover, (3) in cases where the investigator starts the interrogation with a preconceived story and tries to persuade the defendant to accept the story, following things may well take place:

(i) The investigator asks many questions of a leading nature, using terms and phrases that the investigator wants from the defendant. In the written statement in the end, perpetually questions and answers are reversed, moreover, even when the defendant answered with a denial to a certain question, such is twisted with speculation and phrased as if the defendant him/herself spontaneously answered to the question using those terms and phrases that are in reality used by the investigator.

(ii) Contents that the defendant states in general context are recorded in the written statement as if they had been stated with regard to the particular case.

(iii) Contents that the defendant states from a conjecture are written as if such had been stated in confirmation.

To point out specific examples in the interrogation in this case:

(i) The Defendant never made any statement on his own words concerning illegal drugs. When asked by an investigator ‘What do you know (in general terms) about illegal drugs? Do you know Ecstasy or cocaine?’ he answered in the affirmative in the general sense. Thereupon the investigator asked ‘Then, in this case, did you not suspect that the things your friend A was planning to bring back from Japan were ecstasy or cocaine?’ or ‘Did you not know they were hidden in the suitcase?’ Definitely the Defendant denied these. Nonetheless, the questions and answers are somehow turned opposite then whole meanings are twisted with speculation in the written statement. According to the document, it is as if the Defendant voluntarily stated that ‘Because of the way things went up to that time I had almost predicted that it was narcotics’, ‘(immediately after the narcotics were discovered in the suitcase at Narita Airport) I thought “As I thought before, it was narcotics. I’m screwed”’. And, ‘My life is finished,’ and ‘I really regret I came with A’”

(ii) When the investigator asked Defendant to recall if there had been any unusual behavior by his friend A in Amsterdam or in Brussels, where they had stopped before leaving for Japan, Defendant faithfully attempted to remember and mentioned that A had been suffering from a toothache and also that A had had some quarrel on the phone with his girlfriend besides few short telephone call from Israeli friend. Then investigator asked Defendant whether A had any trouble at that time, while he answer from a conjecture it could have been. According to the written statement, however, Defendant somehow said ‘(A had) a pale face. A got phone calls from two Israeli friends all through the night and seemed to be under close watch.’ Moreover,

(iii) replying to the question of investigator as ‘Do you remember anything unusual about the suitcase?’, the Defendant attempted to remember, and referred to the scene when the Defendant had inquired of A, while A was carrying the suitcase, whether A had a backache. However, according to the written document, the Defendant seemed to state that ‘I told (A) to confirm whether the suitcase was all right.’

Thus, most importantly, (4) if the interpreter for interrogation does not perform interpretation accurately, contents of the written statement in Japanese may be totally
different from contents of the oral statement by the defendants spoken in foreign language. The question of interpretation accuracy concerns each of the two stages of interrogation: the stage where investigators ask questions and defendants respond to them; and the final stage where the entire statement is read aloud to the defendant. As a significant example found in the interrogation of the present case, is as follows: though Defendant had consistently from the beginning made the claim that the suitcase was not his, that the blue sports bag was his possession, that said sports bag had the smell of aftershave lotion that he mistakenly spilt, and that he had purchased said sports bag five years previously in England, the written statement said that Defendant had purchased the suitcase five years previously in England. This arose out of differences in the language system between Japanese and English, and out of culture gaps. In English, to express baggage or belongings, there exist such general terms as ‘luggage’ or ‘baggage’, and such common nouns as ‘suitcase’ and ‘bag’, each having clearly different meanings. On the other hand, when the Japanese adopted word ‘BAGGU’ is used, both ‘sports bag’ and ‘suitcase’ fall within the meaning of the word. Unfortunately, very few among those who have received their educations in Japanese as native speakers of Japanese sufficiently understand the subtle difference in the nuances of these two languages. It is possible that the interpreter took ‘sports bag’ for ‘suitcase’ or vice versa and made interpretation mistakes as a result of such differences as discussed above.

As seen here, in written statements of foreign defendants who do not understand Japanese, not only have the questions of credibility as they are, as discussed in (1) and (2), but also are questionable whether or not they are the same as what the defendants actually said, and/or whether they were made voluntarily, discussed in (3) and (4).

Defense counsel contested the admissibility of the written statement of Defendant, making arguments as outlined in (1) through (4). Particularly concerning point (4), Defense counsel argued that despite the due process provision guaranteed in Article 31 of the Constitution and Article 1 of the Code of Criminal Procedure calls, with construction, for ensuring measures to verify the accuracy of interpretation retrospectively by such means of as audio recording or video taping of the interrogation, the interrogators failed to provide neither audio recording nor video taping, easy and simple measures in the sense that they are executable with little effort and a minimal budget, but carelessly allowed themselves to be busily occupied with the production of a written statement alone, and thus deprived Defendant of the opportunity for retrospective verification, which is certainly in violation of due process clause and provision.

5. Judgment by Chiba District Court

Without clearly responding to the issues presented in (1) through (4) of Paragraph 4 separately, Chiba District Court held in the judgment as follows, under the title ‘Accuracy of Interpretation at the Investigation Stage’:

‘1. Since the defense counsel asserts that there is a problem in the accuracy of the interpretation at the investigation stage, and that the admissibility of the written statement by the Defendant at the investigation stage should be denied, we shall therefore examine this point. In general, when a suspect signs and fingerprints a written statement, the investigator reads it aloud thorough to the suspect and lets the
suspect listen to it, and gives the suspect the opportunity to propose. In this case, at the investigation stage, this procedure of reading and listening was performed for Defendant concerning the statement and Defendant signed and fingerprinted it. Furthermore, during the interrogation by the public prosecutor, Defendant actually proposed some corrections.

‘Also, as for the investigation stage interpreters, even those with low scores have received scores on TOEIC of 715 in TOEIC (Test of English for International Communication) or “EIKEN” Level 2 qualifications, and are engaged in interpretation on a daily basis. The others have experience of living for five years in England, or have studied in high school, university, or graduate school in the United States, have such high marks on TOEIC as 960 or 920, and/or have “Special A” certificates on the United Nations English Examination, or “EIKEN” Level 1, and all of them are engaged in interpretation on a daily basis.

‘As seen here, there is no room to question the accuracy of interpretation at the investigation stage of the Defendant.

‘2. Then, considering statements of the Defendant at the investigation stage and testimony at the trial by witness “B2”, who is the prosecutor in charge of the interrogation of the Defendant, while the Defendant stated that the suitcase was his possession just after his arrest, shortly later, at the initial interview by the public prosecutor, the Defendant denied his previous statement and made changes in his statement to say that the suitcase in the present case looked similar to a suitcase he had originally owned but was a different one, and that the suitcase in the present case must be a result of a switch. Eventually, the Defendant changed the statement again and said that the suitcase was A’s. In light of such series of changes in the statements, it can only be said that the Defendant has been making particular retreats in his statements concerning such crucial facts as possession of the suitcase in the present case.’

6. Conclusion

A quite wide range of points at issue can be presented in this case; however, the greatest point is the accuracy of interpretation, confidently, in order to verify accuracy of interpretation retrospectively no other means is eligible except audio recording or videotaping of interrogation process. The reason is because human beings make mistakes, so it is impracticable to deny the possibility that an interpreter, no matter how excellent, can make mistakes, consequently, once mistakes are included, since interpretation is technical operation of converting different languages simultaneously, it is impossible for even the very interpreter himself or herself to regain the memory of his own mistake after the incident.

Definitely all interrogation processes should be audio recorded or videotaped without making distinction between Japanese citizens or foreigner. However, as for foreigners who do not understand Japanese, I believe at the very least the stage of reading the entire report performed at the final stage of interrogation should be audio recorded or videotaped. Therefore, without such, the identical nature and voluntariness of statements should be denied even though signature or fingerprints are affixed on statement reports. The reason is because, otherwise, the guarantees of due process and the right to receive fair trial will turn out to be useless.
Case 6) Matsumoto Sarin case

Summary of Matsumoto Sarin Case
November 9, 2003
Yoshiyuki Kono, victim, Matsumoto Sarin Case

Late on the night of 27 June 1994, my family complained suddenly of having physical problems and was sent to the hospital by ambulance. My wife’s heart and lungs stopped, I received severe injuries and my children had slight injuries. Developing into a huge incident, including seven dead and 600 injured, this was later called the ‘Matsumoto Sarin Case’.

The next day the Matsumoto Police Department of the Nagano Prefecture Police Force made a forcible investigation in my house for the crime of murder, with no uncertainty about the suspect, and seized chemicals, etc. At 10:00 p.m., an official announcement was made to the mass media. At that point in time, they had not reached the point of judging objectively whether the incident was an accident or a crime. And, in addition, from that day on, under the name of ‘mass media measures’ a police investigator stayed constantly in my hospital room and watched over me. Repeated mass media broadcasts from June 29 regarded me as the culprit, and I suffered serious damages as a result of the broadcasts.

On 3 July, Nagano Prefecture Police Force announced at a press conference that a ‘substance assumed to be sarin’ had resulted from the analysis, but the suspicion that I was involved in the case still did not subside. From the occurrence of the incident to July 30, when I left hospital, there were interviews by police investigator inside hospital on as many as fifteen occasions. However, during that period, the police only interviewed me about my private matters.

Although I was discharged from the hospital on 30 July, I did not feel well, and the physician issued a diagnosis certificate stating, ‘Interviews by police investigators should be confined to two hours.’ I voluntarily responded to requests for police interviews as witness. When I went to the Matsumoto Police Department, the official in charge urged me to sign a polygraph consent, so I agreed. After I had taken a polygraph test for about one hour, the police investigator in charge in the investigation room said, ‘machine is honest and you are lying’. Then he related to me a succession of bits of hearsay information such as, ‘there are multiple persons among those who visited you in the hospital on 28 June who heard that you said you had made mistake in the blending of the chemicals’, and ‘a certain person heard you telling your eldest son to hide the chemicals and containers’, and continued the questioning, saying, ‘all the suspicions point to you’. After about two hours had passed, I asked the police investigator in charge if I could go home, as I didn’t feel good. The police investigator said he would call the hospital and got a diagnosis from the physician, and if the physician gave permission, he wanted to continue the interview. I agreed. I rested for about forty minutes in the lodging room for investigators, and without the diagnosis from the physician having been received, the interview restarted, and continued until 5:30 p.m. I later checked to see if the hospital had received a request from the police for a house call by a doctor to the police, but there was no such fact. At my house three police investigators surrounded my eldest son, who was in the first year of high
school, and questioned him with such false information as, ‘where did you hide the chemicals and containers? Your father has already admitted his crime’.

I went to the police on July 31 as well to a voluntary interview. The investigator in charge showed a copy of an article from the *Sankei Shimbun* newspaper, saying, ‘This is you’. When I saw the article, with the headline ‘Possessed Chemicals Capable of Killing 20 or 30’, the contents were that a taxi driver had a customer in his car from a snack bar and the customer told the driver he had some serious chemicals. The investigator in charge said, ‘The taxi driver had a man in his car who called himself Kono and let him off in front of the Kono house, and the man went into the house’, and ‘Police called the taxi driver to the police station and showed the picture of you, and he said it was a definite match’, and stated therefore that this person mentioned in the article was me. That article was information that had been leaked by the police to the mass media and the police had them write it. Then they showed the article to me and used it for the investigation. Other major media also got the information, but they did not make it into an article since they were unable to find such facts through their news gathering in the related places.

I later accidentally got into a taxi driven by a co-worker of the above-mentioned taxi driver. The co-worker said that there was no such fact as mentioned above and that he would testify as to said if necessary and he gave me his business card.

Additionally, at the interview on 31 July, I was forced to make a confession. The investigator in charge left the room and then another man came in, and that man forced me to make a confession, saying ‘Sit up straight’ and ‘Don’t you feel sorry for the people who died?’ ‘The police know everything about your life of 44 years’ and ‘You are the one who did it’, and so on. No matter how many times I counter argued, the investigator kept yelling at me to admit my crime, and I reached the limit of my endurance. I stood up and said, ‘I cannot cooperate with you any more’. Then the investigator who forced me to confess left the room and the investigator in charge came in. He persuasively told me, ‘You have to prove your own innocence’, and the interview continued. The interview on that day also continued for seven and half hours. When I got home, my physical state had become so bad that I could not go to the bathroom by myself.

Since the interviews on the two days after I got out of the hospital happened as related above, I refused to do interviews from then on and ‘prepared myself for arrest’. There were articles in the newspapers with the detail that the first person that reported the incident, the office worker, had actively talked in voluntary interviews that were published as comment by the police. I later clarified the actual situation of the interviews with the mass media and this was reported. Concerning this, the police made the commented that ‘procedures were proper and we were sufficiently concerned about human rights. It’s not true that the office worker is being treated as a criminal.’

Interviews were performed behind closed doors in the investigation room and even though the mass media offered stories fro both sides, the police and the suspect, it was not clear which assertions were true. As a result, supposing I were to bring a legal action against the police for national indemnity, the facts from behind closed doors cannot be verified. So right now the situation is such that there is no way we could
receive a fair trial. To guarantee the status of investigations behind closed doors, which is overwhelmingly disadvantageous for suspects, I think it is necessary at a minimum to visualize the situation inside investigation rooms.
Case 7) Uwajima case

On 1 February 1999, Mr. Y was asked to voluntarily appear at Uwajima Police Station (he was not arrested) on suspicion of stealing bank passbooks and seals from his cohabitant and using them to illegally withdraw money. At the police station, Y was questioned behind closed doors.

In the beginning of the interview, Y entirely denied the charges. The investigator, however, did not accept his story, and forced Y into confession by striking the table and making such threats as ‘We have evidence. Hurry up and confess. If you don’t admit it, we’ll have to investigate your parents’ home, so that it causes your parents a lot of trouble… You’ll also cause inconvenience to your co-workers at work. The longer you wait, the heavier will be your punishment.’

Six hours after the interrogation began, sunk into despair by such interrogation, Y confessed after breaking into tears thinking that no one would believe him. Y was arrested based on this confession, and a written statement on the details of the crime was later made. The written statement was made by the investigator inducing Y, and Y assenting to the investigator, after Y assumed that he could not change his statement after admitting to the crime. Although the written statement was entirely fictitious, it explained the crime story in extreme detail. Based on this confession, Y was indicted on 12 February the same year.

After the indictment, Y denied the charges. The Public Prosecutor’s Office, however, demanded two years and six months of imprisonment for Y in December the same year, ten months after the indictment. The court concluded the hearing, and the judgment was to be pronounced on 25 February 2000. During the trial, Y was kept in custody and was not released on bail.

In January 2000, after the court concluded the hearing, a man who was arrested by the Kochi Prefectural Police on a separate case confessed to all the criminal facts for which Y was charged. Evidence supported the confession. Arrest of the true perpetrator proved Y’s innocence.

The Public Prosecutor’s Office released Y on 21 February, four days before the judgment was to be pronounced, and claimed Y’s innocence in closing argument afresh.

On 26 May of the same year, the court denied the credibility of Y’s confession, and pronounced not guilty on Y. If the actual perpetrator was not arrested, Y may have been pronounced guilty.
Case 8) Interrogations in the Recruit Scandal

1. Case Summary
President E of the major information and job-placement agency, the Recruit Co Ltd was indicted and convicted of bribing public officials including Diet members and Vice-Ministers in the stocks-for-favors scandal where E assigned to and procured for a number of people the unlisted shares of the real estate agency, the Recruit Cosmos Co Ltd to be listed.

The Public Prosecutors Office started investigations against E at home in November, 1988. The subsequent development of the case is as follows:

13 February 1989  Arrested/detained
4 March 1989  Indicted
6 March 1989  Arrested/detained
27 March 1989  Indicted
28 March 1989  Indicted
28 March 1989  Arrested/detained
18 April 1989  Indicted
22 May 1989  Indicted
6 June 1989  Released on bail

2. Interrogation Summary
   a. Apprehension of Parties Concerned
   The Public Prosecutors Office summoned a number of people involved in the Recruit Co Ltd, Diet members and public officials to carry out lengthy interrogations, and arrested some of them. Public prosecutors intimidated E to obtain plea from him by saying ‘if you don’t plead guilty, we will arrest your company’s executive officers, and then, the company will go bankrupt.’ E was afraid that his company would really go bankrupt if central figures were arrested.

   b. Physical Abuse
   Public prosecutors carried out lengthy interrogations all day long every day. As they shouted about his ears, E thought he might have his eardrum split. They also kicked up and slammed a desk. Further, since they coerced E to stand against a wall close until his face was nearly touching with his eyes open for long hours, E’s head felt fuzzy and the white wall started to look yellow.

   They forced E to fall on his knees to ask for pardon.

3. Inducement by investigation authorities to obtain the plea
Public prosecutors told E repeatedly, “If you don’t make a confession, you will not be released and will be tried whilst remaining in prolonged detention. If you plead not guilty, you will be detained for longer than the prison sentence received. If you plead guilty, you will be released earlier.”

4. Judgment
E was released early, having made a confession after a round of the abovementioned coercive conducts and inducement; however, he was eventually convicted after 14
years of trial. In the judgment, public prosecutors’ allegations were accepted for the most part and it was concluded that there was no such coercion and inducement as E asserted and E’s confessional statement was voluntary.
Case 9) Pakistani Arson Case

Urawa District Court: (excerpt)

Case of violation of the Immigration Control and Recognition of Refugee Status Law and arson to an inhabited structure

Judgment by the Third Criminal Department on 12 October 1990: guilty in part; and innocent in part (finalized)

Commentary

1. This judgment has declared the innocence of a Pakistani who was accused of the criminal charge of arson to an inhabited structure. The judgment has presented a variety of holdings to be noted in respect of the consideration of circumstantial evidence, voluntariness and admissibility of confession and credibility of confession and so on, and has presented a material issue with regard to the future investigation of crimes committed by foreigners.

2. First of all, an outline of the facts acknowledged by the court decision is as follows: the accused is a Pakistani who came to Japan nine months ago and overstayed unlawfully. The house of his friend with whom the accused stayed was burnt to the ground by a fire of suspicious origin. The accused was suspected of arson and pressed for a confession by said friends and others, and finally confessed to said criminal act. Then, said friend and other persons turned the accused into the police as the culprit of the arson. The police had a further suspicion against him, for the looks and belongings of the foreigner observed near the site immediately after the fire by a neighbour housewife had resemblance to those of the accused. The police hastily arrested him for pretextual charge of unlawful overstay, and investigated him also for the arson during the detention. The accused initially denied the criminal act (arson), and then confessed later on. The contents of his confession were implausible, namely that the accused had set fire by throwing burning matches into a room from outside a window; when a police officers actually tried this method, the matches soon died out and no fire was started. The police personnel tried to investigate the accused further to obtain a reasonable confession. However, since the accused did not understand Japanese or English, and it was impossible to investigate him except through an interpreter of his mother tongue (Urdu), the investigation did not proceed. The frustrated police personnel then made the victim and the person who had turned in the accused as the culprit, attend an interview with the accused in the presence of a Pakistani interpreter.

Finally, after the interview, the accused confessed that he had ‘sprayed aftershave lotion onto a cloth cover around a blanket and started the fire by igniting it with matches’. One day after being indicted for unlawful stay, the police arrested, detained and investigated the accused for arson. They indicted him for arson of inhabited structure on the day when the extended detention period expired. However, at the trial court, the accused persistently denied causing arson and stated that he had confessed during the investigation at the suggestion of his friends etc. at the time of the interview to the effect: ‘you should say that you used kerosene or aftershave lotion
since the police will not believe the story about throwing matches. If you say as we suggest, you can go back to your country, otherwise you will be detained by the police for about six years’ and that the confession was not true.

3. Under such facts, this court decision found that the accused was guilty of unlawful stay (four months of imprisonment with suspension of enforcement for two years), but declared the accused innocent of arson. The reasons are outlined below.

(1) The probative value of circumstantial evidence except for the confession (the main part being the identification by said witness) is materially questionable, and the accused cannot be identified as the culprit solely based on such circumstantial evidence.

(2) Although the accused is a foreigner having no knowledge of Japan’s legal system, the investigators failed to notify the accused of his right to remain silent or the right to appoint a defense attorney and so on in a manner that he could understand: They carried out the investigation without giving, even though the accused was in poor health at that time, any consideration to his condition; and tried to obtain a plausible confession by making the accused have an interview in his mother tongue with the victim and other persons who had turned in the accused as the culprit; investigated the accused, knowing that the accused misunderstood the situation due to the suggestion of said victim and others that his confession would enable him to be sent back, without making an effort to remove the misunderstanding. As the confession by the accused was obtained during such investigation, it was not voluntary.

(3) Further, the confession was obtained under the arrest and detention for pretextual charge as well as the arrest and detention for the main charge that followed them. Even if arrest and detention on the pretextual is not illegal, an interrogation of the main charge while under arrest for pretextual charge is, as it clearly exceeds the lawful scope of interrogations of other charges under investigation, permissible whether or not the suspect subjects him/herself to interrogations of such other charges. In either case, the confession of the accused in this case lacks admissibility.

(4) Even if, unlike (3) above, one considers the confession of the accused in this case on the premise accepting its admissibility, its credibility is also questionable. Even when combined with the circumstantial evidence discussed in (1), does not establish that the act was committed by the accused.

4. Each of the holdings discussed above may be worthy of note. For details, refer to the text of the judgment. The following are some comments on certain key aspects of the holdings respectively.

(2) Judgment’s Point 2

Judgment Point 2, as well as Point 3, merits the most attention among the holdings of this court decision. As is repeatedly pointed out in the decision, the accused in this case is a Pakistani who recently came to Japan, could not understand English or Japanese other than his mother tongue (Urdu), had a low level of intelligence and was
not familiar with the legal system of Japan or even his own country. The judgment, 1) taking the premise that, in an interrogation of such a foreigner as a suspect, the rights to remain silent, and to appoint a defense attorney and so on, provided in the Constitution and the code of Criminal Procedure, cannot be secured unless these respective rights are notified in an appropriate manner such that the person can understand them, pointed out that the method of notifying respective rights in this case is considerably deficient. Then, taking into account also the facts that 2) due consideration was not given by the investigator to the health condition of the accused and 3) the way interrogation was conducted was inappropriate, the court decision entirely rejects that the confession was voluntary.

Among the reasons for rejecting the voluntariness of the confession, point 1) specifically relates to a problem particular to the interrogation of a foreign suspect. There has been no preceding judgment in which the voluntariness of the confession was rejected on such grounds. These indications of the judgment should be fully consulted in investigations of crimes concerning foreign suspects which are predicted to increase in the future. This court decision has also presented valuable suggestions regarding notifying foreign suspects of their respective rights, namely: the method of notifying rights to a Japanese suspect needs to be reconsidered; and transparency of investigation, the necessity of which has been highlighted in recent days, is particularly essential for interrogation of a foreign suspect, and least concerning informing a suspect of his/her rights and reading the written statement, aloud to him/her, it is crucial to prepare in case of possible disputes in the future by, for example, recording such scenes onto tape.

5. This court decision severely criticizes, in paragraph no 8 ‘Summary of the entire case’, the investigation of this case, stating that ‘the investigation in this case was too careless and inaccurate to even be called an investigation; in short, it is nothing but “poor”.’ Referring to the Kaizuka Greenhouse Rape and Murder Case (Judgment at Osaka High Court on 30 January 1986: Hanrei Jihou No 1189, p 134; Judgment at Sakai Branch of Osaka District Court on 2 March 1989: Hanrei Jihou No 1340, p 146) in which a similar process had led to the indictment and for which the adjudication of not-guilty had been finalized, the judgment strongly warned against the careless response of the investigators in such cases. In this connection enumerated and pointed out, in paragraph no 6,3. ‘Outline of problems in the investigation measures in this case’, many particulars in the investigation of this case that had been deemed deficient and/or mismanaged, including the fact that the investigator had not even carried out combustion experiments on such things as whether a fire could be really started by the means described in the confession before they initiated the public action. Premised on the particulars that the judgment pointed out, a strong criticism surely seems an unavoidable consequence of the investigation in the present case.

In addition, the judgment underlined that tape recording of the situation is ‘indispensable’ although it limits the scope of application for the time being to investigations of foreign suspects and namely to the actions of notifying a suspect of his/her rights and reading to a suspect for confirmation the written statement produced according to the interrogation of the particular suspect, creating a stir in the issue of ‘transparentization of interrogations by the investigation authorities’, the necessity of
which has been stressed recently. The future response of the investigation authorities is to be noted.

The following are the relevant excerpts of the judgment:

(Reason for partial non-guilty)
No 1 Outline of facts constituting the offence charged and disputed points

2. Outline of disputed points
According to the evidences examined at this trial, it is clear that at around the date and time as identified in the indictment, the wooden one-story apartment house with slate roofing as identified in the indictment that C and others had been using as a dwelling (with a floor area of approximately 37.45 m²) was burnt down by fire. While the prosecutor asserted that the above-mentioned fact was caused by arson by the accused, the accused has persistently denied such assertion at the trial. The accused has stated that he was in the vicinity of Kanamachi, Katsushika-ku, Tokyo at around the time when the fire is said to have occurred and that he was not involved in the incident at all. The defense attorney has also asserted that the accused had nothing to do with the fire in this case and is not guilty.

As mentioned above, in this case the connection between the accused and the criminal act is severely contested. There is little objective evidence that connect the accused to the criminal act, and the admissibility and credibility are severely contested of the written statements of the accused (mainly his written statements of confession) during the investigation process although it is virtually the sole evidence to establish the above-mentioned connection.

3. Peculiarity of this case
Under this case, as mentioned above, the most contested issue is the admissibility and credibility of the written statements of confession of the accused that is virtually the sole evidence connecting the accused to the criminal act. This case has a peculiarity and is different from ordinary cases in that the accused is a Pakistani who speaks only Urdu as his working language and does not understand Japanese or English.

First of all, there is the problem that such a foreigner does not know the legal system of Japan. Generally, a foreigner such as the accused who has come to Japan recently from a foreign country having a completely different social structure, legal system, cultural background, etc, will typically know little about Japan’s legal system. It is reasonable to expect that a person such as the accused who has low intellectual level, who is poorly educated, who cannot understand any language except for his mother tongue, and who has difficulty in communicating with persons except those from his mother country, will have no knowledge at all of Japan’s legal system. Such a suspect may naturally enter a psychological state in which he feels completely isolated and highly insecure since he cannot anticipate what procedures he will face once suspected of a criminal charge and detained, for there is no way for him to learn of such matters from prison officers or prisoners in the same cell.

Secondly, there is the problem of the language barrier between the suspect and the investigator. It is a fact that the interrogation of a foreigner who does not understand
the Japanese language can only be carried out through an interpreter. Considering this point alone, it is unavoidable that communication between the investigator and the suspect cannot be always conducted smoothly. Since it is also difficult to secure adequate interpreters for Urdu, it is unavoidable to proceed by using private citizens who may not be adequate as interpreters in terms of their capability or educational background. As such, one can easily anticipate that improper speech and behaviour of the interpreter may cause problems at a later stage.

It is only just that the investigation authority, which has to conduct the investigation under various restrictions as mentioned above, has the obligation to at least substantially ensure that the rights of a suspect provided by the Constitution of Japan and the Code of Criminal Procedure (right to remain silent and to appoint a defense attorney) are fully notified to the suspect, and that the suspect can exercise such rights. Further, with respect to interpreters who have inadequate capability and educational background as mentioned above, it may be only proper that the investigation authority is required to take such necessary measures as making the interpreters aware of their duties (to translate faithfully and correctly, as an objective third party, the comments of the suspect and investigator) and, audio-recording at least at the stage of reading the written statement aloud to the suspect for confirmation, in order to prepare for any future disputes.

However, in the present case, the investigator did not show any consideration to these matters adequately (rather, almost nothing was done). One cannot accept that the right to remain silent and to appoint a defense attorney was notified to the accused in a manner that the accused could understand. Further, contrary to the investigator making efforts to make the interpreter aware of his duty, there are doubts that they may have used victims or some of the interpreters to cause the accused to confess under these people’s influence. There is therefore material doubt in respect of due process (these points are further discussed in detail in the section on the voluntary nature of confession).

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No 6 Concerning the Admissibility of Confession

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6. General Problems in Investigation Measures

(1) Knowledge, etc. of the accused concerning legal matters
According to various relevant evidences, in particular according to the statement made by the accused at this trial, that the knowledge, etc held by the accused concerning legal matters is almost as pointed out in preceding No 1 and No 3. Namely, the accused is a Pakistani who uses only Urdu and who cannot understand Japanese or English at all. Moreover, since he has been of delicate health from his youth and received a thyroid operation, he had not received even proper compulsory education in his home country, has a low level of intelligence and is not familiar with the legal system of his own country. As a matter of course, he has no knowledge at all about Japan's legal system (the mechanism of criminal proceedings) and accordingly, when he was subjected to investigation on a criminal charge, he was completely
unaware that a suspect has the right to remain silent and to appoint a defense attorney, and had no knowledge at all as to what procedures he will be subject to as a suspect or as an accused after being detained.

(2) Problems in the method of notifying the right to remain silent
The accused stated that he was not notified, at the time when he was investigated, that he had the right to remain silent and did not know that he had the right to refuse to say those matters which he did not want to say (p 793 of the written statement of the accused). On the contrary, Mr Heitani and Mr Suzuki, who investigated the accused, stated to the effect that they notified the accused through an interpreter that the accused had the right to refuse to say those matters which he did not want to say. Furthermore, at the top of each page of written statement of every person before police interrogators and before the public prosecutor, there is a pre-printed phrase to the effect that the investigation was conducted ‘by notifying that no one is required to make a statement against his or her will’. Mr. J, who was indicated in the foregoing and was one of the interpreters at the stage of the investigation, stated that he did not know the word for the ‘right to remain silent’. However, when Mr J was asked ‘the right to remain silent is a right under which the accused is allowed to refuse to say those matters which he does not want to say. Did you translate such matter and notify such right to the accused?’ Mr J then understood the meaning of the word for the first time and stated that ‘I always tell the accused before translating’. Taking all of these circumstances into account, it should be recognized that the investigator performed as a formality the notification of the right to remain silent before starting the investigation of the accused.

However, whether or not this notification was sufficient to enable the accused to understand the meaning of the right to remain silent is a different matter. First, even Mr J, who was one of the interpreters during the process of investigation and who had some experience in this field, did not know the word for the ‘right to remain silent’ and came to understand it for the first time only when the meaning was explained as mentioned above. Therefore, one cannot think that Mr I, who has no experience at all, had any knowledge of the concept of the right to remain silent, and under no circumstances can one believe that the right to remain silent was properly notified in a manner that enabled the accused to understand the meaning by such an interpreter who had either inadequate or no basic education at all on legal matters. It seems impossible under any circumstance for an investigator, who has to use such private citizens who have little basic education on legal matters as interpreters, to make them properly notify fundamental rights such as the right to remain silent and the right to appoint a defense attorney provided by the Constitution and the Code of Criminal Procedure, unless the investigator firstly explains to the interpreters themselves the meaning of such rights and uses them for interpreting work only after they have obtained sufficient understanding. However, there appears to be no recognition of such problems in the words or deeds of the investigators who investigated this case.

There may be some counter-argument that Article 198 of the Code of Criminal Procedure merely obligates the investigator to give prior notification of the fact to an accused that ‘the accused is not required to make a statement against his/her will’ and that, at this level of contents, even a person who has no basic education specifically on legal matters may interpret it sufficiently, and that it was actually interpreted in the
present case. In fact, in cases where a suspect is an ordinary Japanese who has some
knowledge, even if only vaguely, concerning Japan’s legal system and rights of
suspects provided by the Constitution (common knowledge in Japanese society), the
notification at the level as just described above may well be seen that the suspect is
informed of the existence of the right to remain silent (although the ordinary method
by which the right to remain silent is notified to Japanese suspects needs to be
improved, we do not discuss this matter here). However, the issue in this case is, as
pointed in the foregoing, the way in which the right to remain silent was notified to a
foreign suspect who knows almost nothing about the legal system of his own country,
let alone that of Japan, and whose intelligence level is low. Under no circumstances
can such a suspect understand, merely from a notification as a formality as indicated
in the foregoing, the real meaning of the right to remain silent, which is, that he/she
has a ‘right to refuse to make any and all statements’ and that, if he/she refuses to
make a statement, he/she would not be treated unfavorably simply for such a refusal.
It must be said that, in the present case, the way in which the investigator notified the
suspect of his rights was largely inadequate to substantially ensure the suspect the
opportunity to exercise his right to remain silent.

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(3) Problems in the notification method of right to appoint a defense attorney
There was also a similar problem in the way in which the accused was notified of the
right to appoint a defense attorney. According to relevant evidence, one can
acknowledge that a notice to the effect ‘if you pay by yourself, you can get an
attorney’ was made through the interpreter at least at the stage of initial interview by
the public prosecutor following arrest based on respective facts concerning unlawful
stay and arson in this case. As such, one may acknowledge that the right to appoint a
defense attorney was notified as a matter of form. However, firstly, since the accused
had no knowledge at all of what the role of an attorney was for him and how he could
appoint an attorney, under no circumstances one can accept that the right to appoint a
defense attorney was substantially ensured by simply informing ‘you can get an
attorney’ only as a matter of form (Mr Heitani testified that he told the accused that ‘it
may be impolite to call him/her an ally, a person who could defend the accused is
available’ [p 669 of the stenographic record of Mr Heitani]. But even if an
explanation was made as in the above-mentioned testimony and was translated
accordingly, one cannot accept that the accused was able to understand the meaning
of a defense attorney, not even vaguely, from such a simple explanation.) In fact, the
accused stated that he was not aware that a person called a defense attorney would
assist him until the defense attorney appointed by the court came to see him after a
written inquiry concerning the appointment of a defense attorney was sent by the
court to the accused and the inquiry was explained to him (p 793 of the written
statements by the accused). This statement suggests that the notification made during
the investigation process could not make the accused obtain substantial knowledge
concerning the right to appoint a defense attorney.

As discussed in the foregoing, the notification of the right to appoint a defense
attorney made to the accused by the investigator in this case is largely inadequate, and
such notification is not adequate enough to substantially ensure the exercise of said
right.
(4) Lack of explanations of the basic flow of criminal procedure and the meaning of signing and placing a fingerprint on written statements
For a foreign suspect who has no knowledge about Japan’s criminal procedure, the right to remain silent and to appoint a defense attorney, as mentioned above, must be notified in an easy-to-understand manner. In addition, in particular, when such suspect is not attended by a defense attorney, due consideration is required; unnecessary anxiety should be eliminated by outlining the flow of criminal procedures in Japan (the length of the period of arrest and detention, indictment and prosecution as opposed to arrest and detention, differences between police officers, prosecutor and judge, and so on); and when the investigator requires the suspect to sign and place a fingerprint on written statements that has been prepared, the suspect must be told that such record can be used unfavorably against him or her in a future trial. If the investigation is conducted without giving such an explanation while a suspect is left isolated surrounded by many investigators with whom he/she cannot communicate due to the language barrier, the suspect is likely to suffer a strong feeling of insecurity since he/she cannot understand how he/she will be treated by what procedures, or may be scared unnecessarily by the slightest words or behavior of the investigators or interpreters, or, adversely, he/she may attempt to please them or accede to signing or placing a fingerprint at their demand simply because he/she is instructed to do so by the investigator without understanding the meaning of signing or placing a fingerprint on a written statement. This situation makes it difficult to ensure voluntariness of written statements.

From the above viewpoints, there is nothing to indicate that the investigators gave appropriate consideration as mentioned above to the accused in the actual investigation carried out in this case. Namely, in this case, when the investigators interrogated the accused, they gave no explanation at all to the accused on the period of detention or on the procedures that could be expected after detention, nor the difference between a police officer and a prosecutor, and the accused was investigated without knowing how long the interrogation would continue. Regarding this point, Mr Suzuki stated ‘interrogations by the police and by the public prosecutor’s office are conducted in different places. As police interrogators never attend the interrogation at the public prosecutors’ office, I thought that the accused naturally knew that with us, it was a different organization carrying out his interrogation (p 638 to p 639 of Suzuki’s stenographic record)’. He also stated ‘(also at the time of initial interview by the public prosecutor) we might have said that we would request for his detention, but we said nothing else. I thought that the judge would give an explanation since it is the court, the judges, who directly orders detentions. Usually, in other cases, we do not explain (the flow of criminal procedures that can be expected in the future such as the period of detention) in such detail in ordinary cases.’ (Ibid, p 638). This is the level of awareness of a prosecutor, who is generally considered to have the best grounding in legal matters and the highest level of intelligence among investigators. The level of awareness of police officers such as Mr Heitani can be easily surmised.

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(5) Conclusion relating to general problems of the investigation method
As mentioned in the foregoing, the investigators who investigated the accused clearly lacked awareness of the problem that handle foreigners who have no knowledge about Japan’s legal system. They have shown no enthusiasm or consideration to
substantially ensure the rights provided by the Constitution of Japan and the Code of Criminal Procedures are properly secured for a foreign suspect who is at a considerable disadvantage in terms of knowledge and language. These aspects must therefore be properly considered when judging the voluntariness of the written statements of confession produced as a result of such interrogations.

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8. Problems in the interrogation on 18 September

(1) Existence of peculiar circumstances
As pointed out several times already, there is a peculiar circumstance in this case. Namely, the particular statement by the accused in the written statements of confession that ‘in the four-and-half-tatami-matted room at C’s house, after spraying aftershave lotion on a blanket cover, I set it on fire by striking a match’, which has been given the greatest importance by the prosecutor when accusing the accused was made when the investigator took the unusual measure of making the accused meet and talk with the victims in their mother tongue.

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(6) Conclusion on the question of voluntariness of the written statements of confessions prepared on and after 18 September

Summing up the matters pointed out so far, the following can be said: police officer Heitani and others at the Yoshikawa Police Department, under the circumstance described in (2) above, made the accused meet and talk with C, B and an interpreter in their mother tongue. As a result, C and others successfully elicited a new confession by the accused to arson by using after-shave lotion, as expected by Heitani. Even though Heitani knew that such confession was made based on a misunderstanding by the accused that if he admitted to arson he would be returned to his country, Heitani made no sincere effort to correct the misunderstanding, rather took advantage of the misunderstanding and prepared a written statement of confession. Prosecutor Suzuki, who later interrogated the accused, also assumed the same attitude and prepared another written statement of confession without correcting the misunderstanding of the accused.

Considering these circumstances under which the respective written statements of confession were prepared in this case (those that were prepared on and after 18 September), this court judges that these written statements of confession were obtained by investigators by using highly inappropriate methods (fraudulent means and deception) that could easily induce a false confession, and that they were not made voluntarily.

9. Conclusion on the question of voluntariness of the confession
Based on the result of the foregoing consideration, it should be concluded that the written statements of confession made by the accused were not voluntary (at least those that were prepared on and after 18 September), as they were obtained by investigators by using highly inappropriate methods (fraudulent means and deception)
that could easily induce a false confession as indicated in 8, (6). Also, considering the problems in the method of interrogation as indicated in 6, and the health condition of the accused and inadequate consideration to it as indicated in 7, the voluntariness of the written statements of confession, beside those prepared on and after 18 September, but those prepared prior to said day, is also questionable, and their admissibility should be also denied.

2. Concerning the method of study of the credibility of confession

Generally speaking, it is usually hard for people to believe that anyone would confess to a crime they did not commit. A person who confesses to a crime is generally considered to have actually committed the crime. However, it is well known that, even under the current Code of Criminal Procedure that explicitly ensures the rights of the accused to remain silent and to appoint a defense counsel and has significantly developed the due process provisions for the investigation stage, a significant number of false charges caused by illegal and undue investigations are brought throughout the country. As the defense counsel pointed out, the experience tells us that such false charge cases have many common characteristics such as undue investigation by police authorities limited to their own hypotheses, unjust interrogation of the suspect, insufficient collection and preservation of objective evidence, excessive reliance on confessions and disregard of objective evidence.

As is obvious from what this court has already discussed in detail, since many common characteristics found in false charge cases as discussed above are also found in this case, this court considers that the credibility of the confession must be examined particularly carefully. Many recent judgments including precedents of the Supreme Court stress the importance of giving a comprehensive judgment, in each occasion, after conducting a detailed analysis of the contents of the confession as 1) in past cases, many confessions that are detailed, concrete and seemingly with vivid reality turned out to be false after all, and 2) considering that interrogations are carried out in a closed room and that a written statement of confession is just a summary of oral statements made by the suspect using the language of the investigator himself, it is dangerous to judge the credibility of written statements of confession simply relying on simple intuition and impression.

Following the general trend of these recent judgments, this court will make a thorough analysis of the confession based on the following viewpoints and then will make a judgment on a comprehensive basis: 1) problems in the process during which the confession was obtained, 2) situation in which the accused changed his statements, 3) changes in the contents of the confession, 4) whether the contents of the statement are reasonable, 5) whether contradictions or conflicts exist against objective evidence, 6) how much the confession is supported by objective evidence, 7) whether or not he/she referred to any facts which were unknown to the investigation authorities until then and later found to be true (‘exposure of unknown facts’).

3. Problems in the process by which the confession was obtained

First, as is obvious from the result of the discussion in the section of voluntariness of confession above, it must be pointed out that in this case there are some material
problems in the process by which the confession was obtained from the accused. Namely, in this case, the investigator 1) did not notify the fundamental rights of a suspect such as the right to remain silent and to appoint a defense attorney, in a language that can be easily understood by a foreign suspect (the accused of this case) who had almost no knowledge about the legal system of his country, let alone the legal system of Japan, who could not understand the Japanese language and has low intellectual level, 2) carried out interrogations while ignoring the poor health condition of the accused, and moreover 3) after being frustrated by the attitude of the accused who persistently refused to make a confession, the investigator, in an attempt to lead to a confession under the influence of the victim C and others, the very persons who had battered the accused, forced him to make a confession and turned him into the police, made them meet and talk to the accused in their mother tongue, and, as a result, obtained a confession because their words and behavior made the accused misunderstand that he would be returned to his country if he admitted to committing the arson. The fact that the confession in this case was obtained by undue interrogation that could easily lead to false confession must be fully taken into account when evaluating the credibility of the confession even if such fact is considered insufficient to question the voluntariness of the confession.

No 8 Summary of the entire case

1. As this court has mentioned earlier, this case has, as similar to many other arson cases, little material evidence and has the considerable peculiarity that the victim, the accused and many of the major witnesses are foreigners who understand no or very little Japanese. One can therefore understand that the investigation authority found it difficult to perform the investigation properly within the limited time. This court fully understands the hardships of investigation authorities who ceaselessly tackle difficult
cases of this kind under various restrictions (human, physical and time-related) and highly appreciates the efforts of the authorities that have performed proper investigations in many actual cases.

2. However, even taking the above-mentioned circumstances into full account, the investigation in this case was too careless and inaccurate to even be called an investigation; in short, it is nothing but ‘poor’. This court would finally summarize the process of investigating this case as follows: when a Pakistani, whose house was burnt down, firmly believed that the culprit was the accused based on inadequate information of the police and the fire department and on his intuition, battered the accused with his friend to make him confess, and turned him in to the police, the police authority instantly had the same impression as that of the victim and indiscretely kept pressing for a confession the accused, who was ill at that time, without fully trying to collect and preserve material and objective evidences. Once the police authority faced difficulties, they used the help of the victim and others and finally forced the accused to make a confession. However, the police authority failed to diligently examine such matters as the rationality of the confession and its consistency with objective evidences, and the accused was indicted by the prosecutor. This process was a shoddy investigation improper for investigation professionals. Even the prosecutor, who should be in the distinct position from police officers (and who is supposed to have, as a member of the legal profession, better insight and legal training), could not function in any way to correct the investigation by the police.

3. As pointed out repeatedly, it is dangerous to easily rely on a confession when investigating a case in which there is little direct evidence. This point should have already been fully recognized by and disseminated to the real work of investigations, having had those adjudications of non-guilty in the recent series of precedents at the Supreme Court and the notable re-trial cases. It is most regrettable that the lessons of these preceding cases were almost entirely ignored in this case. We already know the valuable case in which a victim ran down a person who was assumed to be the ‘culprit’ by its own ‘investigation’, forced him to confess after battering and intimidation, and then turned him in to the police. The police and the prosecutor believed the confession to be true and the ‘culprit’ was indicted. However, he was found not-guilty since all of the said confession and confessions made by four other accomplices were found to be possibly false (the judgment on koso-appeal in the so-called ‘Kaizuka Greenhouse Rape and Murder Case’ [judgment by the Osaka High Court on 30 January 1986; Hanrei Jihou no 1189/134] and the not-guilty adjudication in the re-trial to one of the other accomplices in the above-mentioned case [judgment by the Sakai Branch of the Osaka District Court on 2 March 1989; Hanrei Jihou no 1340/146]. It is obvious, however, that a victim, or other persons who have common interests with the victim, tend to exhibit rough speech or behavior against the person whom they strongly believe to be the culprit due to the high state of emotion caused by suffering from criminal damage. It is not necessary even to refer to the preceding case mentioned above.

Therefore, even though such persons have run down a person assumed to be the ‘culprit’ and forced the person to confess based on unproved information and their own intuition, it is clearly dangerous to immediately take such confession as highly credible. It is only right that on such occasions, investigation authorities as a professional in investigation remain calm, take one step back, and carefully examine
the credibility of such confession. If a police officer gulps down such a ‘confession’ and does not question it deeply and the prosecutor behaves in the same manner, then the purpose having such investigation authorities themselves may be questioned. The Code of Criminal Procedure does not authorize the investigation authority to detain a suspect in its custody for the maximum of 23 days (in this case, this period was extended by the second arrest to more than one month) in order to allow such careless investigation.

4. It is considered that crimes in which foreigners are involved as seen in the present case will increase, not decrease, in line with today’s internationalization. To interrogate a foreign suspect, who is not familiar with Japan’s legal system and who cannot even understand Japanese language, in the manner done in this case and to force him to confess, is a serious issue also for humanity and international trust, and such practice must be immediately corrected. Lastly, it should be added that the ‘transparency of investigations’, the necessity of which has been highlighted recently, is essential in interrogating a foreign suspect and it is indispensable to record on audio tape without fail at least those scenes when the written statement is read to the suspect for confirmation, when explanation and response to signing and placing a fingerprint is made, and when the rights of a suspect are notified at the beginning of the investigation in case of possible dispute in the future.

No 9 Conclusion
This is as discussed above. With respect to the facts constituting the offence charged relating to the count of arson in the present case, there are various doubts about the evidences that connect the accused to the crime, and so this court cannot sufficiently believe and determine that the accused is the true culprit of the arson. As such, the facts constituting the offence charged in the indictment dated 11 October 1988 have not at all been established, and this court declares the accused not-guilty pursuant to Article 336 of The Code of Criminal Procedure.

Therefore, this court makes its judgment as declared in the main text. (Chief Judge Akira Kitani, Judge Tetsuo Oshima, Judge Keiko Suzuki)

Case 10) Soka Case

Problematic Points in the Investigation of the Soka Case

16 November 2003
Hiroshi Shirmizu
Attorney at Law

I. Summary of Soka Case

The Soka Case concerned a case of delinquent conduct of rape and murder of a female junior high school student, and in September 1985, five juveniles of 14 to 15 years in age (at that time) (one other 13-year-old juvenile was sent to community school as a pre-delinquent juvenile) underwent the disposition of being sent to a reformatory. As repetition of appeal was dismissed, it was finalized in July 1989. Motions for cancellation of disposition on three occasions were all rejected without
reaching actual hearings. In the civil compensation trials brought by the bereaved family of the victim, however, in the first instance the juveniles were found innocent. But the appeal court pronounced a reversed judgment, and on 7 February 2000, the First Petty Bench of the Supreme Court (Chief Justice, Syunro Oide), in the third instance, reversed and remanded the case, as ‘there is a violation of empirical rules in the judgement on credibility of the confessions by the juveniles’.

As a result, the judgments by the judiciary were totally different between the juvenile trials and the civil trials; however, as a cause for misjudgement in a juvenile trial, although there are such fundamental problems in the criminal judiciary as ‘excessive emphasis on confessions and prejudgments and bias against juvenile delinquents’, fundamentally there are many serious problems in investigations creating factors caused misjudgements of courts. Then, although these are problems in common with the general criminal judiciary, it is necessary to consider these also as problems particular to juvenile cases.

Incidentally, after overturning the case, the Tokyo High Court pronounced the juveniles innocent, and the adjudication became finally binding in March 2003.

II. Points at issue on facts finding
In this case, there was no objective evidence whatsoever substantiating contact between the juveniles and the victim, or involvement in murder by the juveniles. The sole evidence was ‘confessions’ taken from six juveniles. However, on the other hand, there was an abundance of evidence that was actively and passively favourable to the juveniles. For example, two automobiles in which the juveniles were considered to have had the victim seized and items inside the cars, fingerprints, hair, and all minor substances such as sand were collected, and also the clothes and shoes of the juveniles were kept; however, there was nothing to indicate the fact that the victim actually got into the car, and checking with footprints, tire tracks or mud or leaves, etc, of the place that is considered to have been the scene of the criminal act, nothing corresponded. There were none of the traces that should have been left if the confessions had been true. Not only that, but the first characteristic of evidence in this case was the existence of the items which were left behind such as the spots of saliva attached to both breasts of the victim, sperm attached to the skirt, and hair attached to the rear collar of the shirt showed type AB blood, and had no relation to the juveniles, whose blood types were O and B. In this case, which was considered to be a murder-rape case, judging from the status of the remain, in relation how to judge the fact of the existence of this AB type blood physical evidence, evaluation of the credibility of the confessions by the juveniles was a serious point at issue.

The Supreme Court in civil trial made the very commonsensical fact finding that such evidence leads one to suspect that type AB blood residue ‘might have been attached when the victim was murdered’, and that this criminal act ‘might have been perpetrated by a person with a blood type of AB’. Then the Court denied the ‘possibility of (that residue) having been attached at some other opportunity’, which was stated in the original decision, which ruled out its relevance to this murder case. Moreover, as for the credibility of the confession, upon detailed analysis, the Supreme Court found that there were no revelations in the confessions nor was there objective evidence supporting the confessions, and pointed out that ‘there are many problems such as, though merely partial, portions that are obviously false and which have a high
possibility of having been caused by deception by investigators, and moreover, there are changes of the stories with regard to the core of the criminal act’.

III. Concerning the police investigation
The clue based on which the Soka Police Department conducted their investigation of the six juveniles via a voluntary investigation was merely that one of the juveniles had told his friends that he had seen the victim on the day of the incident, and this was a so-called ‘presumed investigation’, without any facts supporting any relation to the incident. However, the police had no evidence so that the investigation of the juveniles was what could be called a forced confession, without any consideration for their ages of 13 to 15. Cross-cut questioning, with such phrases as ‘the others have already said they did it’, was the usual practice for each juvenile. The juvenile who was said to have ‘confessed in less than 30 minutes’ from the start of the interrogation had the chronic disease of epilepsy from infancy, and indeed after the interrogation by the prosecutor, on the day following the day of the ‘confession’, he had a seizure. The police obtained their ‘confessions’ by fully utilizing the juveniles’ weaknesses in intellectual and mental defensive ability, through things such as inducements, making false suggestions, or coaxing, as in, ‘if you speak honestly, we’ll let you eat some’ in front of ramen noodles, and ‘if you tell the truth we will show you the evidence’. A juvenile who consistently denied and even made a denial written statement did not know the existence of a limit on the period of detention, and kept being threatened by the policemen that as long as he kept telling lies he would never get out of police custody, and because he actually was arrested despite his denials, he felt fear and resignation, and he finally made a ‘confession’ as he was told to by the policemen.

Since the statements by the juveniles would not correspond to each other no matter how hard they tried, they even performed the investigative method of taking the juveniles to the place that was considered to have been the scene of the ‘criminal act’ and having them inspect the place in turn, and then, in the end, having all the juveniles inspect the place together and endeavoured coercively to have them reconcile with each other concerning the scene.

Additionally, in the initial interrogation by the police, the statements were all made preconditioned on ‘attempted rape’; however, from a certain point of time, in the interrogation by the prosecutor mentioned later, all of the juveniles simultaneously changed their statements to ‘accomplished rape’ with such rape modes as ‘using condoms, oral sex and anal sex’. Statements by the police were also changed (these are the parts of the statement that are acknowledged by this Supreme Court decision as ‘it is impossible to dispel the suspicion of deception by the investigators’).

IV. Concealment and manipulation of evidence
1. The Soka Police Department knew the existence of the saliva spots attached to both breasts of the victim and the sperm attached to the skirt, with analysis results of the blood type of being said type AB (Phone Conversation Statement concerning the saliva spots as of 22 July, Analysis Request concerning the sperm as of 25 July), in the initial stage of the investigation after the discovery of the incident (19 July 1985). As a matter of course, after obtaining the ‘confession’ by the juveniles at an early stage in the interrogation, they performed a checking analysis of the blood type of the juveniles in order to support the confessions (in the statement on the physical examinations as of 5 August of the same year, the reason for the necessity of the
physical examinations was stated as, ‘it is necessary to analyse the blood types of suspects and support the verification of this case’; however, all six juveniles had either O or B type blood. The investigative organs concealed the analytical materials on the remnant physical evidence and on the blood types of the juveniles, violating their obligation to the juvenile trial which ordered them to send every document to the court, and failed to send it to Family Court (evidence manipulation 1). It is unclear how the prosecution office was involved in this illegal non-transmittal, however, as stated later, if they had at least checked the investigative records in the detailed way that the counsels had, this concealment of evidence could have been discovered.

This fact of concealment of evidence was revealed from a page of the Phone Conversation Statement (record of phone inquiry of blood type of the saliva spots from the crime laboratory) included in the records sent to Family Court, and at the time of the trial in Family Court, the defence demanded the sending of those analytical records, etc, and examination of witness; however, without such facts being examined at all, the juveniles were found ‘guilty’. After the determination of disposition by Family Court, from the description of the saliva analysis report (as of 19 August) sent on 9 September and additionally sent on 1 October, and the abovementioned physical exam statement, in addition to saliva, the existence of AB type sperm was verified in succession, and then in response to counsel’s request for an explanation, analysis statements about hair attached to the shirt, etc., were sent in a trickle. However, it was in January 1986 when the written expert opinion of the sperm attached to the skirt was submitted to the appeal court and this opinion was written in response of the second request for the expert opinion (evidence manipulation 2, proved by the testimony of the Tajima scientific investigator in the first civil trial). The hair analysis statement was dated 19 April 1986.

2. Submission of falsified investigative reports (evidence manipulation 3)

With regard to the hair attached to the back of the collar of the shirt of the victim, one example of the physical evidence of type AB, an investigative report with regard to the judgment on sex was also sent to the court together with hair analysis results. This contained the explanation by the Tajima scientific investigator, and it appeared that the hair could be judged to be ‘female hair’. The appellate decision that upheld ‘guilt’ found the hair ‘has rather a possibility of being that of a female’ referring to the contents of this report. However, in the civil trial, the Tajima scientific investigator denied the contents of this investigative report, and submitted to the court a copy of the report that had been sent to Soka Police to the effect that ‘identification of sex is impossible’, (as of 24 April 1986), thus the falsification of the investigation report became obvious.

Other than this, many unclear investigative reports attempting to weaken the value of the type AB remnant physical evidence were submitted through the Public Prosecutors’ Office, and these were precisely to cover up the concealment of the evidence.

Urawa District Court, in the first instance of the civil trial, strictly pointed out as ‘problematic points of the investigation body’, that ‘the investigation body, the Soka Police Department in particular, neglected to make a detailed inspection, sampling, or analysis of sand present around the neck of the body and expanded the anus at the time of the body inspection and moreover failed to notify either the expert medical
witness or prosecutor of that facts, and failed to send to the prosecutor or to the court the analysis results of the type AB sperm having been attached to the skirt until the decision had been reached in the original trial, and then at the appellate trial, had analysis results with almost the same contents created and sent after the decision of original trial, making an incorrect oral report as to the analysis results on the hair, and not only that, they even acted to cause us suspect that they might have been trying to conceal objective evidence favourable to the juveniles.’

V. Correspondence by prosecutor from investigation and trial
In juvenile cases, as prosecutors cannot attend trials under the Juvenile Law, there are some opinions that assert as if fair fact findings cannot be guaranteed. However, the role and power of the prosecutor, who is supposed to check the investigative authorities legally, is the same as in the criminal justice system, and they can contribute to the realization of fair fact findings at trial by excluding illegal investigations and having the fair collection of evidence be performed at the stage of investigation.

However, in this Soka Case, not only did the check function by the prosecutor fail to work, but, as a result of neglecting the detailed checking of objective evidence, maybe because he was in too much of a hurry to ‘pursue the offender’, the prosecutor also overlooked concealment or manipulation of evidence by the police, and himself influenced the juveniles and fabricated the written statement based on their false ‘confessions’ which was misled by the prosecutor. Moreover, at the trial stage, when the existence of the type AB remnant physical evidence was revealed, the Prosecutor failed to correct the illegalities in the investigation, and made a report himself that lacked any scientific grounds, and sent the report of additional investigations without any objective supporting facts, and confused the valuation of evidence and led the trial astray. The responsibility is massive.

(1) Fabrication of ‘confessions’ through misleading the juveniles
In this case, from the beginning of the investigation, there were no objective facts supporting the contents of the ‘confessions’ by the juveniles. From the results of the analysis informed to the prosecutor by phone by Dr Yanagida, who did the autopsy on the body around the end of July, through the expression ‘sperm reaction is seen at deep locations’ (testimony by Prosecutor Yuko Sumida), it was judged that in four places inside the body, vagina, throat, inside stomach and rectum, ‘there is a possibility of sperm left.’ Around the same time as such information was obtained, the ‘confessions’ by the juveniles were all at once changed from attempted rape to the criminal act of accomplished rape with the modes of condom wearing, anal sex and oral sex. This statement on anal sex and oral sex was ‘stated for the first time at Prosecutor Takai’s office’ (testimony by Prosecutor Sumita). In the decision of the appeal court on the juvenile trial, by the fact that the written statement made by the prosecutor in which such things as anal sex, etc was written, was in correspondence with the results of the analysis by Dr Yanagida, it was evaluated that the ‘credibility of the contents of statement is rather heightened’.

However, in the first instance of the civil court trial, the results of acid phosphatase test with regard to the sperm reaction in the four places inside the body judged by Dr Yanagida (all slight or weak purplish blue) were considered not to be specific reactions to sperm, according to witnesses or opinion papers by other forensic
pathologists, and Dr Yanagida, testifying as a witness, also recognized it and himself denied the result of his own analysis. As a result, the existence of 'sperm at four places inside the body' lost any basis, and, together with that, the objective evidence on the status of the body supporting such acts of assault as rape was lost. Credibility of the written statement fabricated by the prosecutor while influencing the juveniles trying to correspond with the incorrect analysis by Dr Yanagida was lost.

In the civil trial, in the first instance, the appeal court and the Supreme Court as well decided that the courts could not admit that sperm existed at four places inside the body of the victim, and found the ‘confessions of the juveniles to the effect that they inserted their penises into the anus and mouth and ejaculated is contrary to the objective facts’ and that the confessions taken from the juveniles ‘include the falsified statements that are suspected of being the result of misleading by investigators.’ Moreover, the Supreme Court acknowledged that, as to whether or not the juveniles inserted their penises into the vagina, judging from the fact that hymen of the victim remained intact and no external injury was recognized, to extend the scope of the misleading statements to the part regarding rape, ‘there is still doubt that the confessions by the juveniles are false’ and ‘it is impossible to dispel the sense of doubt about misleading by investigators as to those points as well.’

(2) Submission of report regarding blood type of saliva spots: cover up of concealment of evidence (evidence manipulation 4)

At the juvenile trial in Urawa Family Court (three juveniles who were considered to commit the murder were in the former group), as mentioned above, according to the description of the phone conversation report, the existence of the type AB saliva spots attached to both breasts and concealment of evidence such as analysis reports by investigation authorities was revealed. When the counsels demanded the submission of the saliva spot analysis reports and the blood type analysis reports on the juveniles, in response to the request for an explanation by the judge, Prosecutor Sumita submitted the reports (as of 6 September 1985). According to the reports, there was a so-called ‘mixing possibility theory’ as to the ‘saliva of offender (type B) and body liquid of the victim (type A) being admixed and judged to be type AB’. However, since the victim had the status of being a non-secretor, such mixing with body fluids (sweat) was clearly incorrect. Though the counsels pointed out this point at the trial of the former groups, disposition was decided based on this report (6 September).

Prosecutor Sumita, perhaps because the court pointed out her error, submitted a revised version of the report for the trial of latter group as ‘saliva of offender (type B) and cellular flakes (grime) of victim (type A) was admixed’ (as of 11 September). Also, a report on the so-called ‘grime test’ to indicate that it was possible to perform a blood type check from the grime of a person who was non-secretor status (not a mixing test of grime and spit) was additionally sent. Tokyo High Court, the appeal court, adopted this revised version and the grime test, and found that ‘there is a possibility of the blood type of the saliva being not only type AB, but also type B’, so this was not contradictory to the confessions by the juveniles.

At the first instance of the civil trial, through the examination of witness, which was not used in the juvenile trial, of Professor Michioki Naito, a forensic pathologist, and of scientific investigator Toshiaki Tajima from the crime laboratory, who performed
the analysis on the remnant physical evidence, errors in the finding of the decision by the appeal court were verified. Even if the grime (cellular flakes) had been admixed with the attached substances, the amount of blood type substances included in the grime was so miniscule compared to that which was included in the saliva that the influence of grime is minor (testimony by Tajima). Accordingly, the fact that in both the absorption test and the elution test in the blood type identification of the saliva spots in this case it was judged to be type AB (analysis report by Tajima) indicates that the saliva itself was type AB.

In the civil appeal trial, in order to verify the abovementioned conclusion, which was said to be the conventional wisdom in forensic pathology, we entrusted the ‘admixing test of saliva and grime’ to Professor Hitoshi Maeda of the forensic medicine course at Osaka City University, summarized the results of his test as an analysis results report, and submitted it to the Supreme Court as materials for supplementary written statement of grounds for appeal. (Incidentally, these results of the Maeda test were announced at a forensic medicine conference and reported in the conference journal, and no objections to the results have surfaced).

The Supreme Court found that ‘it is inescapable to allow that the blood type of all the residue is AB type’ and ‘based on slight theoretical grounds, the judgment in the original trial, that there is a possibility of the blood type of the above-mentioned residue being of the B type, and, even though there was nobody among the juveniles with blood type AB, the blood type check of all of the residue in the above and the confessions of the juveniles is not contradictory or infringing, cannot be admitted.’
Appendix E

The Daiyo Kangoku (Substitute Prison) System of Police Custody in Japan

Report by
The International Bar Association

Supported and Endorsed by
The International Commission of Jurists and LAWASIA
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The First Mission was undertaken by
Nicholas R Cowdery QC,
Vice-Chairman, IBA Human Rights and a Just Rule of Law Committee,
in September 1994.

The Second Mission was undertaken by
Mr Cowdery QC and Professor J Ross Harper CBE, IBA President
in February 1995

The International Bar Association wishes
to acknowledge its appreciation of
Mr Cowdery's work.
Introduction

In June 1994 the Human Rights and a Just Rule of Law Standing Committee ("the Committee") of the International Bar Association ("IBA") acceded to a request by the Japan Federation of Bar Associations ("JFBA"), a member organisation of the IBA, to send a member of the Committee to Japan to investigate the operation of the daiyo kangoku system of police custody and to report to the Committee on his findings.

Daiyo kangoku and its place in the Japanese criminal justice system have been of grave concern to lawyers and others for most of this century, and neither domestic nor international representations for change and improvement, made over a period of many years, have thus far been successful.

The intention was (and remains) that, if it is seen to be necessary and appropriate, a senior officer of the IBA would visit Japan and make representations to the Japanese authorities, after taking into account this Report of the preliminary mission's investigations, findings and recommendations.

The International Commission of Jurists ("ICJ") and the Law Association for Asia and the Pacific ("LAWASIA") agreed to co-sponsor the mission by lending their names to it and to this Report as an indication of their endorsement and support.

This Report is written by a practitioner from a system of law based upon the English common law. The modern Japanese criminal justice system is a hybrid of the ancient Japanese (largely forgotten), French, German (particularly as reflected in the Penal Code) and (since World War II) Anglo-American systems. It is convenient to draw comparisons, where they are thought to be illustrative or otherwise useful, between features of the Japanese criminal justice system and those of the English common law system. Those more at home with civil law systems must make their own comparisons. All such comparisons will suffer by reason of the effect of special influences on the modern Japanese system.

There is at least an argument to be made that in the post World War II move from the European inquisitorial systems towards the Anglo-American adversarial system, in respect of criminal justice at least, some of the safeguards of the former (for example, a formal, regulated, limited and recorded interrogation regime during investigation which, incidentally, results in full discovery) were lost without being replaced by some of the safeguards of the latter (for example, bail or effective habeas corpus, common information charging provisions and either grand juries or committals for trial); for it would appear that the current problems are, for the most part, largely systemic and to a lesser extent cultural in origin, rather than the product of individual aberration or isolated regulatory lapse. Further, there is a continuing problem created by adherence to the largely German form of the Penal Code (preserved as to about 70% after World War II) which is required to be implemented by means of a code of procedure that was not influenced entirely by European minds.

A further complication arises from a tension between the jurisprudence of the Anglo-American system, reflected in the principles embodied in the Constitution in force since 1947, and procedures that owe their origins to ancient Japanese and later European practices, reinterpreted by Americans and their wartime allies, and reflected in procedural statutes, rules and regulations.

It must be made clear from the outset that the mission was conducted without preconceptions of any kind and in the spirit of free, open and unbiased inquiry. It was approached with an open mind - which is not to say with an empty mind: a large amount of written material was provided in advance, including documents from the National Police Agency and the Ministry of Justice. It must also be said, however, that the balance of the arguments developed in that material did not favour the retention of the present system of daiyo kangoku in the context of the Japanese criminal justice system as a whole and of modern international norms.

Because of the preliminary investigative nature of the mission, this Report sets out in some detail the events that occurred in September 1994. A choice had to be made between reporting such detail or confining the Report to an abbreviated survey of the issues raised. It is thought that the former approach will more helpfully contribute to the second stage of the operation (if it occurs), allowing an analysis and extraction of relevant highlights for future consideration. It enables those who contributed to the mission to see the contributions of others. It also enables any reader to see the basis upon which the Findings and Recommendations were made and to be assured that there is nothing secret or underhand in the way in which the process has been followed.

An extract from the Report has also been prepared which identifies the key issues and sets out in summary form the mission's findings and recommendations. The extract will be sufficient for those seeking a summary account of the situation, but if the findings or recommendations are to be assessed or critically evaluated, reference should be made to the detail of the Report and to its accompanying documents for the supporting factual, legal and contextual material.

[The masculine gender is used in the Report only for ease and convenience. There are, of course, some female detainees, police officers, prosecutors, attorneys and judges in Japan.]

[Japanese names are given in European style, with the family name last. Often only the family name is used - no courtesy is intended thereby.]

[Words in the Japanese language appear in italics.]
Brief Summary of Issues and Findings

A measure of the importance of the rights and freedoms discussed in this Report is provided by Article 97 of The Constitution of Japan ("the Constitution"): "The fundamental human rights by this Constitution guaranteed to the people of Japan are fruits of the age-old struggle of man to be free; they have survived the many exacting tests for durability and are conferred upon this and future generations in trust, to be held for all time inviolate." (Reference should also be made to the Preamble and to Articles 11, 12 and 13.)

It is also testimony to mankind's insurrection that even rights so described may be so commonly and apparently effortlessly neglected in practice.

The words daiyo kangoku in Japanese mean "substitute prison". The question naturally arises: for what is that kind of prison a substitute? – for it is not intended to be merely a police holding cell. The answer must be that it is a substitute for a properly established, regulated and conducted permanent system of imprisonment. Such a system would be run by a specialist agency, would respect human dignity, observe human and legal rights and accord with the minimum standards for the treatment and protection of prisoners prescribed in international instruments to which Japan is a party (or respect for which Japan would have in any event) and with the requirements of Japanese domestic law.

Like most "temporary" measures (in this case, a system in operation continuously since 1908, when it was enacted as a short-term qualification to a law which in fact was intended to reduce the use of police cells – part of the Meiji reforms) it fails to provide for the essential requirements of a permanent arrangement. This was expressly acknowledged at the time the measure was introduced: the Diet was told that police cells "shall not be used as prisons in the future". To the contrary, now the system has taken on the appearance and substance of permanency, even to the extent of apparently being further groomed (by the expenditure of funds on upgrading and extending police cells) to compete with regular prisons or detention houses. It offers the expediency of a "stoppgap" without the safeguards necessary for a long-term arrangement and suffers poorly in comparison with such permanent institutions. The exception has now become the rule, but without the legitimacy of a rule. A new justification for it has been found in the ancillary purpose it now serves in criminal investigation. Either it must be discontinued by direct abolition or its effects must be ameliorated by modification of the procedures and practices in the criminal justice system that make it efficacious.

Attention has been brought to bear on daiyo kangoku by individual complaints of mistreatment in the facilities. There is legitimate cause for concern in the facts that the physical conditions and the services provided are inferior to those in detention houses, the operators are police officers (despite the perfunctory effort made to categorize them as members of a separate service) and detainees are too readily available to investigating police for purposes of questionable legitimacy.

However, the problem now is deeper and potentially more serious than merely the physical shortcomings in the operation of the daiyo kangoku themselves. There are features of the Japanese criminal justice system that reinforce the expediency of the daiyo kangoku system at the expense of detention houses (ie. remand prisons), and mitigate for its survival; and which, conversely, are themselves reinforced and perpetuated by the existence of daiyo kangoku which provide the opportunity and the environment for abuse.

Those features include:
- the high reliance placed upon confessions (and written statements of witnesses, generally) and their legal status in the obtaining of convictions;
- the focus of investigators on the suspect, rather than on objective evidence;
- the reluctance of prosecutors to indict unless almost certain of conviction;
- the absence of a right to State-appointed counsel before indictment;
- the absence of an entitlement to bail before indictment;
- the absence of an independent and effective authority to oversee conditions in daiyo kangoku and to examine complaints of mistreatment.

These features, militating for the extraction of confessions from detainees in daiyo kangoku, pose a real threat to the rule of law in the criminal justice system of Japan – and to the independence of the judiciary, properly understood. The criminal trial process is becoming increasingly irrelevant – the question of guilt is in truth being determined by prosecutors and judges, away from public scrutiny and without the provision of proper support for the defendant.

It is remarkable to learn that official statistics show that the conviction rate in Japan (including cases in which the charge is admitted) between 1980 and 1992 has ranged between 99.98% (in 1991 – the only year it fell below 99.99%) and 99.995%.

(So exceptional is an acquittal that it is reported to the Supreme Court personnel section, which has a supervisory role over judges of all courts. Acquittals are also discussed at length in meetings of prosecutors, for reasons that become apparent later in this Report.)

While those figures may be seen by some as a measure of the success, perhaps near infallibility, of the Japanese criminal justice system, it underlines the opposing view to note that in the past several people included in those figures have been
sentenced to death, only to have their convictions overturned later (much later) for the reason that confessions extracted while they were in daiyo kangoku, and upon which they were convicted, were found to have been false in fact, and demonstrably so – and coerced from the suspects. It may justifiably be said that the more spectacular of those cases resulted from abuses carried out many years ago, and that the modern situation is different, but similar findings have been made in many other more recent, less dramatic cases that have not carried the death penalty, often only after the exceptional remedy of a retrial (granted after all other avenues of appeal have been exhausted).

Against that background it must be said that it is time for the cycle to be broken. The wheel to which the Japanese criminal justice system is presently chained is comprised of the following elements:

- there is undoubtedly mistreatment of detainees in daiyo kangoku, the facilities of which fall below standards properly required by international norms;
- that mistreatment occurs in the course of efforts by investigators to extract confessions from detainees;
- a very high premium is placed by investigators on obtaining confessions because of: their cogency in the proof of criminal offences, strengthened by the ability of a judge to prefer the contents of a written statement to oral evidence. Investigators consequently give less attention to the investigation of objective evidence;
- that premium may also be contributed to by what may be a misapprehension among prosecutors about the effect of the State Redress Law. Article 1.2 provides that if a public officer is found to have acted intentionally unlawfully or grossly negligently the government may be liable to the victim and may demand reimbursement of its liability from the officer. In fact, claims are not made against prosecutors personally and in most cases (in any event) negligence is not established. Nevertheless it is said that prosecutors will not indict unless virtually certain of conviction, and a confession is the best means of guaranteeing conviction. (Ironically, that situation also means that some defendants who should be indicted and who might well be convicted may escape charge.) Prosecutors also seek confessions to enable the administrative disposal of cases.

- the efforts of the investigators are facilitated by the absence of pre-indictment bail and practical limitations on obtaining legal representation during pre-indictment detention. Judicial attitudes also assist.

The continual turning of this particular wheel is not only potentially productive of injustice; it does produce injustice and the violation of the human rights of detainees.
First Mission

Between 11 and 21 September 1994 Nicholas R. Cowdery, QC of Sydney, Australia, a Vice-Chairman of the Committee, travelled to Japan to undertake the mission. His investigations were confined to Tokyo and nearby Prefectures.

Copies of Mr Cowdery's letters of accreditation and facilitating correspondence from the President of the IBA are attached as Appendix A.

An itinerary and agenda were arranged by the JFBA and the final working schedule is attached as Appendix B.

A statement of Mr Cowdery's experience and qualifications is attached as Appendix D.

The objectives of the mission were:
- to gather information about the operation of the daiyo kango system from published sources and documents provided from all concerned parties;
- to interview persons who had experienced the operation of the system as prisoners;
- to interview practising and academic lawyers with knowledge of the operation and theoretical basis of the system;
- to interview police officials responsible for the administration of the system;
- to interview government officials responsible for the maintenance of the system;
- to interview court officers and prosecutors about the operation of the system;
- to inspect the facilities used for pre-trial detention;
- to assess the existence and operation of the system from the perspectives of Japanese domestic law and international human rights standards (as recognised by Japan and otherwise);

and to report on those matters, drawing together relevant findings of fact and law and making recommendations for future action consistently with existing legal obligations.

Special acknowledgement should be made at the outset of the assistance and support given by:

- the JFBA, particularly:
  Kazuyuki Azusawa, IBA Human Rights Liaison Officer,
  Masaki Nibe, Director General, Judicial Affairs
  Department,
  Yuichi Kaido,
  Kunio Aitani.

Its officers, members and staff provided facilities and supporting services without which the mission would not have been possible.

Those who gave particular assistance are too numerous to name, but they and I know who they are and I extend my gratitude to them for their warm welcome and their patience, industry and support.

and by

- the hardworking, patient, courteous and always cheerful, extremely proficient interpreter, Mrs Chieko Matsumura from Lexis.

The assistance, co-operation, concern and hospitality of senior officers and members of the Ministry of Justice, the National Police Agency, the Tokyo District Court and the Ministry of Foreign Affairs are also gratefully acknowledged.
Second Mission

From 10 to 18 February 1995 the IBA President, Professor J Ross Harper CBE and Nicholas R Cowdery QC were in Tokyo and Kyoto for the purpose of discussions with concerned individuals and organisations about the operation of daiyo kangoku and particularly the matters contained in the Report of the Preliminary Mission (the First Mission).

An itinerary and agenda were again arranged by the JFBA and the final working schedule is attached as Appendix C. The assistance of those acknowledged in connection with the First Mission is again gratefully noted, with the support of many others, too numerous to name.

On this occasion discussion was held with lawyers, prosecutors, judges, police and academics and leading politicians from many political parties.

It is noteworthy that in a meeting with officials of the Ministry of Justice on 10 February what was interpreted as a thinly veiled rebuke and warning to keep out of Japanese criminal justice affairs was delivered in a tense and acrimonious half hour. That was regrettable. If it was intended to defer the mission from a frank and thorough examination into and report upon daiyo kangoku it failed.

During this visit the IBA sponsored an international Seminar at the United Nations University on 14 February 1995. The theme of the Seminar was Criminal Pre-Trial and Trial Procedures, which in the case of Japan included consideration of daiyo kangoku. A brief note of the proceedings of the Seminar is included in this Report.

At the end of the visit a list of ten questions about daiyo kangoku was provided to agencies concerned in their operation and to all political parties. A record of the questions and responses received by the end of April 1995 is also included in this Report.

(Again, the assistance of the interpreter, Mrs Chieko Matsumura from Lexis, is specially acknowledged.)

The accounts of interviews, inspections and the like given in detail below are of events that occurred during the First Mission. The events of the Second Mission, while producing more detailed analyses of the issues and providing a more complete political perspective did not detract from the force of the recommendations made following the First Mission and little purpose is served by recounting later discussions in detail.
Previous Missions, Reports, Papers and Correspondence

This mission was not a revolutionary idea - although it was a mission into which a great deal of time, effort and resources were put by all concerned in a genuine effort to bring international attention to bear on the true nature of the problem. The daiyo kangoku system has been the subject of serious domestic and international concern for decades. It has been the subject of official criticism and attempts at legislative reform in 1922, 1934 and 1970. It has also been the subject of attempted legislative entrenchment in 1982, 1987 and 1991. Even today there is a Bill in the wings (known as the Criminal Facility Bill or the Penal Institution Bill) and another possibly to go before the Diet (the Police Detention Facility Bill) which would have the effect of permanently institutionalising daiyo kangoku in its present form (as well as imposing further restrictions on visits of attorneys and otherwise further limiting the rights of detainees).

Since 1958 the JFBA has publicly urged the amendment of the Prison Law and the abolition of the daiyo kangoku system, a proven source of human rights abuses in Japan. In February 1992 it released its own "Proposed Bill for the Treatment of Detainees in Penal Institutions" which provided, inter alia, for the abolition of daiyo kangoku by the year 2000. To do so would require the diversion of funds from upgrading daiyo kangoku to the establishment of only 60 more detention houses nationwide. The JFBA has invested enormous time and resources in carefully researching the issue, even to the extent of costing alternatives to the present system.

In recent times much has been done, written and said in attempts to have the anachronistic and seriously flawed system abolished or overhauled. Some of those measures are described below - there have been many other investigations, reports and publications whose existence and importance are acknowledged. It is not possible in this Report to compile an exhaustive list of such events or to survey all the published material. The issues and the arguments may be derived quite adequately from consideration of the following items.

Missions


2 In March 1989 Amnesty International sent a high-level delegation to Japan to look into detention (including daiyo kangoku) and other legal procedures. Its report, Japan: The Death Penalty and the Need for More Safeguards against Ill-Treatment of Detainees, was published in January 1991.

3 In 1987 Lawrence Repeta wrote an article entitled "Forced to Confess" which included criticism of the daiyo kangoku and interrogation procedures.

4 In 1988 the Joint Committee of the Three Tokyo Bar Associations for the Study of the Daiyo Kangoku (Substitute Prison) System issued a report entitled Forced Confessions - How the Japanese Police Forced Thirty Innocent People to Confess. The cases spanned the decades from the 1940's to the 1980's.

5 Also in 1988 the Committee for the Advancement of the Rights of Arrested to Assistance of Counsel issued a report on eight cases of abuse in police custody.

6 Also in 1988 a collection of JFBA seminar papers Futaba Igarashi wrote a Report on How Detainees are Treated in Japan's Substitute Prisons - Why Detainees Confess to Crimes they did not Commit - with illustrations by an artist who had experienced the system.

7 On 4 November 1988 the JFBA held an International Human Rights and Environmental Protection Symposium at Kobe. Papers included criticism of the daiyo kangoku system.

8 In August 1989 the Joint Committee (see 3 above) issued a report entitled Torture and Unlawful or Unjust Treatment of Detainees in Daiyo Kangoku (Substitute Prisons) in Japan. It dealt with 20 cases between 1983 and 1988.

9 On 10 November 1989 Futaba Igarashi presented a paper entitled Coerced Confessions and Pretrial Detention in Japan to the 41st Annual Meeting of the American Society
There is a very large amount of factual material drawn together in the reports and papers referred to above, which themselves refer to many more published works. There are worthy comments from many knowledgeable, reputable and distinguished investigators and reporters. There are statements from those responsible for the operation of the system. It would be of only limited value to review that material here in detail – copies of all the items listed are provided with the original of this Report and the substance of them has been taken into account in reaching the findings and recommendations set out below.

Nevertheless, it is helpful to summarise in point form at this stage the aspects of daiyo kango ku identified time and time again as being contrary to proper standards and/or potentially or actually productive of human rights abuses.

1 The same agency, the prefectural police (in the vast majority of cases), is responsible for the investigation of alleged offences and the custody of detainees.
2 The focus of investigators on suspects and confessions, rather than on obtaining independent evidence of the commission of the offence, places an unwarranted priority on the obtaining of confessions. This focus is also reflected in judicial attitudes.
3 There is mistreatment of detainees by investigating police during interrogation.
4 Prosecutors are reluctant to indict unless there is a virtual certainty of conviction. This leads them to look to confessions as the primary evidence.
5 The ability (and habitual practice) of judges to prefer the content of a written statement to the oral evidence of a witness (or the accused) further emphasises the desirability of having written confessions.
6 Judges abrogate their judicial function in favour of acquiescence to the wishes of the prosecution in respect of detention.
7 There is no right to bail before indictment.
8 There is no right to State-appointed counsel before indictment.
9 There are practical difficulties in obtaining counsel before indictment which infringe upon the right to counsel.
10 There is a lack of confidentiality of written communication with counsel.
11 Unsatisfactory physical conditions and procedures exist in many, if not all, daiyo kango ku, contrary to international standards.

These matters in turn raise serious questions about:
- the rule of law
- the independence of the judiciary
- the status and treatment of women
- the status and treatment of juveniles
- the status and treatment of foreigners.

These issues are referred to in the context of discussion of daiyo kango ku, but it is not possible in this Report to explore those further ramifications in any comprehensive way. However they should be the subject of future consideration, because they are not merely incidental issues.
Present Legal Framework – Criminal Justice in Japan

Structure

The Courts

The Constitution of 1946 (in force since 1947) established democratic government and confirmed the principle of the rule of law. It provides for the separation of state powers, the judicial power being vested in the Supreme Court and the inferior courts (Article 76). The Supreme Court is responsible for, inter alia, the internal discipline of the courts and the administration of judicial affairs. It may delegate rule-making power to the inferior courts (Article 77).

Criminal proceedings are conducted under uniform procedures throughout the country and are instituted by either the police or the public prosecutor. They may follow an ascending path from the Summary Court or the District Court to the High Court and to the Supreme Court. Juvenile cases (the age of majority is 20) are sent to the Family Court by the Public Prosecutor prior to indictment.

Certain minor cases may be dealt with by way of special summary proceedings (ryakushiki teisuzuki) where cases are taken to Summary Courts with the defendant’s consent. Under these procedures these courts dispose of matters informally on the documents and exhibits, without public hearings, and have power to impose fines up to Y500,000. Persons dissatisfied with their determinations may go to formal hearings.

More serious cases – in fact most cases of “non-regulatory” offences – begin in the District Court.

Exceptional cases (such as insurrection) begin in the High Court.

A Summary Court is constituted by one judge. A District Court is presided over by one or three judges, depending on the seriousness of the offence. The High Court is presided over by three judges (except in some special cases where five judges constitute the court).

Appeals may be brought to the next court in the hierarchy by either party on grounds of fact and/or law and against sentence. There is a limited right of appeal to the Supreme Court (for example, on constitutional grounds). There is also provision for a rehearing or review on the basis of new evidence or other circumstance vitiating the original finding (sai shin) and there are other limited rights of review in certain circumstances.

Punishments include, in descending order of gravity, death (by hanging), imprisonment with labour, imprisonment without labour, fine, penal detention (up to 29 days in a penal detention house) and minor fine. Detention in a workhouse may be ordered in default of payment of a fine.

The Legal Profession

The Japanese legal profession is divided into judges, public prosecutors and practising attorneys.

All lawyers must pass the compulsory national bar examination, currently contested by about 25,000 each year and for which the pass rate is less than 3%. They must then complete two years at the Legal Training and Research Institute. Judges and prosecutors then follow those respective career paths. There is little changeover between the branches. Some prosecutors become judges and some judges and prosecutors become practising attorneys. Judges and prosecutors may be appointed from the practising attorneys, but few have been so appointed despite recent efforts to encourage more to apply.

The population of Japan is about 130 millions (Tokyo has about 14 millions). There are just over 2,000 judges, over 1,100 public prosecutors, and about 14,700 practising attorneys who belong to 52 local bar associations (of which Tokyo has three).

All practising attorneys are members of the JFBA through their local bar associations and the JFBA officers are directly elected by the attorneys. The JFBA was created in 1949 when the Practising Attorney Law came into effect. There is a standing Human Rights Protection Committee of the JFBA and the promotion and protection of human rights has become in recent years a major priority of the Association.

Judges and prosecutors have their own, common, professional association – Hosokai.

Prisons

By Article 1 of Law No. 28 of 28 March 1908 (Prison Law), still in force as amended in 1949 and 1953, prisons are classified into four kinds:

– three types for convicted persons; and
– one – a “house of detention” – for “accused persons, persons detained under the permit of detention, permit of provisional detention or writ of detention or detained upon the warrant of arrest (inchii-jo) and convicted persons sentenced to death”.

Provision is made for convicted persons eligible for one of the other three kinds of prison to be detained temporarily in a house of detention.

Article 1.3 provides:

“The police jail may be substituted for a prison; provided that a convicted person sentenced to penal servitude or imprisonment shall not be detained therein continually [sic] for one month or more.”

This is daiyo kangoku. The central problem is the place and
period of detention, particularly pre-indictment.
In 1993 there were 116 detention houses (remand prisons) in Japan (the number having been static since 1989 and having risen by only 3 since 1980). The average daily population was 7,664 (in 1989 it had been 7,411).
By contrast, in 1992 (the last year for which official figures are available) there were 1,265 daiyo kango kai (having increased by 34 since 1980) with an average daily population of 5,700.

**Domestic Law**

**Evidence**
The Code of Criminal Procedure ("CCP") provides that facts shall be found on the basis of the evidence (Article 317) and the probative value of evidence shall be left to the free discretion of judges (Article 318).

Article 38.1 of the Constitution provides that "No person shall be compelled to testify against himself." Under the CCP Article 311 an accused has a right to silence at trial and may refuse to answer any question. If he makes a voluntary statement he may be questioned.

Article 319 provides that:
"Confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not to have been made voluntarily shall not be admitted in evidence."

This gives effect to Article 38.2 of the Constitution.

Further, "The accused shall not be convicted in cases where his own confession, whether made in open court or not, is the only proof against him" (Article 319.2 of the CCP - echoing Article 38.3 of the Constitution).

"Confession" is defined as including any admission acknowledging guilt of the offence charged.

Article 322 provides:
"A written statement made by the accused or a document which contains his statement and is signed and sealed by him may be used as evidence against him, if the statement contains an admission by the accused of the fact which is adverse to his interests, or if the statement was made under such circumstances as secure a special credibility. However, where the written statement or document contains an admission by the accused of the fact which is adverse to his interests and there exists any suspicion that the admission has not been made voluntarily, it shall not be used as evidence against the accused as well as in cases prescribed by Article 319, even though the admission is not a confession of a crime.

2. A written record which contains the statements given by the accused on the date either for the preparation for public trial or for the public trial may be used as evidence, in so far as the statement appears to have been made voluntarily."

A confessional statement may therefore be in a form rewritten by an investigator or prosecutor but containing the substance of the accused's confessional statements. Habitudally, many such statements will be prepared for an accused over a lengthy period of interrogation. Police Regulations make more detailed provision for the formal requirements of such statements.

Written statements assume greater importance in Japanese criminal proceedings than in the oral tradition of the common law. Statements of witnesses are tendered in trials, but only with the consent of the accused. If consent is withheld the witness is called to give oral evidence. The importance of the witness's statement is underscored, however, by the operation of CCP, Article 321, which provides that if the oral testimony is "contrary to or materially different from" a statement made before a judge or prosecutor the judge may (and in practice does) rely on the statement.

[This is to be contrasted with the common law position where a prior inconsistent statement may be used to attack the credibility of present oral testimony, but the prior statement does not itself become the evidence of the witness.]

Official statistics disclose that between 1983 and 1993, in between 89.54% and 95% of criminal cases there were confessions of guilt. The trend has been consistently upward, the 1993 figure of 95% being an increase from the 1992 figure of 91.68%.

**Procedure**
As in other societies, criminal investigation is carried out by the police, particularly at the initial stage. The public prosecutors may give suggestions and instructions to the police (CCP, Article 193). The public prosecutors also conduct investigations, in some cases independently of the police. Only the public prosecutors may lay charges to bring suspects to trial (indict), at which point a suspect becomes an accused and the trial formally begins. Consequently when the police conclude an investigation, which may include the arrest of a suspect based upon suspicion of commission of an offence, they must refer the matter to the prosecutor who subsequently decides whether or not to indict, and if so, on what charge or charges.

This Report is concerned only with those suspects who are arrested and taken into custody. (There is provision, as in other jurisdictions, for suspects in certain cases to be proceeded against otherwise than by arrest.) Persons may be arrested on warrant issued by a judge who must be satisfied that "there exists reasonable cause enough to suspect that the suspect has committed an offense" (CCP, Article 199.2). The warrant must specify the offence with which the person is charged (the Constitution, Article 33) and other prescribed information (CCP, Article 200). There may be an arrest without a warrant by police or any citizen if the suspect is caught in the act of commission of a crime or immediately after its commission (the Constitution, Article 33; CCP, Article 212) - or by police in some cases of urgency where certain types of serious crime are suspected, in which case a warrant must be obtained subsequently (CCP, Article 210).

Upon arrest by the police a person must be informed immediately of the charge and the essential facts of the crime (and the warrant must be shown to him - the Constitution, Article 34 and CCP, Article 201) and of his right to select his own counsel (CCP, Articles 39 and 203, 204; see also Article 34 of the Constitution. State-assigned counsel - Constitution, Article 37 - is not available before indictment at which point a suspect becomes an "accused.") He must be notified that he is not required to make a statement against his will (CCP, Article 198). He must be given an opportunity to explain if he wishes and he must be released immediately if there is no need to detain him (CCP, Article 203).

If the police perceive a need for continuing detention, the following timetable applies:

1. Within 48 hours of arrest the suspect must be taken to the prosecutor with all the available documents and evidence (CCP, Article 203). Otherwise he must be released. The prosecutor must also inform the suspect of the essential
facts of the crime and of his right to select counsel. He must
give the suspect an opportunity for explanation and release
the suspect unless he believes further detention is
necessary (CCP, Article 204).
2 If the suspect is detained, the prosecutor must within 24
hours (and within 72 hours of arrest) request a judge to
authorize detention (CCP, Article 205).
If that is not done, and the prosecutor does not indict
the suspect within that period, the suspect must be released.
Some latitude may be given for delay caused by
unavoidable circumstances (CCP, Article 206).
3 The judge must inspect the materials and at a pre-
indictment detention hearing inform the suspect of the
charges against him (although not formally indicted) and
give the suspect an opportunity for explanation.
If there are reasonable grounds for detention a warrant
must issue, otherwise the suspect must be released. The
judge specifies the place of detention and may order that
there be no personal visits.
Reasonable grounds for detention after indictment may
be provided by:
- reasonable grounds for suspicion that he has committed
the crime; and
- no fixed dwelling;
- reasonable grounds for suspecting he will destroy
evidence; or escape or reasonable grounds for suspecting
future escape.
(CCP, Article 60). These tests are also applied before
indictment, in addition to consideration of the needs of the
investigation (which assumes particular prominence).
That decision is appealable to a court of three judges.
The period of such detention is normally ten days, but it
may be extended for a further period of no more than ten
days (or fifteen days in some exceptional cases) if
"unavoidable circumstances exist" — CCP, Articles 208 and
208.2.
The prosecutor is expected to decide whether or not to
indict the suspect within this period. He has certain
discretionary power in such circumstances.
Official statistics disclose that between 1981 and 1992 pre-
indictment and post-indictment detention was ordered by
judges in between 99.6% and 99.9% of cases in which it was
requested by the prosecution. (In 1992, for example, there
were 77,655 requests and 77,545 orders for detention).
Access to counsel (and to visitors) may be controlled by a
prosecutor or police officer during pre-indictment detention
"when it is necessary for [the] investigation ... provided it
does not unreasonably hold the suspect in check when he
exercises his rights ..." (CCP, Article 39.3).
After indictment an accused may be held in custody for up
to two months from the date of charge, renewable monthly
(CCP, Article 60). This may be in dairyo kangoku.
Bail is not available before indictment (CCP, Article 207).
Figures show that for 1990, 54.7% of accused awaiting trial
were held in custody. The trend since then has been upwards.
There is no grand jury and there are no proceedings for
committal for trial. (There is, however, provision for lay
review of decisions not to proceed with prosecutions. It is
advisory only.)
(There has been provision for trial by jury in Japan since
1923, but it was suspended in 1943 for "practical reasons"
and has not been reinstated. The system was not similar to
the Anglo-American system and the judge had the power to
override the jury's decision. Officials of the Supreme Court
and some academic lawyers are presently studying the
question of the reinstatement of trial by jury in the Anglo-
American model. It would require a complete overhaul of the
laws of evidence and contempt, among other things.)

International Law

Japan has ratified 8 of the 25 international instruments
relating to human rights, including the International
Covenant on Civil and Political Rights ("ICCPR").
The effect of Article 98.2 of the Constitution:
"The treaties concluded by Japan and established laws of
nations shall be faithfully observed." is to make such treaties automatically part of the domestic
law of Japan with full legal effect. They prevail over statutes.
Other instruments adopted by the UN are "respected" by
Japanese authorities in the making of policy and the planning
of administrative procedures. The National Police Agency
of Japan specifically acknowledged this at page 9 of document
21 referred to above.

1 Article 7 of the ICCPR provides:
"No one shall be subjected to torture or to cruel,
inhuman or degrading treatment or punishment ..."
This provision is echoed in Article 36 of the Constitution
which forbids torture by any public officer and cruel
punishments. Such conduct — acts of violence or cruelty by,
inter alia, police — is made criminal by Article 195 of the
Penal Code.

Article 9 provides:
"1. ... No one shall be subjected to arbitrary arrest or
detention ..."
3. Anyone arrested or detained on a criminal charge shall
be brought promptly before a judge or other officer
authorized by law to exercise judicial power and shall be
entitled to trial within a reasonable time or to release ... 4. Anyone who is deprived of his liberty by arrest or
detention shall be entitled to take proceedings before a
court, in order that that court may decide without delay
on the lawfulness of his detention and order his release if
the detention is not lawful."
(It should be noted that, as the legislative history of
Article 9 demonstrates, arbitrary arrest and detention
includes arrest and detention under arbitrary laws.)

Article 10 provides:
"1. All persons deprived of their liberty shall be treated
with humanity and with respect for the inherent dignity
of the human person."

Article 14 provides:
"3. In the determination of any criminal charge against
him, everyone shall be entitled to the following
minimum guarantees, in full equality:
(a) To be informed promptly and in detail in a language
which he understands of the nature and cause of the
charge against him;
(b) To have adequate time and facilities for the
preparation of his defence and to communicate with
counsel of his own choosing ...
(g) Not to be compelled to testify against himself or to
confess guilt."

2 Japan has not ratified the Convention against Torture and
Other Cruel, Inhuman or Degrading Treatment or
Punishment, but Article 1 defines "torture" (used in Article
7 of the ICCPR) as meaning "any act by which severe pain
or suffering, whether physical or mental, is intentionally
inflicted on a person for such purposes as obtaining from
him or a third person information or a confession, ... when
such pain or suffering is inflicted by or at the instigation of
or with the consent or acquiescence of a public official or
other person acting in an official capacity."
3 The United Nations has also adopted the *Standard Minimum Rules for the Treatment of Prisoners*, some of which apply to all categories of prisoners. They include provisions for accommodation, hygiene, clothing and bedding, food, exercise, medical services, discipline, restraint, complaints, contact with the outside world, and so on.

Instruments of restraint are to be used only as a precaution against escape during a transfer and must be removed when the prisoner appears before a judicial or administrative authority (clause 33).

Part C applies to Prisoners under Arrest or Pending Trial – either in police or prison custody.

Clause 84 (2) provides that “Unconvicted prisoners are presumed to be innocent and shall be treated as such.”

Clauses 92 and 93 make provision for communications and visits with and from persons outside and legal advice and consultation.

4 The *UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment* (adopted by consensus by the UN General Assembly, including Japan, on 9 December 1988) requires that the expression “cruel, inhuman or degrading treatment or punishment” (which is forbidden by Principle 6) be interpreted so as to extend the widest possible protection against abuses, whether physical or mental.

Principle 1 provides:

“...All persons under any form of detention or imprisonment shall be treated in a humane manner and with respect for the inherent dignity of the human person...”

Principle 7 provides for the right to complain of any violation of the Principles.

Principle 9 provides:

“The authorities which arrest a person, keep him under detention or investigate the case shall exercise only the powers granted to them under the law and the exercise of these powers shall be subject to recourse to a judicial or other authority.”

Principle 17 provides:

“2. If a detained person does not have a legal counsel of his own choice, he shall be entitled to have a legal counsel assigned to him by a judicial or other authority in all cases where the interests of justice so require and without payment by him if he does not have sufficient means to pay.”

Principle 18 provides:

“1. A detained or imprisoned person shall be entitled to communicate and consult with his legal counsel.
2. A detained or imprisoned person shall be allowed adequate time and facilities for consultations with his legal counsel.
3. The right of a detained or imprisoned person to be visited by and to consult and communicate, without delay or censorship and in full confidentiality, with his legal counsel may not be suspended or restricted save in exceptional circumstances, to be specified by law or lawful regulations, when it is considered indispensable by a judicial or other authority in order to maintain security and good order...”

Principle 21 provides:

“2. No detained person while being interrogated shall be subject to violence, threats or methods of interrogation which impair his capacity of decision or his judgment.”

Principle 23 provides:

“1. The duration of any interrogation of a detained or imprisoned person and of the intervals between interrogations as well as the identity of the officials who conducted the interrogations and other persons present shall be recorded and certified in such form as may be prescribed by law.
2. A detained or imprisoned person, or his counsel when provided by law, shall have access to the information described above.”

Principle 27 provides:

“Non-compliance with these Principles in obtaining evidence shall be taken into account in determining the admissibility of such evidence against a detained or imprisoned person.”

Principle 29 provides:

“1. In order to supervise the strict observance of relevant laws and regulations, places of detention shall be visited regularly by qualified and experienced persons appointed by, and responsible to, a competent authority distinct from the authority directly in charge of the administration of the place of detention or imprisonment...”

Principle 33 provides:

“1. A detained or imprisoned person or his counsel shall have the right to make a request or complaint regarding his treatment, in particular in case of torture or other cruel, inhuman or degrading treatment, to the authorities responsible for the administration of the place of detention and to higher authorities and, when necessary, to appropriate authorities vested with reviewing or remedial powers...”

Principle 39 provides:

“Except in special cases provided for by law, a person detained on a criminal charge shall be entitled, unless a judicial or other authority decides otherwise in the interest of the administration of justice, to release pending trial subject to the conditions that may be imposed in accordance with the law. Such authority shall keep the necessity of detention under review.”

5 The United Nations has also adopted a Code of Conduct for Law Enforcement Officials. Article 2 provides that:

“In the performance of their duty, law enforcement officials shall respect and protect human dignity and maintain and uphold the human rights of all persons.”

Article 3 provides:

“Law enforcement officials may use force only when strictly necessary and to the extent required for the performance of their duty.”

Article 5 prohibits cruel, inhuman or degrading treatment or punishment by law enforcement officials.

(These obligations are reflected in the *Criminal Investigation Rules*, issued by the Japanese Public Safety Commission, which also emphasise that confessions must be voluntary.

An English translation of these rules was not available.)

The status of the ICCPR in Japan has been the subject of a report by the JFBA: *A Report on the Application and Practice in Japan of the International Covenant on Civil and Political Rights*, April 1993. In Section 2 the *daiyo kangoku* system is severely criticised for the opportunity it gives police to force confessions from suspects. This must be viewed against the background of a criminal justice system that relies very heavily on confessions for obtaining convictions. There are also alarming criticisms of the way in which prisoners in *daiyo kangoku* are treated. It is said that a fundamental flaw in the system is the entrusting of prisoners to the custody of those responsible for their investigation.

Critics of these and other matters were also made in the JFBA’s response to a UN questionnaire on the Right to a Fair Trial, made in July 1992 (see above).
Interviews and Discussions

1 Tokyo District Court

On 12 September 1994 the Deputy Chief Judge (and Acting Chief Judge) of the Tokyo District Court, Judge Akinori Matsumoto, was interviewed in his chambers in the Court building. He briefly explained the law relating to pre-indictment detention and the procedure followed in his court (which has 300 judges), showed a videorecording explaining pre-indictment and trial procedure and answered questions. There was an inspection of the pre-indictment detention hearing rooms and nearby holding cells and legal interview rooms in the basement of the building.

The law is set out earlier in this Report. The videorecording was an English version of a tape available in the Japanese, English, Chinese, Korean and Thai languages. More translations are planned, since about 20% of defendants are foreigners. It is shown in detention houses and in the court building (where suspects in daiyo kangoku can see it), before suspects/defendants are taken before a judge. The tape - “Criminal Trial Procedures in Japan” - explained procedures using the progress of a typical (staged) case as an example.

In the course of discussion the judge expressed the following views:

- the required degree of satisfaction with guilt rises progressively from suspicion to support the granting of a warrant of arrest, to the decision to detain, to finding an indictment, to conviction.
- the trial proper begins with the finding of an indictment.
- the judge decides where the suspect will be detained considering, primarily, the convenience of the investigation, although the nature of the charge and circumstances personal to the suspect will be considered. He will take into account the need for questioning, inspection of the scene, identification parades and the like, but also the need for the suspect to have contact with family and counsel.

[It seems, however, that the prosecutors always ask for detention in daiyo kangoku and the forms which the judge must complete are pre-printed with daiyo kangoku as the place of detention. The reason given for the extension of detention is almost always that interrogation or investigation has not concluded.]
- detention houses have only limited capacity.
- “the basic flaw” in the system is that bail is only available after indictment.
- any problem of forced confessions or other abuses in daiyo kangoku has been removed by the separation of the functions of the investigating and custodial police. In any event, there would still be risks of such abuses in detention houses.
- confessions are encountered in most trials - certainly more than 90%.
- judges have no authority to control the means of detention or interrogation.

The prosecutor makes a request for pre-indictment custody in writing to the court. The hearing is conducted in a small room with only the judge, clerk and suspect present. An interpreter will attend if required, and if there are security needs a police officer will also be present.

2 Eleven Attorneys

On 15 September 1994 (a national holiday in Japan - “Respect for the Aged Day”) under the chairmanship of Katsuhiko Nishijima, Secretary General of the JFBA’s Headquarters for Countermeasures against Two Confinement Bills, there was lengthy discussion involving 11 attorneys from Tokyo and the Prefectures of Saitama, Yokohama, Kanagawa, Osaka and Yamagata.

Nine case studies (in which the attorneys had been directly involved) were presented and discussed. (The annotated briefing paper accompanies the original of this Report.) Questions were asked and the issues arising from the 9 cases, from other cases and from the operation of daiyo kangoku generally were explored. There was also discussion more generally about aspects of the Japanese criminal justice system and their shortcomings, particularly in the light of international standards. The differences between theory (as prescribed in statutes and policy statements) and practice were explored - they are significant. This was an opportunity to draw widely on the combined knowledge and experience of a representative group of attorneys and to get “background” information in addition to the details of specific cases.

The detail of the discussion is too lengthy to include in this report. An adequate and incomplete attempt is made to summarise the messages conveyed in the discussion:

- There is a great gulf between the letter of the law and the practices actually adopted.
- While many aspects of daiyo kangoku are unsatisfactory, a central vice is the length of detention - up to 23 days.
- Police use simple holding charges to detain suspects for interrogation about more serious charges. Sometimes detainees may be indicted on the minor charge so that the 23 day limit cases to apply. They are then interrogated on the other charges.
- There is a high level of violence and offers of inducements employed against suspects during interrogation.
- Daiyo kangoku give to police the opportunity to confront detainees with their accusers in the statement making
process—which has happened.
- The right to counsel before indictment is consistently denied, although with bar associations introducing free duty attorney systems this is slowly being remedied. While judges usually advise detainees of the availability of such services it is taking longer to persuade police to give such advice in police stations.
- Women, juveniles and foreigners are at an additional disadvantage in daiyo kangoku:
  - women because they are housed in the same facility as men, they are denied harmless items (such as sanitary pads) and there are no female guards;
  - juveniles because although the Juvenile Law, Article 48, provides that “A warrant of detention shall not be issued to a juvenile unless unavoidable circumstances exist” and that he may be detained in a Juvenile Classification Home, juveniles are regularly detained in daiyo kangoku, and because although policy (not law) requires a parent or guardian to be present during interrogation it often happens that juveniles are interrogated, sometimes for long periods, without such a person present; and
  - foreigners because of their exposure to immigration holding charges and the failure to adequately address their right to translations and interpreting facilities.
- There is no availability of State-appointed attorneys for juveniles. In practice, only about 2% of juveniles are represented by counsel.
- Even when bail is (occasionally) granted after indictment, it is usually set at an impossibly high figure (at least Y1 million). In practice, bail is withheld from detainees who do not confess.
- The constitutional right to silence is not interpreted as meaning that once a detainee has said he does not want to answer questions the interrogation will cease. Continuing interrogation is seen as a “right” of the investigators. Entitlement to interrogate is seen as a different proposition from the right of the interrogated to remain silent.
- In practice, the attitude of the investigators softens when an attorney becomes involved for the suspect.
- Judicial attitudes towards the police are not realistic. Judges are seen as being blinkered in their vision through not having practised as attorneys.
- In theory the prosecution must prove the adoption (by signature) and the voluntariness of confessions—but in practice judges accept what the police say and, in the case of juveniles, will accept unsigned confessions.
- In some areas judges are becoming more open to persuasion by evidence from the defence. In some areas they are beginning to ask for tape recordings of interrogation procedures. Now in about 2/3 of cases judges will, if an application is made, change detention from daiyo kangoku to a detention house. When such an application is made, prosecutors will very often then make the application themselves, to prevent the judge ordering it.

3 Ministry of Foreign Affairs

On 16 September 1994 a visit was made to the Ministry of Foreign Affairs where discussions were held with Tosio Kunikata, Director of the Human Rights and Refugee Division, and Takeshi Goto, attorney (and former prosecutor and departmental officer working with the Supreme Court on criminal justice issues).

Confirmation was obtained of the propositions that:
- Pursuant to Article 98 of the Constitution international instruments ratified by Japan, which are regarded as treaties, have the full force of law in Japan.
- Relevantly, the ICCPR is one such instrument.
- Japan has not ratified the First Optional Protocol to the ICCPR, the Convention against Torture and other Cruel, Inhuman or Degrading Treatment or Punishment or the Convention on the Elimination of All Forms of Racial Discrimination.
- It has ratified the Convention on the Rights of the Child, which came into force on 22 May 1994.
- It has ratified 8 of the 25 international instruments on human rights.
- Procedures are in place for other international instruments which do not have treaty status (eg, the Body of Principles for the Protection of All Persons under any form of Detention or Imprisonment, the Standard Minimum Rules for the Treatment of Prisoners, the Code of Conduct for Law Enforcement Officials, etc), although not legally binding, to be considered in the formulation of policy and to be respected in the establishment of administrative systems.

There was discussion of the processes to be undertaken by the Treaty Bureau before ratification (translation, checks of existing laws, referral to the appropriate Ministries and agencies, etc) and of the assignment of priorities to the various instruments in many different fields of activity and the resources available for such work. By way of example, the process leading to ratification of the Convention on the Rights of the Child took 3 years.

Consideration is being given to the question of ratification of the instruments named above, but consideration must also be given to whether or not particular instruments are capable of practical implementation in the Japanese legal and constitutional system.

The perceived priorities of the Japanese people, gauged in part by popular expression through the mass media and elsewhere, is a factor in assigning priority of consideration of particular instruments.

4 Academic Scholars and Attorneys

On 17 September 1994 a meeting was held at the JFBA with four academics and seven attorneys. The academics were:
- Professor Hideo Niwayama, Senshu University
- Professor Nobuyoshi Araki, Rikkyo University
- Professor Akira Goto, Chiba University
- Professor Osamu Niikura, Kokugakuin University.

The attorneys included Futaba Igarashi (see publications above), a Vice-President of the Tokyo Bar Association, officers of the JFBA and others.

As with the meeting with the eleven attorneys, it is not possible to recount all that was discussed in 2 1/4 hours of intense conversation that included many references to the statutory provisions referred to above and argument about differing interpretations given to them (some of which was not directly relevant to the issues dealt with in this Report); but again an attempt is made (inadequate and incomplete though it may be) to summarise the consensus views on the main points of criticism of daiyo kangoku and what action should be taken:
- Daiyo kangoku should be abolished.
- If abolition is not possible, there are steps that can be taken by attorneys and by the authorities to alleviate its consequences.
- A serious problem with daiyo kangoku is the difficulty it creates for a suspect to retain his right to silence.
- Another serious problem is continuing detention in daiyo kangoku after detention hearings.
- It is inappropriate for the same agency to be responsible for both investigation and custody.
- The distinction argued by police and prosecutors between the investigators' claimed right to interrogate, on the one hand, and the detainee's right to silence, on the other, is specious. The argument is based on an interpretation of Article 198 of the CCP which is not thought to be inconsistent with the constitutional right to silence.
- The duty attorney scheme will alleviate some of the effects, but attorneys need to be able to appear at pre-indictment detention hearings and apply for the transfer of detainees from daiyo kangoku to detention houses. (There is no legal barrier to such an appearance.)
- Attorneys need to be given proper access to detainees.
- If a detainee informs the judge at the detention hearing that he does not admit the charge, he should automatically be transferred to a detention house. (At present, in practice, if a detainee denies the allegation he is sent back to daiyo kangoku for further interrogation.)
- Although judges have the power to order the place of detention, in practice they follow the prosecutor's request.
- There is no requirement that a statement must be made at every interrogation. A statement should be made, for example, that a detainee remained silent. There is no requirement to record systematically the times and events of an interrogation.
- The system is defended by law enforcement officials on the precise basis that it enables confessions to be obtained which then enable the truth to be discovered. There is a culture of belief in the confession as the source of truth — and in the ability of judges to divine the truth through statements. It is believed by law enforcement authorities that the primary responsibility of law enforcement officials is to safeguard the security of the nation and that the people generally support the daiyo kangoku system.
- Statements and confessions have become the central focus of criminal trials, rather the objective or independent evidence obtained by proper investigation.
- Judges (with the Emperor) were not purged after World War II. Judges traditionally derived their power from the Emperor and were seen as superior beings. Arrogance and the notion of judicial infallibility survived in the culture of the judges and have been handed down through the generations. There is a need for re-education of judges.
- The theory and philosophy of the Anglo-American system, as reflected in the Constitution, is at odds with the rules of practice and procedure which survive from the traditional Japanese and European systems.
- The prosecution does not present statements of denial to the court. In practice, the onus is on the defense to prove the involuntariness of a confession, and the concept of voluntariness is extremely elastic.
- The formal requirements of the written statements derives from traditional Japanese procedures.
- The denial of bail pre-indictment is an historical accident. The American framers of the CCP intended any person under arrest to be an "accused", but in Japanese the word is different from that for "suspect". With procedures not making a suspect an accused until he is indicted, suspects missed out on the entitlement to bail given to accused.
- Academics teach students that detention is not for interrogation; but when the students ask their parents for their views they invariably say that interrogation is the purpose of detention.
- Detention is usually extended at pre-indictment hearings for the reason that interrogation or investigation has not concluded. This reason appears on the documentation.
- Confessions are forced by a combination of: the absence of entitlement to bail the absence of State-appointed attorneys the absence of attorneys from interrogations the absence of attorneys from detention hearings the fact of custody in police facilities.
- Suspects should be entitled to take notes during interrogation.
- There needs to be a recording made of what actually takes place during interrogation.
- Jury trial would assist to dilute the idea of judicial infallibility.

5 Ministry of Justice

On 19 September 1994 a visit was made to the Ministry of Justice. (No practising attorney or interpreter was permitted to attend.) A courtesy call was made to Noburu Matsuda, Director-General of the Correction Bureau. Kenichi Sawada, an official of the Legislation Office of the Correction Bureau, acted as interpreter and accompanied throughout the day. A meeting and discussion took place with Mr Sawada, Shotaro Tochigi (Director, General Affairs, Correction Bureau), Takashi Tamaoka (Attorney, Correction Bureau) and Norio Sonobe (Attorney, Criminal Affairs Bureau).

The officials were interested to learn (although they had already been informed) of the IBA and of its interest in the issue of daiyo kangoku. The background to and purpose of the mission were explained. A number of documents were provided (see Appendix E.5). It was made clear that the mission was interested in daiyo kangoku both by reason of its place in and its effect upon the criminal justice system and because of individual cases of ill-treatment of detainees.

Reference was made to the two documents numbered 20 and 21 in the section "Reports, Papers and Correspondence" above. One of the statements made was that the time in daiyo kangoku detention was short. When asked about the practice of arresting suspects on "holding" charges, interrogating until the maximum time was about to expire, then re-arresting and starting a new detention period for the continuation of interrogation, the response was that there was nothing wrong with that course of action because maximum periods of detention were specific to particular charges.

It was pointed out by the officers (after explaining the course of procedure from arrest to trial) that "considerable suspicion" was required for the issue of a warrant of arrest, and that the degree of suspicion rose with each succeeding step in the process. Japan has a very low crime rate and detention is only sought in serious cases. (The statistics can be seen in the Summary of the White Paper.) Further, in only 4.8% of cases referred by the police to the prosecutors do formal trial proceedings result. The rest are disposed of by way of fine or suspended prosecution. In 1.97% of cases going to court is imprisonment ordered.
Daiyo kangoku detention is ordered for the convenience of the investigation – to enable interrogation to proceed. It was stated that such detention is also convenient for defence counsel and for personal visits to the detainee.

In discussion about the right to silence the officials said that a suspect must be informed of that right. If it is claimed, which happens in very few cases, interrogation will be suspended; but sometimes the suspect will inform the investigators that because of their “anxiety” they wish to confess after all. There is no purpose in coercing confessions, it was said, because they would not be admitted into evidence unless they were voluntary.

[These arguments do not account for the existence of false confessions, however.]

During lunch at the Hosok Kaikan the following points were included in the general discussion:

- daiyo kangoku should not be abolished principally because they provide convenience to investigators and because the cost would be too high.
- it is part of the Japanese culture to confess to wrongdoing and show contrition [which again, however, does not account for false confessions].

6 Officials of the National Police Agency

On 20 September 1994 a meeting was held with officials of the National Police Agency. Present were Superintendent Takaumi Fujimoto (who had been the guide at the inspection of the two daiyo kangoku facilities), his assistant, Superintendent Yasuhiro Shirakawa (Assistant Director of the Investigative Planning Division), and another officer.

The session began with what was in effect a lecture about the police system of Japan given by Superintendent Fujimoto from an English translation of a prepared text. A booklet, “The Police of Japan 1991” – the latest edition – was provided and relevant facts from it are not repeated in this part of the Report. The role of the NPA was explained, and the role of the national and prefectural Public Safety Commissions. For present purposes it is relevant to note that the NPA sets policy, plans rules and regulations, sets standards for all police and co-ordinates the 260,000 police of the 47 prefectures who carry out the policing duties.

There were statements of crime rates and clearance rates – and it might be noted that by comparison internationally the former are very low and the latter are relatively high. (The figures may be found in the accompanying documents.) Vehicle theft seems to be the biggest problem.

The statement was made that these excellent figures may be attributed to the good relationship between police and citizens, fostered by community activities undertaken peculiarly by Japanese police.

Superintendent Shirakawa then described the procedure followed during the investigation of crime. He said it is governed by the CCP and carried out by police and prosecutors. Arrest is by warrant (except in cases of arrest during or shortly after the commission of a crime) – when citizens have the power of arrest, also) and the test for the issue of a warrant is not stated clearly in the CCP, but judges are guided by past experience. There is no prescribed test or formula of the degree of satisfaction (eg. “reasonable suspicion”), but there should be good reason to believe that the suspect committed the offence and the possibility of his absconding or destroying evidence.

The rest of the procedure was then described, as to which reference may be made to the provisions of the CCP set out above and described by others before him. It was stated that the fact that the investigation had not concluded was sufficient reason to extend the initial 10 day period.

It was said that interrogations of suspects, as part of the investigation, should as a matter of principle be carried out voluntarily – ie. without having to arrest the suspect – and that this happens in the “overwhelming majority of cases”. If the suspect refuses to co-operate he may leave the police station. If the police have a strong case, the suspect may be released from custody. That question is not influenced by the type of crime, but is determined by consideration of whether or not the suspect is likely to abscond or to destroy evidence. A suspect has the right to silence and must be told of it at the beginning of interrogation. It must appear on the form of the statement he signs [but is pre-printed on it]. Interrogation takes place in question and answer form, but the investigator makes notes and ultimately composing a statement in his own words. The suspect rarely writes it, but it must be shown or read to the suspect (if he cannot read) and errors must be corrected. The document cannot be used in evidence unless the suspect has signed and sealed it – and it will not be used if it has been coerced or the questioning continued for an inordinately long time.

If the right to silence is claimed, it will depend on the circumstances whether or not questioning will continue. The suspect can be taken to the evidence, asked about his history and questioned about the offence, nevertheless.

Interrogation usually takes place in business hours (8.30 – 5) with proper regard to mealtimes and the requirements of the custody regime. If interrogation continues after hours the investigator must pay special attention to the question of voluntariness and the routine of the cell guards.

If the only incriminating evidence is a confession, there cannot be a conviction.

The National Public Safety Commission issues regulations which ban coercive methods such as leading questions, enticements and questioning for extended hours (except in unavoidable circumstances). They state general principles of respect for the suspect’s human rights, voluntariness, etc.

The NPA issues to all police detailed directives and the prefectural police must collate them and instruct their members about them. There are education officers in each prefect who have the responsibility to educate members on the correct method of interrogation.

It was said that no special significance was placed by police on confessions because it was up to the judge to decide guilt after considering all the evidence. Nevertheless, the police considered it important to get detailed information from a “person who had committed a crime” about his motives, intention, family history, etc – for that reason a detailed interrogation occurred. But it was said that the investigation did not stop after a confession had been obtained.

A suspect has the right to defend himself – and to have counsel (although not present during interrogations). A detainee, informed of this right, may designate an attorney or contact the relevant bar association. If he says he does not know any, the police will contact the relevant bar association to seek to have representation through the duty attorney system. Posters are displayed on police noticeboards about this system.

There is an entitlement to interviews with attorneys (CCP Article 39) but investigators can, if appropriate, designate the
time and place. In practice, it was said, in many cases interrogation was suspended to enable interviews to take place. No telephone calls are permitted because of the possibility of the destruction of evidence. It is unnecessary, anyway, because the police and guards will contact family and an attorney if necessary.

At the time of the detention hearing the judge must specify the place of detention. Until then, suspects are detained in police cells. The CCP prescribes detention in a prison, and the Prison Law makes *daiyo kangoku* a substitute for prison. The Judge must decide, taking into account the capacity of the *daiyo kangoku*, its location, the convenience of the investigation, the convenience of family and of legal counsel. The order may be changed later to detention in a detention house.

It was said that police favoured the retention of the *daiyo kangoku* because there was a maximum period set of 23 days for the investigation to be concluded. If the investigation is not concluded in that time (i.e. sufficiently to allow a formal charge) then the suspect must be released. The place of detention must be convenient for the investigators in order to expedite the investigation by enabling them to interrogate suspects, take them to crime scenes, etc. Detention houses are far from police stations and the time spent in travel would be wasted. It is difficult and expensive to obtain land for more detention houses. The convenience of attorneys and family should also be considered.

There is a practice of charging on a minor charge, which cannot be indicted, and investigating the major charge while the suspect is detained. This practice has been criticised, it was said, but it is not done without good reason and therefore is not really taking advantage of the suspect. Nevertheless, the NPA is now instructing police not to do it because it is acknowledged that it is not proper practice. It is a course of conduct dictated by the 23 day investigation limit.

Comments were sought and made about the standard of *daiyo kangoku* facilities. It was said that they should equal those of the detention houses. Every police station has them; the guards respect the privacy and human rights of the detainees, subject to the need to maintain order and prevent escape and the destruction of evidence. Privacy needs to be balanced against security requirements. Pictures were produced of typical meals (provided by outside contractors and served also to the police officers). [The standard appeared higher than in the Tokyo Detention House.] Bedding is provided and extra food, drinks, sweets, stationery may be purchased.

The health of detainees is safeguarded by 8 hours’ sleep a night, 30 minutes of exercise a day (optional) and 20 minutes bathing at least once in 5 days (in summer) and when specially requested. There are government doctors assigned, on call to each facility, and they carry out health visits and checkups twice a month. In cases of illness a doctor will be called or the detainee taken to hospital (at the expense of the prefecture).

In newer facilities *cf. Mitsukaido* women and juveniles are kept in cells screened off from men. Newspapers and books are available and radio broadcasts may be heard.

Interviews with family and personal visitors will be permitted, even outside normal working hours if the guards’ schedule allows. Interviews with counsel will also be allowed outside working hours (except late at night), even on weekends and holidays. The Prison Regulations limits on visits are relaxed in practice.

On the subject of the separation of investigators from guards, it was said that there is a clear separation in the police organisation and in practice. It was said that “investigation and custody are totally different functions.” Custodians belong to the administrative section and are not invited in investigating. Any interrogation must take place outside the detention facilities. Investigators are not permitted to enter custody facilities. Detainees are escorted by guards to interviews – and investigators must get the permission of the chief custodian and chief investigator to remove a detainee. The guards keep records of any movement of detainees. The daily schedule must be maintained.

Custodial officers do police training, then special training in human rights, the Constitution, criminal law and procedures and prison law. They are taught the directives issued by the NPA and relevant international conventions and resolutions. A training textbook was produced and it was said that each guard is given a copy. Training courses are given when a guard is first assigned to custody work – there are lectures and written materials and the course takes a little under one month. If a guard is promoted to section chief or station chief there are further training courses of similar duration. In addition, short courses are held from time to time in Tokyo and personnel travel to country stations to instruct.

In summary, the NPA sees *daiyo kangoku* and detention houses as having the same legal status, and therefore subject to Prison Law. The treatment in each system should be the same, although there is more space at detention houses (for exercise, etc). It is considered that interview facilities, airconditioning and food are better in *daiyo kangoku*. There are some posture restrictions in *daiyo kangoku* (sitting formally when guards approach, etc).

For the future it is envisaged that *daiyo kangoku* facilities will be upgraded to meet international requirements and in accordance with improvements in the country’s living standards. If judges continue to order detention in *daiyo kangoku*, then because of their convenience and their usefulness in the criminal justice process they will continue to be used.

At the end of the discussion a brief meeting occurred with Akira Watanabe, Senior Superintendent and Chief of Detention in the Administration Office.

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**7 Officials of the Ministry of Justice**

On 20 September 1994 a courtesy call was paid on the Director-General, Criminal Affairs Bureau, Mamoru Norisada.

Discussions were then held with Seiji Kurata, Director of the Legislative Affairs Division of the Criminal Affairs Bureau, Seimei Nakagawa, Attorney of the Public Security Division of the Criminal Affairs Bureau and Noriaki Koyama, Attorney of the Criminal Affairs Bureau, which continued over lunch.

There was wide-ranging discussion over several hours about the history and modern development of Japanese criminal law and procedure, comparative law and some of the current problems faced by prosecutors in Japan. The documents described in Appendix F8 were provided.

The origins of the criminal justice system in French, German and Anglo-American law were discussed (noting that the ancient Japanese jurisprudence has virtually been forgotten). Current controversies stem largely from the need to enforce a German Penal Code by means of incompatible
French procedures employed in compliance with Anglo-American philosophies and procedures that arise in turn from those philosophies. Some of the present practical problems are:

- the Penal Code requires the specific and direct proof of states of mind for many offences (cf. Anglo-American law, where inferences of state of mind may be drawn from circumstantial evidence);
- there are no prescribed defences (eg. in cases of otherwise strict liability) – there is no onus of proof of any sort or in any case on an accused, and consequently the prosecution must prove everything, including the absence of defences that may or may not be raised;
- there is no concept of “prima facie case”;
- there is no separation of trial into processes determining liability, then sentence;
- there are no advantages for the prosecution such as conspiracy charges, interception of communications, undercover police operations (entrapment is illegal and contrary to custom and culture), indemnified witnesses and plea bargaining.

The police and prosecution have had to assume the role of the French juge d’instruction. In very many cases (the figures are in the documents provided) there will be a suspension of prosecution (a discretionary decision not to proceed to trial) – but only if the suspect has made a full confession, shown contrition and provided information that justifies the decision not to proceed.

Article 40 of the Constitution and the Criminal Compensation Law give to an acquitted person a right to compensation, up to a fixed limit per day of detention. General damages for illegality or gross negligence may be claimed pursuant to Article 17 of the Constitution and the State Redress Law. The award of either of these types of damages would have a serious effect on the morale of prosecutors, particularly, there being great shame attached to an adverse finding. These concerns appear to be baseless, however. The prospect of the government, much less any prosecutor, being held liable for a decision to prosecute is so remote as not to be worth considering. (One wonders why this concern was voiced.)

As to the suggestion that jury trial be introduced: further complications arise from the present absence of any law of contempt of court (in its application to publications, etc that may interfere with the course of justice).

This was a particularly illuminating session, shedding light, as it did, on the attitudes and approaches of prosecutors towards what were apparently some aspects of the criminal justice system that they regarded as unsatisfactory.

[There was later a discussion with the same three gentlemen about legal matters unconnected with the mission.]

### 8 Meeting with Eleven (Further) Attorneys

Later on 20 September 1994 a meeting was held at the JFBA with eleven attorneys, chaired by the Secretary General of the JFBA’s Headquarters for Countermeasures against Two Confinement Bills, Katsuhiko Nishijima. A detailed report was made of the meeting with the NPA and comments were made by many of those present about a number of assertions by the police officers. For example, the National Safety Commission was said not to have any actual independent power, its secretariat being provided by the police, and was described as “a figleaf to cover deficiencies of the police”.

It was said that in truth arrest occurs to enable confession and that the confession is then investigated to establish corroborative evidence.

There are incentives offered to detainees to confess (privileges of contact with family, visitors, etc) which in turn place the detainee under an obligation to the investigators. This does not happen in detention houses. (Much more was said, some of it being a repetition of comments made in similar sessions earlier.)

### Additional Events

- On 13 September 1994 a courtesy call was paid to the JCLU and discussions were had with the Secretary General, Yoichi Kitamura. Copies of relevant JCLU reports and articles were provided. Mr Kitamura, a practising attorney, was able to add his own perceptions of the operation of the system of daigyo kangoku.

Case Studies

1 Ko Toyoshima

He was interviewed on 13 September 1994 in the company of his attorney, Tadashi Nojima. He was currently on bail of Y10 million on a bribery charge.

Police investigations came to his attention on 12 February 1994 and after 3 days of inquiries an arrest warrant was issued on 14 February. On the 15th he was arrested and the next day taken before a judge. He was detained in daiyo kangoku at Kanda police station for 20 days. On 1 March he was being interrogated by a prosecutor, Hitoshi Shinpo, in a room at the Tokyo District Public Prosecutor’s Office when the prosecutor got up from his seat, walked around to Toyoshima seated on the other side of the desk (having had his handcuffs removed, but with a rope around his waist attached to his chair) and, in the presence of his clerk and a police guard from the daiyo kangoku, lifted the end of a desk and drove it down hard onto Toyoshima’s left forearm. He suffered a painful and debilitating injury with severe bruising.

The prosecutor had been demanding that Toyoshima should resign from the local government council of which he is a member and Toyoshima had been denying guilt. There had been earlier incidents of violence during interrogation on other days, but without physical injury.

On 2 March, after a night of pain and attempting to cool his wound with toilet paper soaked in water from the toilet, Toyoshima asked the guards at Kanda for access to his attorney. Nojima was telephoned at about 9 am. He telephoned Metropolitan Police Headquarters and went there to meet his client at 11 am. He was referred to the prosecutors and rang Shinpo’s superior, Izu, who at first denied him access and attempted to put him off until late the next day. They argued, the attorney threatening to sue if access to his client was denied (this being a tactic employed by attorneys, alleging loss from obstruction of their right to work), and permission was eventually given to see his client at 1 pm.

Fortuitously, Nojima was able to photograph his client’s arm in the interview room – the bruising, in a distinctive pattern, is evident in the photographs. He was told of the events of the day before. On the next day, 3 March, he made an application to the court under CCP, Article 179 for the preservation of the evidence of the assault on his client.

Orders were made and photographs taken by a court officer. Even one day later the bruising is shown as having changed shape and size. The injuries took a month to heal.

Damages claims were commenced by Toyoshima against the prosecutor and the government for breaches of Articles 195 and 196 of the Penal Code. The proceedings against the government were eventually settled upon the government making admissions that it had caused the injuries. The proceedings against the prosecutor were consequently withdrawn, although he remains liable to criminal proceedings for the assault.

A new prosecutor was assigned to the case after the assault. Toyoshima signed a confessional statement, rather than face it all again, and on 7 March he was indicted. On 6 March he was moved to a detention house and on 25 June 1994 was released on bail. His eighth appearance for trial was on 21 September 1994 (trials in Japan being protracted affairs).

2 A Foreign Woman

This woman was interviewed on 13 September 1994 in company with her attorney, Kazuyuki Azusawa.

On 2 April 1990 she was arrested at her home and charged with introducing a woman to a Tokyo nightclub for the purposes of prostitution for a fee of Y40,000. Such conduct is contrary to the Job Stabilisation Law and carries a maximum penalty of 10 years’ imprisonment. She had not introduced the woman to the nightclub (but in fact had been taken there by the woman) and did not know whether or not prostitution was carried on there.

She was detained in daiyo kangoku at Kikuyabashi police station in a cell of 10 square metres with 5 other women. The cell contained a toilet, but no basin. Water was available from a tank. They were permitted limited movement in the cell but no talking. They were under constant surveillance. They were not allowed even a hair ribbon and were required to clean the cell every day by hand, without implements. They were permitted one 30 minute period per day of “exercise” in an outside yard 10 metres square and one short shower per week. Rice was given for breakfast, bread for lunch and rice with fish or mince at night with a piece of fruit. Extra food could be bought if the detainee had money available. No reading materials were allowed. The judge had imposed a condition on her detention that she have no visitors, although her husband was able to visit once in 20 days.

Throughout her time in detention the woman repeatedly asked for a lawyer and for access to her consular officials. This was refused, the police saying that lawyers were expensive, or giving her lists of lawyers in Japanese writing (which she did not understand). All documents shown to her were in Japanese. On her appearance before a judge she was told that all the lawyers were listed in a book. When she asked for access to the book she was told that there was not a copy available at that time.

After arrest on 2 April she was interrogated for more than 6 hours. On 3 April she was interrogated again. At the interrogations, many police crowded into the small room and
shouted at her. There was no physical violence. She was repeatedly told that if she signed a confession she could have a lawyer and visitors. On 4 April she appeared before the judge where she was subjected to questioning for about an hour.

After 9 days of fruitless interrogation the police did put her in touch with the Tokyo Bar Association, who provided Azusawa. On occasions he was denied access to her on the false pretext that the police were about to interrogate her. She was taken to an interrogation room, but no questioning took place. He made an application to a judge and it was agreed that he could have access for one hour.

A letter she was allowed to send to her consul was postmarked about 6 days after the day on which it was written and given to the police for posting. The day after the letter was received by the consul the woman was released (21 April). On 7 May the prosecutor decided not to indict.

3 Yukio Saito

Mr Saito was interviewed on 13 September 1994 in the company of his attorney, Masayoshi Aoki.

In April 1955 he got into a drunken fight with some friends. The police were notified. Apologies were made and the matter subsided. On 1 December 1955 he was arrested in Tokyo on a warrant alleging a serious assault at the time of the fight. He was 24. He was taken by night train to the police station at Matsuyama Town, Miyagi Prefecture, to the north. One day later he was taken to a bigger police station. A day or so later he was taken before a judge and ordered to be detained. The judge did not tell him of his right to silence or to a lawyer.

During those 3 days, and for some time thereafter, he was interrogated not about the drunken fight but about the murder of a family of four and the arson of their house in Matsuyama Town on 18 October 1955. He was made to sit to attention and was pushed and prodded from early in the morning until late at night. He was not told he had a right to silence and he did not know if he could have a lawyer, although he was told he could have one if he signed a confession.

He was kept in a cell alone until a police collaborator, who said he had past experience of the criminal justice system (as a consumer) was put in his cell. After a day or so they were talking freely and his cellmate told him it was best if he confessed and then denied the confession in court. After further interrogations Saito decided to follow this advice.

The police asked him leading questions and he told them what he thought they wanted to hear. He had no knowledge of the events of 18 October so there were difficulties; for example, the police drew a plan of the house and asked him to mark where he had set the fire. There were many false attempts until he finally nominated a spot close to the actual seat of the fire and the police accepted it and recorded it.

The police wrote out a statement and read it to him. He signed and sealed it on the last page. His conditions of detention changed overnight. He was allowed to smoke and given sweets. He was allowed to bathe, change clothes, take exercise and have visitors. He was then charged on warrant for the October offences.

Saito then withdrew his confession and complained about the collaborator’s conduct. He denied guilt. The police record of these events remained hidden for some time. On 16 December 1955 he was moved to a detention house – 200 metres away.

At his trial he was convicted on 29 October 1957 and sentenced to death. His confession was in evidence, although he denied his guilt.

An appeal to the Supreme Court was refused on 1 November 1960. A second application for a retrial, based upon police materials which had previously been unavailable, succeeded. Documents recording the withdrawal of the confession, the changes in “confessional” statements and the condition of physical exhibits demonstrated that the police had changed his “confessions” because they did not fit the facts. The “facts” to which he had confessed were proven not to be true. Six of the consecutively numbered volumes of the prosecutors’ file were discovered to have gone missing – material that might have proved Saito’s innocence. On 11 July 1984 he was released, after nearly 29 years in custody.

Saito believes that if he had not been held in dainyo kango, and subjected to its pressures, but 200 metres away in the detention house, he would not have signed a false confession. He is entitled to compensation at the rate of about Y7,000 per day of detention, but he is suing for his mental suffering.

While in custody Saito took up calligraphy. A large painting of the Chinese characters for “being acquitted”, which he painted after his release in 1984, hangs in a prominent position in the JFBA building.

4 Kasumi Yoshida

She was interviewed at Kashiwa on 14 September 1994 in the company of her attorney, Yuichi Kaido.

She is a farmer and widow of a man who died soon after being taken into custody. On 15 December 1974 her husband, then aged 43 and with no serious health problems, was arrested at a polling place and charged with vote-buying, in contravention of the Electoral Law. He was taken to Tsuchiura police station. Another person who had seen the arrest informed Yoshida who went three times to the police station to attempt to see her husband, but was refused access on the grounds that the investigation was still continuing.

In fact, her husband had been threatening suicide, because of the great shame of being arrested – he being from a small village community – and not much investigation was able to be done. At 7.08 pm on 19 December 1974 he bit his tongue (this being popularly believed to be a means of committing suicide, although it rarely succeeds). Instead of tying a towel or cloth across his open mouth – which would have prevented him from attempting to bite his tongue again – the police wrapped cloth around a chopstick and pushed it into his mouth and down his throat. His condition took a turn for the worse and at 7.45 pm he was admitted to a nearby hospital. A policeman brought the wife to the hospital. Her husband remained unconscious, despite the taking of emergency measures, and on 20 December 1974 he died. The cause of death was given as suffocation. There was a relatively minor wound on the tongue.

The widow spent years trying to find out what had happened to her husband and why. No explanation had been given to her by the authorities. She approached police, the Ministry of Justice, lawyers and bar associations. She even visited 4 of the former guards at the dainyo kango. Eventually Kaido met her on referral from the Second Tokyo Bar Association in October 1983 and he instituted an investigation. In 1984 he instituted a damages suit on her
behalf and on 30 March 1994 at the Mito District Court a verdict was entered for the plaintiff for consolation for the family in the maximum sum allowable, Y2.4 million. The case is on appeal to the High Court.

The plaintiff succeeded on the basis that the police had taken incorrect measures to treat the deceased and delayed unreasonably in transferring him to hospital. A claim that they should also have allowed the wife access to her husband – on the basis that he having expressed an intention to suicide may have been calmed by his wife – was not successful.

The Ibaragi Prefecture police maintained in this case that there was no obligation to provide medical attention to detainees; but this assertion would appear to be contrary to National Police Agency policy.

[There have been 3 more recent cases of attempted suicide and lack of medical care in daiyo kangoku that have come to the attention of Mr Kaido. One case in Kyushu in 1989 was remarkably similar to this one, but the wrapped chopstick perforated the victim’s throat and he died. In the other cases police failed to obtain medical attention and the detainees died in custody.

There are no full-time medical staff at daiyo kangoku, by contrast with detention centres, and the proposed Criminal Facility Bill and Police Detention Facility Bill contain inconsistent provisions for the provision of medical assistance.]

5 Masaya Watanabe

He was interviewed on 14 September 1994 in company with his attorney, Mr Hosoda.

In June or July 1977, aged 20, he had become known to police at Nishi-ara in Tokyo by shooting projectiles at the police station. On 16 October 1977 an incident occurred in the area in which a person was set upon and injured by a motorcycle gang. The police interrogated 42 people between the ages of 15 and 18 years. They were held in daiyo kangoku and made confessions, of sorts, in order to be released. The police showed them pictures of older men they said were the leaders of the gang, including a picture of Watanabe. 31 of those interrogated nominated Watanabe as a leader of the gang. 27 of them were indicted.

On 10 December 1977 Watanabe was arrested at his place of work and taken to the Nishi-ara police station in Adachi ward. He was told he had a right to silence and of his right to a lawyer, but he did not know any lawyer and the police said lawyers were expensive and that he would be given one free after being charged. He was interrogated that day and the next from early morning to evening, taking lunch in the interview room. He was restrained by a rope around his waist tied to the chair. On 12 December he appeared before a judge and was ordered to be detained. The interrogation continued. He was refused permission to contact his family, despite requests to police and the judge.

In the course of interrogation the table was pushed into him, he was hit on the head, shouted at, insulted and called an "idiot" and "stupid" and was told that if he confessed the prosecution would be suspended. Parts of the statements of the 31 were shown or read to him. It was suggested, nevertheless, that he could be demoted from a leader of the gang to a passer-by who happened to join in the attack. Eventually the police told him they would arrest his girlfriend if he did not confess, so he started to take part in the formulation of a confessional statement. The police asked leading questions and he gave by trial and error versions that seemed to accord with what the police wanted to hear.

At this time, his parents had managed to secure a lawyer who obtained a ticket from the prosecutor authorising him to see his client between 4 and 5 pm on that day (under an old system, now abandoned after attorneys tried boycotting it and then instituted more than 100 court actions to challenge it). The ticket had the effect of suspending the operation to obtain the statement and Watanabe was allowed 15 minutes with his attorney. He then returned to the interview room and told the police to forget the confession – that what he had told them was lies and that it should be thrown away. The police criticised the attorney and said they had wasted paper "which is not free", but there was endorsed on the document a statement that the confession was not correct, and this statement was signed and sealed by Watanabe. The police attitude softened once an attorney appeared on the scene.

A second visit by the lawyer of 15 minutes was allowed. On 28 December 1977 he was indicted, the charge containing the allegation that he was a leader of the gang. He applied for bail 7 times but was refused.

At his trial, the retracted confession was not used, after objection. The witnesses who had named Watanabe in their confessions were called, but all said their statements were false and that they did not know Watanabe. In the face of that contradiction the judge invoked Article 321 of the CCP and preferred the statements to the oral evidence. Watanabe was convicted on 24 May 1978 and sentenced to 1 year imprisonment, suspended for 3 years. He was then released.

An appeal was heard and allowed on 24 December 1979 by 3 judges of the High Court and the matter was remitted to the District Court (before 3 judges). This time the oral evidence was preferred over the statements and Watanabe was acquitted on 21 April 1981.

6 Mitsu Takeshi

He was interviewed on 16 September 1994.

He is a journalist with the Shukai Shimpō, the newspaper of the Social Democratic Party of Japan, and reports on human rights issues. On 8 January 1989, when he was aged 22, he was arrested while addressing (and directing the conduct of) a meeting of a peaceful left wing political organisation, "Storm in Autumn", in a public park in Tokyo. It was the day after the death of the former Emperor and the thrust of the speeches was critical of the place of the Imperial Family in Japanese society. No permit had been obtained for the meeting (a requirement of Tokyo municipal Public Safety Regulations). A colleague was also arrested while trying to prevent Takeshi's arrest.

He was taken to the Yoyogi police station and requested an attorney through an organisation known as the Emergency Support Centre. On 9 January the attorney visited him (and was allowed to visit him twice more. On his visits he was able to hold up letters from family and friends for him to read). On 10 January the case was referred to the prosecutors' office and on 11 January he appeared at a detention hearing before a judge. He was interrogated daily until eventual release on 19 January. The thrust of the interrogation was to have him accept that he had been the leader and organiser of the meeting (which must have been obvious from his observed behaviour at the time) – and, it would seem, to attempt to dissuade him from similar political activity in the
future. (Apparently this tactic succeeds in some cases. Detainees feel threatened and avoid future controversial behaviour. Threats against the family of the detainee are particularly effective.) Takeda believes that a primary purpose of his arrest and continuing interrogation was to take him out of society at a sensitive time – a form of preventive detention.

He was held in a cell alone. When police officers came to the cell the detainees were required to adopt a formal sitting posture. He was not permitted personal visits (a common situation in political cases). Interrogation was at first for 2 to 3 hours per day, but the hours lengthened to 6 or more, continuing after 10 pm (although bedtimes was stated to be 9 pm). He was interrogated by police at the police station and was taken to the prosecutors’ office for interrogation by a prosecutor. There was no physical violence, although there was shouting and aggressive behaviour by interrogators. He was required to sit on a small folding chair, tied to it by a rope, and there was always a police officer standing at his back.

When he was taken to the prosecutors’ office he was placed with others in holding cells, handcuffed and tied to the others by a rope during transportation. There were 12 in the cell, required to sit on narrow benches, unable to stand or move about, handcuffed and in silence. Those who were taken out for interrogation for only short periods were required to spend the rest of the day in this condition. There were no lights in the cells – only in the central guard area.

For most of the time he remained silent while his interrogators, who did not know his name (he had been dubbed “Yoyogi No. 1”) insulted his family and his presumed girlfriend. At one point he broke his silence and spoke threateningly to a prosecutor. The prosecutor then changed tack and attempted to speak sympathetically to him.

He was eventually asked to sign a document, it being hinted (but not stated) that if he did so he would be released. The night after his outburst to the prosecutor, the prosecutor visited him in his cell, suggesting that he was a good man in reality and that he would be released.

On the morning of the expiration of the (first) detention order the prosecutor told him that the situation had changed – that political people in his organisation were being investigated. That afternoon he was given a document to sign – it said that he had committed the offence through carelessness, that he regretted it and that he would not do it again. It was again hinted that if he signed it he would be released. There was discussion over 2 to 3 hours, during which some amendments were made to the document, and he eventually signed it “Yoyogi No. 1”. He was then released (on 19 January 1989) without charge.

He is making a claim for damages.

told not to tell his parents where he had been. After interrogation in a separate room B was taken home by the police at about 2 am. On 25 April the police again came for A and B, this time taking them to separate police stations (A to Senju and B to Nishi-Arai) for further interrogation.

Also on 25 April Noguchi (C), then a 15 year-old working at a cleaning factory, was taken “voluntarily” to Minami Senju police station. He told police that he had been alone on the day in question and had not gone to the scene of the crime.

The three youths eventually made false confessions during the day and all were arrested at 10.50 pm (which was then the commencement point for time limits for detention).

None of the three was told on the first day that he had a right to a lawyer. They were told that they need not say anything unless they wished to.

The police suspicion seems to have rested on two facts: A had been acquainted with the victims and two days after the murders the three had been seen near the scene. The three youths had attended a school in Adachi Ward, but often wagged school and met at the home of B.

During interrogation A was struck with a ruler and told that B and C (Noguchi) had confessed. He was shouted at, his face was struck, he was dragged by the hair and his head was struck against a wall. A photograph of the dead boy was shown to him and he was told to apologise.

B was told that A and C had confessed and admitted first that he had been to the scene after the event. Leading questions then eventually had him admitting the three had discussed robbery.

C was threatened with raised fists, shouted at and was also told that A and B had confessed. They showed him a picture of the victims and told him to apologise. They said they were tired of his lies and prevented him from saying what he wanted to. He was told to draw a plan of the house in which the crimes were committed, but could not. The police gave suggestions and he followed them in drawing a plan. He was interrogated for a total of 16 days, on average for 7 hours a day (reconstructed from police records obtained afterwards). He had no outside contact with anyone until an attorney obtained by his family visited him 10 days after arrest.

On 27 April C was taken before a judge. The hearing lasted 20 minutes, or so. A prosecutor visited him the day after arrest and on 3 other occasions.

On 16 May he was taken before the Family Court and sent to the Juvenile Classification Centre. There was no interrogation after that.

(A later denied his guilt to the prosecutor and to the judge at the detention hearing. When he was returned to the police station he was beaten for lying. He was forced to apologise, once again admitted guilt and in his cell attempted suicide.)

On 29 May attorneys were engaged for all three, who were denying their guilt. On 5 June the Family Court began its hearings into A’s case. The three youths raised their treatment in detention in the course of the hearing and two police officers were called. Police interrogation records were produced. Evidence in support of an alibi for B was admitted.

On the evening of 8 June the lawyers were told that there would be another hearing on 9 June. On that day the court ordered the release of the youths and ordered that no further action be taken on the charges.

A written judgement was delivered on 12 September 1989 which contained the following passage (in unofficial translation):

“it follows from what has been explained above that there are still many doubts about the content of these boys’ confessions . . . At this court, each of these boys complained
of the excessive investigations carried out by the police... it may be too much to say that there had been no overdone investigation there, and the boys should have been in fear of the police investigators. Moreover, the boys were only fifteen or sixteen years old when they were examined, and as the records show, these boys had the characteristics of [being] rather withering and weak which are typical of children liable to be bullied by others. It is possible to say, therefore, that they were boys who could easily tell what they were assumed to tell, accommodating themselves to the people with strength and authority. Furthermore, if they have been investigated as they complain about it now, with the false information that the other two boys [for] whom he cares most had confessed already, then it is not very difficult to imagine that he should have reconciled himself to the situation, and been led to make a precise confession of what he had not experienced, possibly with the investigators' skilful leading questioning. Viewed in this light, even if we consider that they confessed not only to the prosecutors but also to the Family Court judges, we cannot affirm to the connection between these boys and the crime of this case, only because of their confessions.”

The cases of A, B and C have been the subject of publications in Japan and are included in a book in the form of a comic produced by a major publisher in an effort to educate young persons about such events.

Unfortunately, the police continued to believe that the three had committed the crime and ceased active investigation into it.

[Despite the provisions of Article 48 of the Juvenile Law (which requires “unavoidable circumstances” for the detention of juveniles) Mr Yoshimine, who acts in many cases of juveniles, advised that about 10,000 juveniles are detained in daiyo kangoku every year – from a total of about 200,000 juvenile crime cases going to courts. There are between 200 and 500 acquittals in these cases in the Family Courts. There is only one Juvenile Classification Centre in Tokyo, and nearly all juveniles arrested are put into daiyo kangoku.]
Inspections

1 Toride Police Station

On 14 September 1994 an inspection was made of the cells at Toride police station, in Ibaragi Prefecture about 40 km northeast of Tokyo. This facility is about 20 years old and is due for renovation. There were currently 5 detainees in residence, although they had been removed for the inspection. Photographs were not permitted. Notes were made at the time.

It was a complex with airconditioning containing 7 cells, each the size of just over 3 tatami mats (about 10 square metres). The cells are in a line, each with bars at the front and a barred door. There is a translucent screen over part of the bars at the front to waist height, "for privacy". At the back of each cell there is a door into a separate fully enclosed toilet with a glass window facing the front of the cell. Toilet paper is inside the cubicle, but to wash his hands a detainee puts them through a hole at the back into a small basin in the back corridor. Water is then obtained from a tap above the basin by pressing a pedal in the cubicle.

Each cell usually houses one detainee, but there is capacity for two. Five cells are for adult males, one for females and one for juveniles. The female and juvenile cells may be blocked off from the others by a screen, and a door may be closed outside the female cell at the end of the row (for example, for body searches).

The cell area is blocked off from the police station by a security door. Only custodial staff are allowed entry. There is an officer in charge, positioned outside the security door, and a post for 2 guards at a desk facing the line of cells. From there they can control the lighting, airconditioning, etc.

All custodial staff are male ordinary police officers who have undergone special training and joined the Detention Management Section. They do not wear different uniforms. If female attention is required (for example, for body searches or for taking female detainees to the bath), female clerks from the station who have received some special training are called upon.

There were apparently newly written instructions displayed on the wall for detainees, above a wash trough with several taps. The instructions were (in summary):
1. Obey the instructions of the guards;
2. Do not cause any damage;
3. Do not be noisy;
4. Keep the cell clean;
5. Keep yourselves and your clothing clean;
6. Do not fight, argue or use violence;
7. Do not exchange money, food, etc;
8. If you have any physical problems, tell the guard.

Another sign notified the daily routine:
7 am – get up
8 am – breakfast
12 noon – lunch
exercise at any time (on request)
5.30 pm – supper
9 pm – to bed

There was a guard restroom, which served as a sickbay when required and as the venue for strip-searching. A cupboard contained bedding that was taken out each night and stowed during the day. The barred windows at the back of the cells could be covered by external curtains when females were being taken along that back corridor to the interview room or outside the complex.

There is a bathroom containing bath and shower "for foreigners" and a small laundry area with a washing machine and dryer in pristine condition. Detainees are permitted to bathe at least once every 5 days from June to September and at least once every 7 days in winter. They can wash their own clothes (there are no uniforms provided for detainees).

There was an exercise area, barred and open to the elements, about 10 square metres. It was a concrete floored and barred room attached to the outside wall of the complex. Detainees are permitted 1 or 2 sessions per day for half to one hour.

There is no prohibition on normal conversation in or movement about the cells. Detainees are permitted up to 3 books at any one time. They are permitted writing materials, but must return them (and all writings) after use. Letters may be sent and received but are censored. If impermissible material is found it will be blocked out (or the detainee may be asked to rewrite a letter). Letters to lawyers will be perused – letters from lawyers are checked to ensure they do not contain any articles other than paper, but it is said that they are not usually opened. (Attorneys say that such letters are in fact censored.)

There is an interview room for visitors. It is a small room divided by a bench with a transparent screen above it, with perforations in part of the screen. Legal visits may be held in confidence, although documents cannot be passed between the speakers. If personal visits are permitted, an officer sits beside and behind the detainee. A sign in the room says (in summary):
1. Obey the instructions of the guard;
2. Limit the content of your conversation to the matters contained in your written application to visit;
3. No foreign language is to be spoken;
4. Do not attempt to pass anything between you.

(Families of foreigners are expected to bring their own interpreter with them and to have their conversations translated into Japanese.)

Investigating police are required to fill out a written
application for approval to have a detainee removed for interrogation. They must return the detainee at noon for lunch and by 9 pm. If they go later, the detainee is to be allowed to make up lost sleeping time the next morning. (In practice, however, it is said that interrogations do not comply with such time limits.)

2 Mitsukaido Police Station

This facility, also in Ibaragi Prefecture and about half an hour from Toride, was inspected on 14 September 1994. Photographs were not permitted. Notes were made at the time.

The police station is relatively new, now in its third year of operation. A brochure published at the time of its opening was provided. The general pattern of the cells was similar to the arrangement at Toride (structure, layout, facilities), but with some more modern improvements. The procedures and operating instructions are standard throughout the nation. The same fresh instruction signs were displayed on the walls and similar pristine washing machine and dryer were noticed.

There is a staff of 71 at the police station, including 6 male custody officers who work two at a time for 3 shifts a day. Again, if female attention is required clerical staff are called upon.

There are 6 cells in a line, 3 for adult males, 1 for male juveniles, 1 for women and 1 for juvenile females. A door separates the 3 adult male cells from the others. The guard post has a view of all cells. There are lockers for personal effects, a cabinet of books and separate washing basins outside the female and juvenile cells. Cabinets contain toothbrushes and toiletries. In the back corridor the toilet paper is fed into the cubicles from rolls hanging outside and an opening is present for passing through a handtowel.

The exercise yard (of similar construction) is 11.3 square metres. The bathroom is able to be used for 20 minutes at a time. In addition to the small laundry, there are 2 drying rooms, one for males and one for females. Clothing was hanging in them. The detainees had been removed to interview rooms for the inspection.

If detainees are removed, they are taken out in handcuffs and with a rope around the waist. For problem detainees there are three levels of discipline:
- leather handcuffs
- leather vest, which restricts movement
- leather mask, which prevents speech.

The need for these measures hardly ever arises and there are restrictions on the length of time for which they may be applied.

Investigating police take over the responsibility for transportation of detainees to crime scenes or interrogation; but detention officers escort detainees to court for detention hearings.

The interview room was similar, but larger. A similar sign hung on the wall.

The facilities generally were cleaner, more freshly painted and more modern (eg, tap fittings). The overall regime, however, was similar to Toride.

3 Prosecutors' Interrogation Room

On 19 September 1994, after discussions with officials of the Ministry of Justice, a visit was made to one of the 94 interrogation rooms in the public prosecutors' offices. It was a large office with an L-shaped desk, set up for the prosecutor, his clerk, the suspect and a police officer behind the suspect. It was 6.4 metres square (40.96 sq. m.) and had the common more formal low table and armchairs to one side. It had large windows down one side, like other offices in the same building. It was an unexceptional modern office. The suspect is tied to the small metal frame chair by a rope around his waist during interrogation. The prosecutor sits in a larger, high-backed, more formal office chair with his back to the window.

4 Tokyo Detention House

On 19 September 1994 the Tokyo Detention House in Kosuge, eastern Tokyo, was visited by Messrs Sawada and Tamaoka. Photographs were not permitted. A briefing was held with Takao Yoshizawa, Director, General Affairs, Tatsu Inada, Judicial Clerk, and the Director of the Treatment Division (responsible for matters relating to the conditions of custody). A "Guide to Tokyo Detention House" (Appendix F6) was presented and its contents discussed. Reference should be made to this document for background facts about the facility and some details of its operation and the services for and entitlements of detainees (which information is not repeated in the body of this Report) – the contrasts between the procedures at the detention house and in daito kangoku are significant and are referred to in the Findings, below.

The detention house is the biggest such facility in Japan. It is primarily a remand centre, presently holding 1500 defendants awaiting trial, of whom 160 are female and 360 are foreigners (chiefly Chinese and Iranian). Females are housed in a separate wing with female detention staff. The total daily turnover is about 30. The centre has a total staff of 500 plus 30 medical staff.

The prosecutors' interrogation rooms, cells, bathroom, personal interview rooms, legal interview rooms and kitchen were inspected in the male wings.

There are 15 interrogation rooms. A row of 10, five of which were in use, was seen. No guard is present during interrogation (there is a peephole in the door, operable from outside), the detainee is not restrained, he may bring and take away notes and keep them in the cell. Occasionally inmates are taken under escort to prosecutors' interrogation rooms; more rarely to police stations for interrogation.

Detainees are housed in single (5 sq.m. – about 50 in each corridor of the four-storey wings) or community (20 sq. m.) cells. Their classification depends on their nature and the nature of their alleged offences – foreigners are usually housed in single cells. The community cells hold up to 6 inmates. The detainees spend all day in the cells except for meals and exercise – they are not required (or able) to work.

Maintenance work is done within the facility by a small number of suitable classified sentenced prisoners kept at the institution. The unsentenced detainees are not permitted to mix with other inmates and are escorted everywhere within the centre, usually by one guard to one prisoner. The cells contain a toilet and basin (in an alcove in the community cells), washbasin, bedding and small tables, reading lights, shelves and a cupboard. The floors have tatami mats on them. There are individual bathrooms available near the single cells and communal bathrooms near the community cells. Inmates are allowed 3 baths per week in summer and 2 per week in winter. The cells have doors with glass panels in them and beside them, and the glass windows onto external
bars can be opened from inside the cells. They were light and airy, but not airconditioned. Personal reading materials, etc were seen.

Inmates may exercise indoors or outside at virtually any time during the day.

There is a limit of one personal visit per day, of up to 3 persons (for 15 minutes). The centre processes about 400 visits per day. The visiting wing is near the female quarters and is airconditioned. Personal visiting rooms have a chair also for a guard, who must hear and understand what is said (in the case of foreigners, either by being able to understand the language himself or by the visitors bringing an interpreter and conversing in translated Japanese). No articles may be passed during visits – a screen separates the speakers – but there is a facility for the delivery of personal items to inmates (they must provide their own clothes and bedding, for example. They may purchase other appropriate articles). No contact visits are allowed in the detention house.

There is no limit to the number of legal visits. Up to 3 persons may visit at the one time and no guard is present. Nothing may be passed between the visitor and inmate.

No telephone calls are allowed to or from inmates.

The kitchen provides 3 meals a day according to 4 menus. The contents of each menu were displayed in a refrigerated cabinet – pursuant to a requirement that it be demonstrated what was served up to 72 hours before. The displayed items were for diets for Japanese, people who are unwell, those suffering from TB and foreigners. The food displayed looked filling and reasonably balanced, but without fruit (see Guide for calorie requirements and menu).
An International Seminar, sponsored by the IBA, was held on 14 February 1995 at the United Nations University in Tokyo. The theme of the Seminar was Criminal Pre-Trial and Trial Procedure internationally.

Over 200 lawyers and law students attended the all-day Seminar. Speeches were made by the following persons, after which there was lively discussion until the Seminar was concluded a little after the scheduled time:

- Kohken Tsuchiya President JFBA (welcome)
- Professor J Ross Harper CBE President IBA (opening)
- Kazuyuki Azusawa
- Katsuhiko Iguchi (Chairpersons)
- Professor J Ross Harper CBE English and Welsh, Scottish and Northern Irish procedures
- Nicholas R Cowdery QC Australian procedures
- Dato' Param Cumaraswamy Malaysian procedures
- José Aguilera Grapilon Philippines procedures
- Park Chan-un Korean procedures
- Katsuhiko Nishijima Japanese procedures
- Professor Akira Goto Japanese procedures
- Toshiro Nishimura (closing)

For the purposes of the inquiry into daiyo kangoku it was interesting to compare and contrast procedures in Japan with those in Korea. Apart from those two countries it was noted that such a system of pre-indictment detention was unknown to other jurisdictions.

It does not serve to advance this Report to describe in detail the proceedings of the Seminar. It is noted that the JFBA is in the course of preparing a full report of the proceedings of the Seminar and reference should be made to that report for comparative information about procedures in a cross-section of international criminal jurisdictions.
Responses to Questionnaire

At the conclusion of the Second Mission (that is, in mid-February 1995) a set of ten questions was delivered or sent to all the ministries involved in some way with the operation of dashi kōgeki and to each of the Japanese political parties.

The questions are attached as Appendix H.

By the end of April 1995, three responses had been received from:

- National Police Agency (Appendix I)
- Communist Party (Appendix J)
- New Party Sakigake (Appendix K)

Those responses are attached as the appendices shown.

It should be noted that the Communist Party and the New Party Sakigake were the only parties to honour their commitments (of six parties who made them) to attend the meeting on 11 February. Their willingness to discuss and contribute to this issue in an open and co-operative way is acknowledged.

The attitude of the National Police Agency remains blindly defensive.
Findings

Introduction

It is important that there not be a perception that this Report is written by a presumptuous foreigner attempting to dictate from a perspective of lofty arrogance to those responsible for the Japanese criminal justice system a set of ideals, forms and procedures applicable in other societies. Such a perception would be false for (at least) the following reasons:

1. The mission was sought by the JFBA – Japan’s own truly representative national association of practising attorneys – highly educated men and women with first-hand knowledge – and their views were sought and given freely and in depth. It was not the initiative of any outside body and the facts and opinions recounted in this Report are “homegrown” in Japan.
2. The JFBA is a member organisation of the IBA, the largest international association of lawyers, and supports the principles espoused by the IBA.
3. The points of view of academic lawyers were considered.
4. The experiences of detainees were described by them, directly.
5. The views of writers, Japanese and foreign, were canvassed.
6. Full regard was paid to the letter of Japanese domestic law and to the legitimate sources of that law (for example, the Constitution).
7. Full regard was paid to international instruments that have become part of Japanese domestic law (in this instance, particularly the ICCPR).
8. Full regard was paid to standards prescribed in other international instruments, to which Japan pays respect in the formulation of policy and the planning of administrative and regulatory action.
9. Full consideration was given to the propositions and arguments put forward by the agencies responsible for criminal law enforcement in Japan, for the system of daijyo kango, and for dealing with detainees.
10. Consideration was made of Japan’s history and culture (of which more is said below).

Further, the writer is acutely aware of the fact that there does not exist in the world a criminal justice system that may be described as “perfect” either in design or in operation, optimising the security of the nation and its inhabitants and fully safeguarding the legitimate rights and freedoms of those caught up in it. Some systems come closer to this goal than others. The task for all systems – including Japan’s – should be to work continuously towards such a goal, adopting appropriate and workable suggestions for improvement from wherever they might come.

In that context the combined views of the commentators, practitioners and academics referred to above, together with the directly recounted experiences of former detainees and judgments of Japanese courts critical of the treatment of detainees in daijyo kango, cannot be brushed aside. Weight must be and was given to them. They are the views of people living and working with the system and people who have made detailed studies of it. Together they make a compelling case for change.

This is not a sociological treatise (and the writer is quite unqualified to venture into that area), but the criminal justice system of Japan should not be considered in isolation from the history, society and culture of the Japanese people. At the very least, a selective consideration at this point of one aspect of the Japanese makeup helps to explain why the features of the system under examination evolved and how they are permitted to continue.

For present purposes it may be said that Japan has been a very homogeneous society in which there has been strong common understanding of what is required. Social rights and obligations have been strongly inter-personal. Obligations imposed by agreement or by regulation have been personal. (For example, written contracts have not been required. If a dispute arose it was settled by discussion, consensus and practical adjustment without regard to the strict legal formalism of other societies.) The obligation to observe the law has been regarded as a personal obligation – and the breach of a law has been regarded by the law enforcers as a personal slight. If a suspect does not confess, it is natural that the personal slight felt by the police officer or prosecutor, convinced of the suspect’s guilt, would be carried forward in future retributive action. So it is that the particular status of law enforcers has been reinforced in their own view and they have come to believe that it is right that they should be entitled to require a suspect to honour what is seen as his obligation to them. He should do that in the first instance by confessing.

But the situation for law enforcers is changing. About 20% of criminal cases now involve foreigners – either foreign residents or, a lesser number, visitors. The cultural imperatives of the Japanese do not apply to the foreigners, but they are being treated as if they did. Further, as Japan looks outwards more and more and seeks to take a more active role in international affairs, it and its people must increasingly accept for themselves the objective standards of conduct mandated by the community of nations. Japan has struggled at times to do this. It has adopted some foreign legal concepts and, for example, where other nations have done the same and adopted the foreign descriptions of those concepts as well – because there had been no local equivalent – Japan has tortuously translated the elements of the concepts.
into the Japanese language, which has often been ill-suited to the task.

These are some pressures for change. They meet resistance in the attitudes of an older and reactionary society. It is, of course, true to state that Japan knows best what is needed for Japan — but perhaps, at least to this small extent, Japanese society must be shown the value of moving on from systems that may have served it well enough in another era towards a greater degree of internationalism.

Unfortunately, it is no exaggeration to state that measured by proper objective standards, matters discovered in the course of the mission and included in this Report disclose serious threats to the operation of the rule of law (properly understood) and the independence of the judiciary in Japan.

Some of those matters are beyond the scope of this Report, but some arise directly from the operation of daiyo kango (the detainee in custody) and in turn reinforce its perpetuation.

The mission found support for the proposition that the adverse human rights implications of daiyo kango arise from features of the system of pre-indictment detention, as actually practised, in the context of other features of the Japanese criminal justice system.

It must also be stated that other than in the histories given in the Case Studies described above there was no evidence obtained of individual defalcation by any member of the police or public prosecution service.

For the most part (but with some exceptions referred to below) the particular laws of Japan are unobjectionable — but their operation in practice, influenced by their relationship with other statutes and the attitudinal shortcomings identified, has contributed to an overall system that gives rise to serious abuse and injustice. This system has evolved in piecemeal fashion over time — and it is now opportune to look back, with detachment and objectivity, to the end product of that evolution and to describe the vice of history that has been created.

**Operation of the System — Theory and Practice**

There can be no doubt that breaches of the law and abuses of the human rights of individual detainees have occurred in daiyo kango (the detainee in custody) — and they probably continue to occur. The reason is that there will always be, even in the best designed system of law enforcement, officers who will seek to use all available methods — lawful and otherwise — to achieve the result they consider right, regardless of existing regulatory constraints. [An interesting comparison may be made between the concentration by investigators on suspects in Japan and the concentration by police on the use of informers in some Australian jurisdictions.] Daiyo kango provides the opportunity for unlawful and improper methods — or at the very least, undesirable methods — to be put into practice.

If abuses are to be seriously addressed and, if possible, eradicated, it is necessary to examine why daiyo kango exists and whether it should be retained or modified. That examination cannot be conducted in a vacuum — the system must be considered in the context of the parts of the criminal justice system which directly impact upon it.

Consequently it is necessary to examine the system of arrest, charge and detention against the role and duties of prosecutors and the requirements and expectations of the Japanese people. When that is done it can be seen that the immediate problems of daiyo kango translate into problems for the rule of law and the independence of the judiciary in Japan. How has that come about?

It has been brought about partly by those in the administration of criminal justice viewing Anglo-American jurisprudential principles (as embodied in the Constitution) through the eyes of lawyers with a European (French and German) legal philosophy.

In practical terms it produces the following results.

The issue of daiyo kango arises upon the first pre-indictment detention hearing before a judge. In theory the judge decides the length and place of detention. In practice detention is ordered for ten days (and often later extended for another ten days) and in the nearest daiyo kango to the base of the investigators. This is done in compliance with the prosecutor’s request and for the expressed reason that it suits the convenience of the investigation.

The reason for this order is that the prosecutor wishes to facilitate the process of interrogation by police (or, in some cases, by the prosecutor) with a view to there being obtained a confessional statement. While a confession is not sufficient evidence by itself, it is the strongest evidence of guilt (once corroborated) and justifies the prosecutor in indicting the suspect — with expectations that there will be a conviction and that if there should be an acquittal there will not be a basis for a negligence claim against him. It also enables a prosecutor to suspend prosecution in the case if that is an otherwise appropriate course to follow. From the prosecution point of view, the obtaining of a confession is by far the best outcome of an investigation and all steps should be taken to produce that result. Judges acquiesce.

In theory a suspect has — and must be informed that he has — a right to silence. In practice interrogation will continue even after that right is claimed and any ensuing confession, provided it is ultimately voluntary and adopted by signature, will be admitted into evidence.

The reason for this course is that the concept of “voluntariness” is uncertain and elastic and often confined only to the absence of physical coercion (by beatings, etc). There is no provision giving substance to the exercise of the right to silence. Further, interrogators are obliged to probe the background and social connections of a suspect, quite apart from the circumstances of the alleged offence, in order to discover material supporting motive, intention and other states of mind.

In theory a suspect has — and must be informed that he has — a right to legal counsel. In practice most suspects have no existing contacts with any attorney and are unable to exercise that right without the assistance of investigators (for the reason also that telephone calls are prohibited). If that help is given (and, for instance, a duty attorney is contacted) there are potential limitations (often imposed) on the time and place of conferring and on the length of consultations. The transfer of items (eg. documents) between them is prohibited and the attorney is not permitted to be present at interrogation.

In theory a confessional statement is the statement of the suspect. In practice it is a “composition” by the interrogator, in his own words, compiled from perhaps days of questions and answers and adopted — but without much scope for qualification — by the suspect. It may be the product of hours and days of treatment that, while not amounting under Japanese law to sufficient illtreatment to result in involuntariness, can be described as severe psychological pressure and often intimidation. No detailed record is made of the actual course of questioning.

In theory a detainee is guarded by a separate unit of custodial police. In practice, the custodians are police officers.
who have undergone somewhat perfunctory training but
who wear the same uniforms and work in the same premises
as other police. They comply with virtually all requests of
investigating police for the production of detainees from cells
that are part of the police station complex.

The end result is a system that paralyses prosecutors unless
there is a confession, provides every incentive and
opportunity to investigators to obtain confessions and
trapmles over the suspect’s rights in the process.

This misconduct will continue unless the conditions and
opportunities for abuse are removed.

The physical conditions in daiyo kangoku are inferior to
those in detention houses in at least the following respects:
medical facilities, visiting facilities, bathing facilities, the
possession of personal items and clothing, facilities for and
treatment of women and juveniles, personal privacy, exercise
facilities, the treatment of foreigners, ad hoc access by
interrogators and the possession of notes during
interrogation.

They are superior to detention houses in respect of:
the standard of food provided, bedding provided.

The conditions in daiyo kangoku are potentially or actually
in contravention of at least the following provisions:
ICCPR
Articles 7, 9, 10 and 14.
UN Body of Principles for the Protection of All Persons under
Any Form of Detention or Imprisonment
Principles 1, 7, 17, 18, 21, 23, and 29.

**Systemic Shortcomings**

There is a compelling case made for the abolition of daiyo
kangoku; but if it is not to be abolished, there are other
features of the criminal justice system that might usefully be
modified so as to reduce the temptation to use the
opportunity of daiyo kangoku improperly.

- Bail should be available pre-indictment. (It is only by an
  accident of history and language that it is not.)
- State-appointed counsel should be available pre-
  indictment. Until such an arrangement is in place, there
  should be a system enforced whereby all detainees are put
  in contact by arresting police with the nearest voluntary
duty attorney scheme.
- The operation of daiyo kangoku should be placed under the
  control of the Correction Bureau of the Ministry of Justice
  and carried out truly independently of the police.
- Statutory clarification should be made of the concept of
  “voluntariness” in its application to confessional
  statements.
- Meaning should be given to a suspect’s claim of the right
to silence by making inadmissible any statement made
after the claim of the right, unless there is clear and
unequivocal evidence of subsequent abandonment of the
right.
- The police culture of concentration on the suspect and
  confession in preference to objective and independent
evidence should be changed. It is unsatisfactory to direct
resources primarily to obtaining a confession and then to
seeking evidence corroborative of the confession.
- Interrogations of suspects must be recorded verbatim.
The most satisfactory way of doing so is by the use of
videotape (a method widely used in other countries).
Alternatively, audiotape or stenography must be used. It
should be possible to be able to prove the words a suspect
actually used, rather than the interrogator’s interpretation
of those words.
- There should be a complete record kept in proper form of
  all dealings and conversations with a suspect while in
  custody; and that record must be available to counsel for
the purpose of court proceedings.
- Judges must be educated in the true import of the concept
  of the independence of the judiciary and should not allow
themselves to get into the position where they are viewed,
on reasonable grounds, as merely an extension of the
prosecution.

**Responses by Police and Ministry of Justice**

- In document 21 in the list referred to earlier in this Report
  the National Police Agency of Japan reported to the UN on
  daiyo kangoku. It said: “We hope this booklet contributes to the
  better understanding of the actual situation of the police
  custodial facilities in Japan and our effort to improve the
  treatment of the detainees”.

  It also said: “The current Prison Law was enacted in 1908
  and needs to be updated in light of the protection of
  prisoners’ rights”.

  In relation to substitute prisons the booklet said: “As for
  this system, the proposal of the Legislative Council approved
  to detain the suspects in police custodial facilities with
  necessary improvements to the current system and practice”.

  The booklet set out the procedures relating to detainees as
  found in Japanese law and the routines followed.

  In defence of the maintenance of daiyo kangoku it made the
  following points (on which comments are made as follows):
- In order to complete investigations within 23 days it is
  necessary to have suspects nearby and handy to
  interrogation rooms. Detention houses are too few, too
  scattered and not fitted with enough interview rooms.

  This argument begins with the invalid proposition that
  arrest of a suspect occurs in order to commence the
  investigation period of 23 days. In truth, arrest should only
  occur – under present Japanese law – if there are already
  proper grounds for suspicion based upon available
evidence. The time periods of 72 hours, 10 days and 10
  days should be viewed as maximum permissible periods of
  detention if circumstances absolutely require it – not as a
  right of detention at the disposition of the investigators.

  The argument reflects the abandonment of proper
  investigation in favour of the obtaining by all possible
  means of a confession.
- Extraordinary expense would be required to replace daiyo
  kangoku with detention houses, and land is difficult to
  obtain.

  This argument is answered by the study done by the
  JFBA which provides a plan whereby all daiyo kangoku
  could be abolished by the year 2000 with the construction
  of only 60 more detention houses nationwide.
- Daiyo kangoku benefit detainees and their counsel because
detention houses are too remote.

  This has not proven to be the case in practice, where
there are significant problems with the availability of
  counsel and contacts with family.
- There is "strict separation of detention administration and
  investigation".

  In practice, the distinction is superficial and perfunctory;
indeed cosmetic only.
- The facilities are being improved.
  Marginally, perhaps: but the resources should be redirected to detention houses.
- There is appropriate treatment of the detainees.
  This has been shown time and time again not to be the case.
- There is respect for the right to defence.
  Again, time and time again this has not been the case.
- There are “external systems” available that guarantee the human rights of the detainees:
  - appeal from detention orders: hardly ever exercised, and almost never successful.
  - relief by habeas corpus: not available in these circumstances.
  - supervision and inspection by judges and prosecutors: no reference was made to any regime of inspection. In any event, such “supervision and inspection”, to the extent that it may exist, is not independent of the prosecution process and of those involved in it. Inspection does not occur frequently, nor does it provide an effective control.
  - check by the prosecutors on the interrogation of suspects by the police investigators: which is no “check” at all, both bodies being devoted to the same ends.
  - complaint to national institutions: with attendant difficulties of proof.
  - exclusion from evidence of involuntary confessions: but in accordance with a test that has become “rubbery”, and with obvious difficulties of proof.
  - damages suit against the government: but surely it is better to avoid the circumstances arising that may produce such action.
- In document 20 referred to above the Ministry of Justice addressed issues raised by *daiyo kangoku*. It said: “Now, when we discuss the merits and demerits of a country’s system, it is not appropriate to observe it by taking up only a certain aspect of that system: the system must always be evaluated, by taking into consideration how it works within the entire structure. So this applies when we discuss the merits and demerits of the Substitute Prison system in Japan, by examining how closely the system is connected with the above two features.” The two features referred to were:
  - Thoroughgoing screening of the cases to be indicted and exhaustive investigation to back up such screening; and
  - Shortness of the period of detention at the stage of investigation.

As to the first, it is said that prosecutors will release a suspect without indictment and trial “if there is even a 1% doubt of the suspect’s guilt”. Often prosecutions are “suspended”, even if conviction is likely. A different test for proceeding would, it is said, “not be acceptable to the people of Japan, as it imposes an excessive burden upon the person prosecuted, economically, psychologically and socially”.

Prosecutors must gather evidence about guilt and relevant to sentencing. These factors require thorough interviewing of suspects.

As to the second, it is said that the limit of 23 days is less than that applicable in some other jurisdictions, such as France.

*Daiyo kangoku* is said to be justified by providing a place of detention that is convenient to the investigators (and, incidentally, to counsel and family of the detainee). If it were to be abolished, it is said, “we cannot but feel deeply concerned about the likelihood of the merits of our criminal justice system being radically impaired, that it would make impossible such a scrupulous investigation in a short period of detention and such a carefully screened prosecution based on it as is possible today; At present, there is no strong opinion among the people in Japan that the existing criminal justice system should be revised so as to aim at simplifying investigations and lessen screening, nor is any opinion taking shape that the limitation of the period of pre-indictment detention should be eased drastically to push forward more scrupulous investigations and more strictly screened prosecutions. Under the present circumstances, it seems inconceivable that a national consensus will be obtainable to change the present system drastically by setting up a sufficient number of detention houses to replace Substitute Prisons at high cost. So, the Substitute Prison system itself cannot [be abolished as it forms the main foundation of our criminal justice system].”

It is said that a number of measures have been taken to protect the human rights of detainees. They, with comments, are as follows:

- Complete separation of custodial and investigative administration: but it is only cosmetic.
- A complaints system under Prison Regulations: but is it not preferable to reduce the incidence of complaints?
- Appeal from detention orders: see above.
- Habeas corpus: see above.
- Right to counsel: but seriously limited in practice.
- Inspections by judges and prosecutors: not independent.
- Prosecutors’ inspections of conditions for police interviews: not independent.
- Remedies available from a Civil Liberties Commissioner: but prevention is surely better than cure?
- Exclusion from evidence of involuntary confessions: see above.
- Remedies under the State Redress Law: see above. (There is even a suggestion that this provision may have been drafted per incuriam, with onerous theoretical consequences for prosecutors.)
- The approach of both the bodies having responsibility for the *daiyo kangoku* system seeks to support its existence as an extraordinary aid to the prosecution process by providing the facilities for the extraction of confessions from suspects.
Recommendations

1 Abolish daiyo kangoku by amendment to the Prison Law and the phasing out of the facilities. (A suitable course of action is to be found in the JFBA Proposed Bill referred to above).

2 If daiyo kangoku are to be retained in their present form:
   - true and effective separation of their administration must be made. This can only be done by handing over their administration to the Correction Bureau of the Ministry of Justice.
   - there should be supervision of daiyo kangoku by an independent agency, to whom there should be a right of complaint by detainees.
   - the standards of the UN Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment must be implemented immediately.

3 Whether or not daiyo kangoku are to be abolished or retained in their present form:
   - bail should be made available pre-indictment.
   - full effect must be given to the right to silence. If it is claimed by a suspect, then the product of further questioning — unless the subsequent waiver of the right is independently verified — should be inadmissible in evidence.
   - full effect must be given to the right to counsel. State-appointed counsel should be available pre-indictment. Until then, it should be compulsory for investigators to inform a suspect of the availability of an attorney through the duty attorney scheme and to contact such a body if requested to do so. If this course is not followed, the product of any questioning should be inadmissible in evidence.
   - tighter requirements need to be laid down for the test of the voluntariness of confessions.
   - all dealings with detainees must be recorded in a form that may be routinely produced in court.
   - there should be verbatim recording of the interrogation of suspects.
   - the test for determining whether or not to indict should be liberalised. (It should be noted that the current test is clearly capable of working an injustice against society, in that some suspects whose guilt should be tried are no doubt not being prosecuted.)
   - judges should be more intensively trained in the practical application of the concept of the independence of the judiciary.

4 Japan should ratify the Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment.
Appendices

A  Letters of accreditation and of request for assistance
B  Schedule for the First Mission
C  Schedule for the Second Mission
D  Nicholas R. Cowdery QC: experience and qualifications
E  Relevant press reports, 15 July 1983 to 13 July 1994
F  Tables of statistics
G  Other reference sources
H  Questionnaire
I  Response by National Police Agency
J  Response by Communist Party
K  Response by New Party Sakigake
Appendix A

1 International Bar Association:
   - Letter of confirmation of appointment from the President, 23 August 1994
   - Letter to the Foreign Minister of Japan, 1 August 1994
   - Letter to the Commissioner General of the National Police Agency of Japan, 1 August 1994
   - Letter to the Minister of Justice of Japan, 1 August 1994

2 International Commission of Jurists:
   - Letter of appointment from the Secretary-General, 9 August 1994

3 LAWASIA:
   - Letter of endorsement from the Secretary-General, 8 August 1994
TO WHOM IT MAY CONCERN

I confirm that the International Bar Association (IBA) has appointed Mr Nicholas Cowdery QC as its official representative on a mission to Japan to investigate the Daiyo-Kangoku Police Custody system. Mr Cowdery will be visiting Japan from 11 - 21 September 1994.

The IBA would be grateful to the government and authorities of Japan for all facilities and usual courtesies which may be extended to Mr Cowdery for the accomplishment of his mission.

The IBA would also appreciate any assistance which the members of the Bar and Judiciary could give him.

Claude R Thomson QC
President

23 August 1994
Dear Minister,

IBA Mission to Investigate the Daiyo-Kangoku Police Custody System, Japan

I should like to advise you that the International Bar Association (IBA) has appointed Mr Nicholas Cowdery QC, Australia, who is Vice-Chairman of the IBA's Human Rights Committee, to visit Japan to examine the Daiyo-Kangoku Police Custody System. Mr Cowdery will be in Japan from September 12 to September 20 1994.

As you may know, the IBA is a federation of 163 Bar Associations and Law Societies, themselves representing over 2.5 million lawyers, and has over 16,500 individual member lawyers from 174 countries.

The IBA would be honoured if you would meet personally with Mr Cowdery during his visit to discuss relevant issues and update him on the Daiyo-Kangoku system. It would also be highly useful if Mr Cowdery could meet with the Director General of the Foreign Policy Bureau and the Director of the Human Rights and Refugee Division, Foreign Policy Bureau of the Ministry.

I also hope that Mr Cowdery will be afforded the opportunity to inspect police custodial facilities, interview arrestees and detainees and to meet with the relevant officials.

The Japan Federation of Bar Associations, which is affiliated with the IBA, will be arranging Mr Cowdery’s itinerary and will be in contact with you shortly.

Thank you in advance for your assistance in this mission, which, I hope, will lead to a better understanding of the Daiyo-Kangoku system amongst the world’s legal community. Your cooperation and that of the Ministry of Foreign Affairs is greatly valued.

Yours sincerely,

Claude R Thomson QC
President
Mr Takaji Kunimatsu  
Commissioner General  
National Police Agency  
1-2 Kasumigaseki 2-Chome  
Chiyoda-Ku  
Tokyo 100  
Japan

1 August 1994

Dear Mr Kunimatsu

IBA Mission to Investigate the Daiyo-Kangoku Police Custody System, Japan

I should like to advise you that the International Bar Association (IBA) has appointed Mr Nicholas Cowdery QC, Australia, who is Vice-Chairman of the IBA's Human Rights Committee, to visit Japan to examine the Daiyo-Kangoku Police Custody System. Mr Cowdery will be in Japan from September 12 to September 20 1994.

As you may know, the IBA is a federation of 163 Bar Associations and Law Societies, themselves representing over 2.5 million lawyers, and has over 16,500 individual member lawyers from 174 countries.

The IBA would be honoured if Mr Cowdery could meet with the Director of the Police Administration Department during his visit to discuss relevant issues. It would also be highly useful if Mr Cowdery could visit around four police custodial facilities in and around Tokyo. I am anxious that both newly and old established police custodial facilities are visited. Mr Cowdery would also welcome the opportunity to interview arrestees and detainees and to meet with the officials of the prefectural police headquarters who are in charge of the police cells which the IBA mission will visit.

The Japan Federation of Bar Associations, which is affiliated with the IBA, will be arranging Mr Cowdery's itinerary and, with your consent, these meetings.

Thank you in advance for your assistance in this mission, which, I hope, will lead to a better understanding of the Daiyo-Kangoku system amongst the world's legal community. Your cooperation and that of the National Police Agency is greatly valued.

Yours sincerely

Claude R Thomson QC
President
Mr Isao Maeda  
Minister of Justice  
Ministry of Justice  
1-1 Kasumigaseki 1-Chome  
Chiyoda-Ku  
Tokyo 100  
Japan

1 August 1994

Dear Minister

IBA Mission to Investigate the Daiyo-Kangoku Police Custody System, Japan

I should like to advise you that the International Bar Association (IBA) has appointed Mr Nicholas Cowdery QC, Australia, who is Vice-Chairman of the IBA's Human Rights Committee, to visit Japan to examine the Daiyo-Kangoku Police Custody System. Mr Cowdery will be in Japan from September 12 to September 20 1994.

As you may know, the IBA is a federation of 163 Bar Associations and Law Societies, themselves representing over 2.5 million lawyers, and has over 16,500 individual member lawyers from 174 countries.

The IBA would be pleased if Mr Cowdery could meet with the Director General of the Correction Bureau of the Ministry during his visit to discuss relevant issues. It would also be highly useful if Mr Cowdery could visit the Tokyo Detention House and be given the opportunity to meet with detainees there.

The Japan Federation of Bar Associations, which is affiliated with the IBA, will be arranging Mr Cowdery's itinerary and, with your consent, these meetings.

Thank you in advance for your assistance in this mission, which, I hope, will lead to a better understanding of the Daiyo-Kangoku system amongst the world's legal community. Your cooperation and that of the Ministry of Justice is greatly valued.

Yours sincerely

Claude R Thomson QC  
President
TO WHOM IT MAY CONCERN

The International Commission of Jurists hereby appoints

Mr Nick Cowdery QC
Barrister, Sydney, Australia

as its official representative on mission.

Mr Cowdery will travel to Japan, to study the Daiyo-Kangoku system of police custody in Japan, in September 1994 and will report thereon to the ICJ.

The International Commission of Jurists would be grateful to the government and authorities of Japan for all facilities and usual courtesies which may be extended to Mr Cowdery for the accomplishment of his mission.

The Commission would also appreciate any assistance which the Members of the Bar and Judiciary could give to him.

This Ordre de Mission has been delivered on behalf of the International Commission of Jurists to Mr Nick Cowdery.

 Geneva, 9 August 1994
TO WHOM IT MAY CONCERN

This letter will serve so as to certify that LAWASIA endorses the mission to be undertaken by Nicholas R. Cowdery, Q.C. to Japan in the near future to study and report upon the Daiyo-Kangoku system of police custody in Japan and is prepared to co-sponsor such mission.

JOHN HEALY
SECRETARY-GENERAL

8 August, 1994
Appendix B
Schedule for the First Mission

Schedule for the First Mission

Sunday 11 September
1900 arrive Tokyo/Narita airport -
   (met by Messrs Azusawa and Itoh)

Monday 12 September
1030 briefing on the proposed schedule (at JFBA)
   meeting with President of the JFBA and other officers
1300 visit to the Tokyo District Court: Acting Chief Judge
1500 discussion with lawyers (at JFBA)
1800 dinner with JFBA officers and lawyers (at Hosokaikan)

Tuesday 13 September
1130 visit to the JCLU: Secretary General
1330 hearings of three former detainees and their attorneys (at JFBA)

Wednesday 14 September
0945 travel to Kashiwa
1100 hearing of a widow of a former detainee and her attorney
1330 inspection of daiyo kangoku at: Toride Police Station
   Mitsukaido Police Station
   (in Ibaragi Prefecture)
1730 hearing of a former detainee and his attorney (at JFBA)

Thursday 15 September (national holiday - Respect for the Aged Day)
1330 meeting with 11 attorneys from 5 different Prefectures to discuss
   specific cases and general issues raised by daiyo kangoku (at JFBA)

Friday 16 September
1100 hearing of a former detainee (at Hosokaikan)
1330 hearing of a former detainee and his attorney (at Hosokaikan)
1600 visit to the Ministry of Foreign Affairs: Director, Human Rights and
   Refugee Division
1700 address to symposium on the Psychology of Interrogation and
   Confessions (JFBA - 230 in attendance) and attendance at reception following
Saturday 17 September
1330 meeting with criminal law scholars (academics) and attorneys
   (at JFBA)

Sunday 18 September
Free day

Monday 19 September
1000 meeting with officials of the Criminal Affairs Bureau and Correction
   Bureau, Ministry of Justice
1115 inspection of public prosecutors’ interrogation room
1230 travel to Tokyo Detention House
1330-1500 meeting with officials of the Tokyo Detention House and inspection
   of facility
1500 travel to JFBA
1600 meeting with lawyers (at JFBA)

Tuesday 20 September
0900 meeting with officials of the National Police Agency
1130 visit to the Director-General, Criminal Affairs Bureau, Ministry of Justice
1145 working lunch with the Director, Legislative Affairs Division,
   Criminal Affairs Bureau and other attorneys of the Ministry of Justice
1300 (discussion with officers of the Ministry of Justice about drug law)
1500-1630 meeting with lawyers (at JFBA)
1800 dinner with JFBA executives and lawyers (at a Ginza restaurant)

Wednesday 21 September
1100 depart Tokyo/Narita airport -
   (escorted by Mr Azusawa)
Appendix C
Schedule for the Second Mission

Schedule for the Second Mission

Friday, 10 February
1030 briefing on the proposed schedule (at Hosok Kaikan)
1330 visit to the Supreme Court: Secretary General, Chief of Criminal Affairs Bureau, Director of Criminal Affairs Division
1500 visit to the Ministry of Justice: Director of Criminal Affairs Division, Criminal Affairs Bureau; Director of General Affairs Division of Correction Bureau
1700 visit to the Ministry of Foreign Affairs, Director of Human Rights and Refugees Division
1900 dinner with JFBA executives and lawyers (at a restaurant near Ginza)

Saturday, 11 February
1030 meeting with members of the Diet and luncheon (Capitol Tokyu Hotel)
1300 media conferences (Capitol Tokyu Hotel)

Sunday, 12 February
Free day

Monday, 13 February
1100 visit to the National Police Agency, Custody Officer and Officer of Investigative Planning Division
1500 media conference (at JFBA – 10 representatives in attendance)
1800 working dinner (Capitol Tokyu Hotel)

Tuesday, 14 February
1000 International Seminar at the UN University (all day – 200 in attendance)
1730 reception to follow the Seminar

Wednesday, 15 February
Travel to Kyoto – meetings with District Court Judges and Kyoto Bar Association Officers
Thursday, 16 February
Free day

Friday, 17 February
Return to Tokyo
1410 meeting with Adviser to the Prime Minister
1500 meeting with President, New Frontier Party
1600 meeting with Chairman, Policy Research Council, Liberal Democratic Party
1740 media conference
1900 dinner with JFBA executives
Experience and Qualifications

Nicholas R. Cowdery, QC

Vice-Chairman, Human Rights and a Just Rule of Law Standing Committee, IBA
Chairman, Human Rights Law Committee, Section on General Practice, IBA
Member, Trial Observer Corps, IBA
Vice-Chairman, Criminal Law Committee, Section on General Practice, IBA
IBA Human Rights Liaison Officer to the New South Wales Bar Association

Councillor, ICJ Australian Section

Member, Human Rights Standing Committee, LAWASIA

Chairman, Human Rights Committee, Law Council of Australia
Member, Bill of Rights Working Group, Law Council of Australia

Convenor, Human Rights, New South Wales Bar Association

Convenor, New South Wales Lawyers’ Group, Amnesty International

1990 – observer at the contempt trial of the Vice-President of the Malaysian Bar in Kuala Lumpur, Malaysia

Mr Cowdery is the Director of Public Prosecutions for the State of New South Wales. Previously (and at the time of the First Mission) he was a Barrister in private practice at the New South Wales Bar in Sydney, Australia, where he practised mainly in the criminal jurisdiction (chiefly as a prosecutor), in common law and in administrative law. He has appeared in several States and Territories of Australia, including appearances as the prosecutor in many prominent criminal trials. He has written and spoken on topics in the criminal law and concerning human rights. He has served as an Associate Judge of the District Court of New South Wales. He began practice as a Public Defender in Papua New Guinea. He has travelled extensively, including travel in Asia.
Appendix E

Press Reports
(Copies of which have been provided with the original of this report)

15.7.83: Asahi Evening News
4.2.84: Mainichi Daily News
12.3.84: Asahi Evening News
11.7.84: Asahi Evening News
5.8.84: The Daily Yomiuri
28.8.84: Asahi Evening News
6.9.84: The Japan Times
24.3.85: The Daily Yomiuri
1.6.88: The Japan Times
9.7.85: Asahi Evening News
27.8.86: Asahi Evening News
14.8.88: The Daily Yomiuri
3.9.88: The Economist
16.11.88: The Daily Yomiuri
1.2.89: The Japan Times
1.2.89: The Daily Yomiuri
24.2.89: The Daily Yomiuri
May, 1989: PHP Intersect
29.5.89: The Daily Yomiuri
1.6.89: The Daily Yomiuri
2.6.89: The Japan Times
8.6.89: The Japan Times
13.6.89: Asahi Evening News
29.6.90: The Japan Times
25.3.91: The Japan Times
24.4.91: The Guardian
18.5.91: (Agence France-Presse)
18.5.91: The Daily Yomiuri
26.8.91: Asahi Shimbun
6.2.92: The Japan Times
22.2.92: The Japan Times
27.2.92: Los Angeles Times
29.2.92: The Gazette, Montreal
24.4.92: The Japan Times
13.10.93: The Daily Yomiuri
30.12.93: The Japan Times
13.7.94: The Daily Yomiuri
## Appendix F

### Tables of Statistics

1. **Numbers of lawyers in Japan**

<table>
<thead>
<tr>
<th>Year</th>
<th>Total Number</th>
<th>Attorneys</th>
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<th>Judges</th>
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<td>12,937</td>
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2. **Numbers of detention houses**

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**Note:** From Report on Ministry of Justice Dept of Corrections "Present State of Correction"
3. **Numbers of prisoners in detention houses**  
(Their nominal capacity are not made public)

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<thead>
<tr>
<th>Year</th>
<th>Average Daily Population</th>
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**Note:** From Report of Ministry of Justice Department of Correction "Present State of Correction"

4. **Numbers of daiyo kangoku**

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<td>1992</td>
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**Note:** From Police white paper
5. **Numbers of prisoners in daiyo kangoku**  
*(Their nominal capacity are not made public)*

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<th>Year</th>
<th>Total Number</th>
<th>Average Daily Population</th>
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Note: From Police white paper

6. **Conviction rate**

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<td>99.95</td>
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Note: From General Secretariat, Supreme Court "Annual Report of Judicial Statistics"
## 7. Detention statistics

<table>
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<tr>
<th>Year</th>
<th>Total number of requests for detention</th>
<th>Total number of detention warrants</th>
<th>Rate</th>
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## 8. Confession statistics

<table>
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<th>Year</th>
<th>Total Criminal Cases</th>
<th>Confession</th>
<th>Denial</th>
<th>Others</th>
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<td>73,256</td>
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<td>1984</td>
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<td>74,611</td>
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</table>

Note: From General Secretariat, Supreme Court "Annual Report of Judicial Statistics"
Appendix G

Other Reference Sources
(Copies of which have been provided with the original of this Report)

1. The Constitution of Japan
2. Court System of Japan – 1992
   Japan Federation of Bar Associations – 1992
   Criminal Justice in Japan
   Outline of Criminal Justice in Japan– 1993
4. Penal Code
   Code of Criminal Procedure
   The Rules of Criminal Procedure – 1968
   A Report on the Application and Practice in Japan of the ICCPR – April 1993
   Responses to UN Questionnaire – July 1992
   Corrections in Japan – Ministry of Justice, Correction Bureau
   Prison Administration in Japan – Correction Bureau, Ministry of Justice
   Correctional Institutions in Japan 1990 – Correction Bureau, Ministry of Justice
   Summary of the White Paper on Crime 1993 – Research and Training Institute, Ministry of Justice
   Correctional Treatment in Japan – Recent Trends and Current Issues – a speech delivered by Noburu Matsuda, 1994
8. The Police of Japan – 1991
9. The Ministry of Justice
   Criminal Justice System at Work – by Seiji Kurata, 1993
10. Arrest statistics
    The Habeas Corpus Law
    The Juvenile Law
    The Penal Institution Bill
Appendix H

Questionnaire

1. Do you intend to abolish the *Daiyo-Kangoku*?

2. If you intend to abolish the *Daiyo-Kangoku*, when and how will it be done?

3. If not, will you consider the comments by the UN Human Rights Committee in November 1993 and transfer the jurisdiction over the *Daiyo-Kangoku* to another agency from the police, which currently administers both the *Daiyo-Kangoku* and criminal investigation?

4. Will you establish an independent agency to oversee the operation of *Daiyo-Kangoku* and to investigate complaints by detainees?

5. What steps do you intend to take to implement the UN *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*?

6. Do you intend to introduce the following two measures to seek to eliminate involuntary statements obtained in the *Daiyo-Kangoku*?
   (a) Prohibit further questioning after a suspect claims the right to silence
   (b) Record the interrogation on audiotape and/or videotape

7. Do you intend to introduce the following two systems to protect the rights of a suspect?
   (a) Introduce the court-appointed counsel system before indictment
   (b) Allow counsel to attend on the suspect during interrogation

8. Will you urge the Japanese Government to ratify the UN *Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*? If not, what are the obstacles to ratification?

9. Will you take steps to require the recording in writing of all dealings with detainees, such records to be available to the detainee for production in court? (By this is meant the making of a continuous record of the movements, activities and contacts of detainees.)

10. Will you allow detainees the right of bail before indictment?
Executive Director
International Bar Association
2 Harewood Place
Hanover Square
London W1R 9HB. ENGLAND

Dear Sir:

I received a letter of 17 February 1995 from the president of your association, Mr. Ross Harpar.

I think that there are various differences in the criminal justice systems of countries and that the pre-sentence detention system in a country has to be considered in connection with the whole criminal justice system of the country.

We explained our system to the representative of IBA on 28 September 1994 and 13 February 1995. It seems to me that there are some descriptions based on misunderstandings in "The Daiyo Kangoku (Substitute Prison) System of Police Custody in Japan (Report of Preliminary Mission by IBA)".

I would like to explain briefly our system again and hope that you understand it better.

Under Japanese criminal procedure, all necessary investigations have to be completed within the period of pre-indictment detention which is no longer than 23 days. To conduct speedy and proper investigation under the current system, it is necessary that the place of detention is located close to the investigating authorities and that the detention institution is furnished with a sufficient number of interrogation rooms as well as personnel to take detainees to and from the investigating authorities.

While police custodial facilities satisfy these requirements, there are only 157 detention houses throughout Japan, most of which are located far away from the investigating authorities and are not equipped with a
sufficient number of interrogation rooms. It is said that it would require an extraordinary expense to abolish the "substitute prison" system by replacing it with detention houses to be newly built and that it is virtually impossible in the small crowded country of Japan to acquire appropriate locations to build new detention houses without meeting a strong opposition from the neighbors. Under such circumstances, we think it necessary to use the police custodial facilities as a place of detention in order to carry out speedy and proper investigation. A report of the Legislative Council approves of the use of police custodial facilities as institutions to accommodate criminally suspected persons, justifying our current practice.

The department in charge of detention is completely separated from the department of investigation. The officer who deals with prisoners in police custodial facilities belongs to a department different from that in charge of criminal investigation, and an investigator is prohibited from entering a police custodial facility and dealing prisoners.

In addition, Japanese police have been taking necessary measures to further guarantee the human rights of the inmates in the police custodial facilities. Among them are improvement of the facilities, appropriate treatment of the detainees, respect for the right to defense, education of detention officers. So we do not think it necessary at all to "transfer the jurisdiction over the Daiyo-Kangoku to another agency from the police".

The operation of the police custodial facilities is frequently inspected on the spot by the National Police Agency, Prefectural Police Headquarters, etc., and the human rights of the detainees are also guaranteed by effective external systems. So we do not think it necessary at all to "establish an independent agency to oversee the operation of this system and to investigate complaints by detainees".

We believe that the requirements of U.N. Rules are nearly fulfilled in the treatment of the detainees in the police custodial facilities.

Furthermore I hear that interrogation by investigation officers is conducted paying due regard for voluntariness of statements. The interrogation is thought to play an important role in clarifying the true facts of the cases.

Needless to say, in thinking about the criminal justice system in a country, we have to take the whole criminal justice system into consideration and it is not appropriate to pick up one phase of the system and to criticize the whole system.
We hope that you will examine our system objectively with more sources again.

Yours sincerely,

Masakazu Kurosawa
Director of General Affairs Division
Appendix J

中央委員会
Japanese Communist Party
Comité Central. Partido Comunista Japonés
Comité Central. Parti Communiste Japonais

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March 27, 1995

Mr J Ross Harper
President
International Bar Association

Dear Mr Harper,

I have received your letter.

I feel great respect for you and your association for taking such an interest in the Daiyo Kangoku (substitute prison) and criminal justice procedures in Japan and for your severe criticism of Daiyo Kangoku as a violation of both the International Covenant on Civil and Political Rights and the UN "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment."

First, allow me to tell you what attitude the Japanese Communist Party takes to Daiyo Kangoku and the criminal justice system in Japan.

For all ages and in all places, a long detention of an arrested suspect or defendant by the police as an investigation organ has been a hotbed for investigators' infringement of human rights, such as torture and forced confessions, as well as for misjudgments by a court. It has become an internationally established principle of criminal justice that any arrested suspect or defendant should be taken before a judge as soon as possible, and once the judge has decided that the person should be detained, he/she should never be detained by the police. But in Japan it has been regarded as a "principle" to place an arrested suspect or defendant in a police cell even after the judge has decided that he/she should be detained in a detention center. This is what is called the Daiyo Kangoku system.

In prewar Japan, many people, including communists, were subjected to torture and abuse by the police under the Daiyo Kangoku system, and forced to make involuntary statements. In the postwar years as well, the police used its Daiyo Kangoku to keep suspects in its custody for a long time—a method used to suppress trade unions and the JCP. The police extorted false statements from detainees by using inhu-
man treatment, based on which a number of false charges were fabricated. Among them was the Matsukawa "overturning the train" case in 1949, which was made known to the international community as a politically biased misjudgment. In the 1980s and 1990s a number of judgments of "guilty" turned out to have been false; this brought to light the danger of the investigation authorities using the Daiyo Kangoku for torturing suspects or forcing them to make involuntary confessions.

The JCP has criticized the investigation authorities for trampling on human rights by using the Daiyo Kangoku, and fought dauntlessly against this practice. It has also carried on a persistent struggle for the abolition of Daiyo Kangoku and for democratic reform of the criminal justice system. The JCP in 1981 published a draft proposal for reforms to the judicial system, in which the party called for drastic reforms, such as the immediate abolition of Daiyo Kangoku and a change to the criminal trial system based on a confession written statement by an investigator.

The government three times submitted to the Diet two bills on police detention. in 1982, 1987 and 1991. The bills were designed to make Daiyo Kangoku an official and permanent detention center to ensure that suspects or defendants were kept in police custody. The treatment of detainees also has many problems. The JCP has made severe criticism of these points and demanded that Daiyo Kangoku be abolished and that the treatment of detainees be drastically improved to ensure that they meet international criteria. The JCP has made every effort to arouse public opinion in favor of these improvements. The Diet rejected the bills against the backdrop of rising public opinion and movements against them. But the Japanese government still plans to have these evil bills passed by the Diet, ignoring the International Covenant on Civil and Political Rights and the UN "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment."

Now let me answer each of your questions in order:

1. Yes. Of course. Daiyo Kangoku should be abolished. Daiyo Kangoku was set up as a temporary step by the Prison Law of 1908; although the law provided that it was a due principle to place a suspect in a detention center supervised by the Ministry of Justice once the court decided on his/her detention, a financial difficulty those days made it impossible for all suspects to be kept in detention centers. The Daiyo Kangoku must therefore be abolished once and for all.

2. The Daiyo Kangoku system should be abolished at once. At the same time, more detention centers must be built by the state within five years at the latest so that all detainees unaccommodated in detention places can be placed in such centers. During this period those detainees who cannot be accommodated in detention centers should be held only in police cells designated by the Minister of Justice, with jurisdiction over these cells transferred to the Ministry of Justice. Staff members of the Justice Ministry-supervising detention centers should be stationed in the police cells so that detainees in the latter may be treated in the same way as they are in the former. In this way investigation and detention must be institutionally separated from each other.

3. (not necessary to answer)
4. Yes. Detainees in the Daiyo Kangoku are subject to inhumane treatments in violation of human rights. It is also true that similar treatments are still given in detention centers as well as in prisons. A democratically constituted independent agency should be established so that the operation of Daiyo Kangoku and other criminal detention facilities can be overseen, and complaints from the detainees be dealt with.

5. The UN "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment" calls on every government to ban by law any act incompatible with those principles. The Prison Law and the relevant laws and ordinances should be overhauled and drastically revised to clear the international criteria.

6. Yes. (a) Japanese criminal investigators, based on the view that "confession is the king of evidence," make utmost efforts to force a detainee to confess, resorting to torture and many kinds of practice contrary to human rights. In order to prevent such practices, it is necessary to take steps to ensure that the right to silence, one of the fundamental human rights, be respected and guaranteed.

   (b) Interrogation is made behind closed doors, and therefore even if suspects or defendants make complaints about investigators' human rights violations, such as torture and pressure for involuntary statements, their appeals are often turned down on the score of "no-evidence." Worse still, in Japan a written statement by an investigator is not necessarily the record of suspect's statement as it is; it is a summary biased more or less by an investigator's subjective point of view. In eliminating these evils, it is useful to record the interrogation on audiotape and/or videotape.

7. Yes. (a) The investigation authorities can use every power to gather evidence against a suspect, and put strong pressure on him/her for confession in the course of interrogation. Most misjudgments made by a court are mainly caused by pre-indictment questioning contrary to human rights or under torture and abuse in the Daiyo Kangoku. That is why the suspect's right to defense should be reinforced. But it is rare in Japan for a suspect to hire a private defense counsel. So all the bar associations in Japan have established a rota system under which a suspect can consult a duty lawyer free of charge at any time. But such assistance is given only once. Furthermore, because of refusal by the police to cooperate, a duty lawyer in most cases cannot visit a suspect before a detention hearing. In order to improve the situation, a court-appointed counsel system before indictment should be introduced.

   (b) In many developed countries a lawyer is permitted to attend interrogation. But in Japan this is not allowed at all. This right is essential to prohibit illegal investigation, prevent the investigation authorities from forcing a suspect to make an involuntary statement or to guarantee a suspect the right to silence when he/she claims it. And in case the suspect has made a statement, this right is also very important in examining whether an investigator-made protocol correctly records the suspect's statement.

8. Yes. In October 1993, the Japanese government was advised by the UN Committee on International Covenant on Civil and Political Rights to ratify the "Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment." But the Japanese government has refused to ratify the convention on the grounds that in exercising the right to trial it is difficult to secure evidence about a
Japanese person who is charged with having committed a crime abroad. The government should not put off ratification on such an excuse.

9. Yes. Recording in writing of all dealings with a detainee and making it available to the detainee for production in court will be important in stopping the investigator from conducting torture-like unlawful investigation, such as an interrogation exercised for well over ten hours or until midnight. This is important to guarantee that a detainee receives both improved treatment and an appropriate criminal trial.

10. Yes. As the Japanese investigation authorities put more stress on forced confession than on material evidence, the country falls far behind the international standard on human rights. Bail before indictment is granted to a detainee in the United States and Britain. To allow a detainee the right of bail before indictment is essential in making the investigation authorities correct the confession-based investigation and in enabling a detainee to cope with the investigation authorities on an equal footing.

Yours faithfully,

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Tetsuo Fuwa
Presidium Chairman
Central Committee
Japanese Communist Party
Appendix K
Response by New Party Sakigake

Mr. Ross Harper
President
International Bar Association

29 March 1995

Dear Sirs:

We appreciate that the IBA has conducted useful investigation and review with regard to Japanese criminal procedures and has provided valuable recommendations.

We attach hereto our answers to the questions we received from the IBA. We apologize for the delay in our response.

We agree basically with the suggestions and recommendations of the IBA. We are making efforts to improve the Japanese criminal justice system into a right direction as quickly as possible. However, such improvements raise, in fact, various difficulties such as financial and organizational matters. We believe that it is important to introduce practical improvements in the right direction even though these might only be gradual steps. The investigations and recommendations made by the IBA, which is an authoritative organization internationally, are very valuable in resolving the difficulties in Japan. We thank you again for this work.

We hope the IBA continues to prosper and request that the IBA render further assistance in improving the Japanese justice system.

Yours faithfully,

Masayoshi Takemura
President
New Party Sakigake

Yukio Edano
Chairman, Legal Affairs Section
New Party Sakigake
ANSWERS

1. Abolition of Daiyo-Kangoku

We consider that the Daiyo-Kangoku should be abolished, in the long-term view, due to its history and the possibility that it might impair human rights.

2. Timing of Abolition

The number of detention centers must be substantially increased in order for the Daiyo-Kangoku to be abolished. Unfortunately, however, it is very difficult to secure budgets and sites for new detention centers. Thus, we cannot at this stage forecast the timing of any increase in the number of detention centers which may have the Daiyo-Kangoku to be abolished. The abolition of the Daiyo-Kangoku should be a long-term target and, for the time being, steps should be taken to thoroughly prevent any possibility of the Daiyo-Kangoku causing any impairment of human rights.

3. Transfer of Jurisdiction

We consider that the jurisdiction over the Daiyo-Kangoku should be transferred from the police to the Ministry of Justice. With respect to such transfer, however, there are many matters to be taken care of, such as differences in positions between the police officers, who are municipal public servants, and the officers of the Ministry of Justice, who are national public servants, as well as those between the police facilities, which are property of the municipal governments, and the facilities of the Ministry of Justice, which are the property of the National Government. In particular, the matter concerning the positions of the relevant officers should be clarified as early as possible but with careful consideration, since it relates to fundamental workers rights.

4. Independent Agency

We agree with the underlying purpose of the recommendation that an independent agency be established to investigate complaints by detainees. The control of such independent agency, however, may overlap with the judicial control of the courts. Rather, the same effect should be achieved through improvement of the judicial check system for the detention period.
5. **Steps to Implement the "Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment"**

We consider that the criminal procedures need improvement as a whole and that the necessary steps should be taken to implement such improvements. We do not indicate here any of the steps in detail since doing so would be misleading, as these steps must be considered in light of the procedures as a whole. We believe that, under the current system, our answers to the following questions may indicate the minimum steps required to be taken.

6. **Elimination of Involuntary Statements**

We hesitate, in the current situation, to prohibit further questioning after a suspect claims the right to silence. Further, it may be superfluous to have all interrogations recorded on audio tape and/or videotape. For the time being, we consider that the practical solution is to require that the interrogation of a suspect who claims a right to silence or denies the alleged facts be recorded on audio tape and/or videotape.

7. **Counsel Before Indictment**

We agree that the court-appointed counsel system should be introduced before indictment and that counsel should be allowed to attend on the suspect during the interrogation. Concerning the court-appointed counsel system before indictment, we consider that it is practical, for the time being, to amplify the duty lawyer system and to take steps to provide financial assistance for the poor.

8. **"Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment"**

In principle, we consider that the Convention should be ratified. Implementing some parts of the Convention, however, would require the enactment or change of Japanese laws. For example, although the Convention requires punishment for torture conducted outside the territory, such punishment could be practically difficult to implement due to the difficulty of collecting evidence. Such detailed matters are necessary to be discussed.

9. **Recording of Dealings with Detainees**

We consider that this should become a requirement as early as possible.
10. **Right of Bail Before Indictment**

Although this issue should be discussed during the review of the procedures before indictment as a whole, we do not consider in principle that there is a substantial reason to deny the right of bail before indictment.

- End -