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## SELF-INCRIMINATION—JAPAN AND THE UNITED STATES

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The author received his degree in law from the Tokyo University. After a two years judicial apprenticeship, he was public prosecutor (Assistant District Attorney) in Sapporo, Hokkaido, Japan. He handled juvenile and adult criminal cases, including those which involved illegal communist activities. In 1953 he began studies at Harvard University where he received the degree of Master of Laws. In 1954 he joined a group of Japanese professors and judges who are cooperating with American law schools in research under the sponsorship of the Institute of International Education.

The present article grew out of the author's study of comparative law. It makes known to our readers the materials which the writer became familiar with as a prosecutor in Japan. Mr. Abe gratefully acknowledges the assistance and advice of Professors A. E. Sutherland and Francis A. Allen in preparing this article for publication.—  
EDITOR.

### I. SELF-INCRIMINATION IN JAPANESE ADMINISTRATION OF CRIMINAL JUSTICE PRIOR TO THE NEW CONSTITUTION

#### A. THE JAPANESE TORTURE PRACTICE UNDER THE FEUDAL SYSTEM UNTIL 1879

As is well known, in the Middle Ages in Europe confession was a prerequisite for guilt,<sup>1</sup> and was called the queen of evidence (*confessio regina probationum est*). The necessity of obtaining confessions for conviction led to miscellaneous kinds of exquisite tortures. The same thing was true of the Japanese criminal procedure under the feudal system. Under the feudal Tokugawa regime (1600–1868) there was a distinction between *Gimmi-suji* (criminal procedure by inquisitorial methods) and *Deiri-suji* (generally civil procedure by accusatorial methods).<sup>2</sup> *Bugyo* or feudal magistrates had the functions of both judges and prosecutors simultaneously. The torture practice was legalized by customary law in the course of accumulated but not publicized precedents. As was usually the case under the feudal regime, the methods and devices of torture were standardized in their details. *Gojin* (*Gomon*) or torture in the broadest sense was broken down into two categories, i.e., *Romon* or torture in jail and *Gomon* in the narrower sense or torture in a special torture-cell.<sup>3</sup> *Romon* or torture in jail was, as it were, the first phase of the "third degree", to which was subject any offender who refused to admit his offence. Stubborn criminals who withstood the first part of torture were subjected to *Gomon* for the further, more severe torture. However, suspects other than those involved in such felonious offences as murder, arson, robbery, larceny, barrier-breaking, and forgery were excused from the

<sup>1</sup> *Constitution Criminalis Carolina* (1532) was a monumental codification of the inquisitorial procedure in the Middle Ages. Cf. SCHOENTENSACK, *Der Strafprozess der Carolina* (1904).

<sup>2</sup> ISHII, *Nihon Hoseishi Gaisetsu* (An Outline of Japanese Legal History), 470–482 (1948).

<sup>3</sup> *Ibid.*, 481; *Koji Ruien*, *Horitsu-bu*, Vol. III, 951 (1902).

heavier torture.<sup>4</sup> The methods of torture were prescribed and illustrated in detail<sup>5</sup> in some of the secret manuals of criminal investigation for the guidance of feudal police investigators. The illustration (Figure 1) a reprint from one of those ancient investigators' manuals, shows the "stone holding" torture.<sup>6</sup>

In 1868 the Tokugawa feudal government collapsed and was succeeded by the centralized government of the Emperor Meiji. However, it took time for the Meiji government to ban all the feudalistic remnants. It was not until 1879 that legalized torture was entirely abolished. In 1870 the new government enacted *Shinritsu-koryo*<sup>7</sup> (the New Penal Code) and soon replaced it with *Kaitei-ritsurei*<sup>8</sup> (the Revised Penal Code) of 1873. Both were primarily derived from the traditional criminal

<sup>4</sup> OSADAMEGAIKI HYAKKAJO (1722, 1740) at KOJI RUEN, *op. cit.*, 968.

<sup>5</sup> Jails were generally designed with a view to convenience for torture and were equipped with torture devices such as a wooden floor with torture poles, ropes, and flat rectangular stones called *Izu-ishi*. The major steps in *Romon* were wringing arms, beating with a torture-stick, and "stone-holding". In the case of the "stone-holding" the prisoner was forced to sit upon a corrugated wooden seat, holding heavy flat stones of about 100 pounds each in his lap. The seat consisted of five to nine prism-shaped logs arranged side by side so as to form a corrugated board. The number of stones held in his lap were gradually increased up to five or six until at last, the prisoner refusing confession, became unconscious. In the case of *Gomon*, the torture was applied to the hard-bitten prisoner in the special cell named *Gomon-gura* (Torture-cell). He was hung in the air with the arms bound at his back (*Tsuri-zeme* or hanging torture) or grilled in the method of *Ebi-zeme* or "lobster torture". In the latter type of torture he was tightly bound by thick ropes in a lobster's shape so that his head and feet would gradually be pulled together. In administering torture officers had to take care not to inflict unnecessary injuries. From this consideration the torture-stick made of a bunch of broken pieces of bamboo was covered by soft materials. If a prisoner became unconscious, he was taken care of by a prison doctor. If a prisoner confessed as a result of torture, the deposition of his confession had to be taken. Koji Ruén, *op. cit.*, 952 *et seq.*, especially 954, 966, 967. Legalized torture, however, was not monopolized by the eastern regimes. JARDINE, *A Reading on the Use of Torture in the Criminal Law of England* (1837); PARRY, *The History of Torture in England* (1933). Aside from the torture practice in the ecclesiastical procedure in the Middle Ages in England, the practice of torture by rack had been legal until the middle of the seventeenth century. In England, and also in America, the device of *peine forte et dure* was inflicted upon the accused usually for his refusal to plead in the arraignment. See 1 PIKE, *A History of Crime in England*, 210-11, 387 (1873); 2 *id.* at 194-95, 238-85 (1876); STEPHEN, *History of Criminal Law*, 297-301 (1883); THAYER, *Preliminary Treatise on Evidence*, 70-81 (1898); 2 HALE, *Pleas of the Crown*, 314-321 (ed. of 1800). There are recorded instances of its use in the 14th, 15th, and 16th centuries. See THAYER, *op. cit.*, 75-77. It is astonishing to find that through the development of the *peine forte et dure* practice a torture technique of using pressing weights came into use, which is similar to the "stone-holding" in Japan. At the Trial of Richard Weston in 1615 reported in 2 How. St. Tr. 911, 914 (1615), Coke warned the accused that if he continued to refuse to plead "he was . . . to have weights laid upon him, no more than he was able to bear, which were by little and little to be increased. . . ." Strangeway's case in 1658, narrated in 2 PIKE, *op. cit.*, 194, suggests that it was somewhat a practice to place a sharp stake or a piece of wood under an accused who refused to plead in order to hasten the death of the victim. Also see MORGAN, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1, 12 *et seq.* (1949).

<sup>6</sup> The print in the text was taken from *Keizai Dai Hiroku* (Secret Manual of Criminal Prosecution) which is now reprinted in Koji Ruén, *Horitsubu*, Vol. III, 954 (1902). The original of the manual is lost but presumed to have been edited by some unknown feudal official in the 18th century. Koji Ruén (An Encyclopedia of Historical Materials) in fifty-one volumes (1896-1913) is a monumental compilation of the Japanese historical materials by the Editorial Staff of the Great Shrine of Ise.

<sup>7</sup> HOREI ZENSHO (1870), 573 *et seq.*

<sup>8</sup> HOREI ZENSHO (1873), 225 *et seq.*



Figure 1. The "stone holding" torture as illustrated in a copy of a police investigators' manual edited in Tokyo (then Yedo) in the 18th century. One of the first hand-written copies of the manual was made in 1814.

laws of Japan which in their turn had been adopted from the Chinese criminal laws in the T'ang Dynasty as early as the 8th century;<sup>9</sup> these new codes of 1870 and 73 still provided for the sizes and materials of the standardized torture-sticks.<sup>10</sup> *Dangoku-sokurei* or the Rule of Criminal Procedure of 1873 provided for the torture-stick and *Soroban-zeme* (abacus-torture).<sup>11</sup> Under the revised system excessive torture was restricted by law.<sup>12</sup> People over seventy or under fifteen years of age and sick people were exempted. In such a case the fact finding of the court could be based upon the testimony of more than three witnesses.<sup>13</sup> Applying torture to women before and after childbirth was also prohibited. Illegal torture by investigators constituted a crime and could be punished by a maximum penalty of death. Witnesses were not subjected to torture, nor were there any such systems as testimony under oath or

<sup>9</sup> DANDO, *Keiji Sosho Ho Koyo* (Outlines of Criminal Procedure), 31-34 (1943). Cf. ISHII, *op. cit.*, 134 *et seq.*

<sup>10</sup> *Horei Zensho* (1870), 589, 590; *ibid.* (1873), 241.

<sup>11</sup> DANGOKU-SOKUREI, §§ 14-17, at *Horei Zensho* (1873), 1715; for illustration see *ibid.* at 1719. The "Abacus-torture" was equivalent to the stone-holding torture.

<sup>12</sup> *Horei Zensho* (1870), 664-666.

<sup>13</sup> ISHII, *op. cit.*, 138. Such evidence was called "Shu-sho" (evidence of plural people).

perjury. Therefore as a matter of fact sometimes witnesses, as potential suspects, might escape tortures, but they did not escape torture by virtue of any privilege against self-incrimination. On the contrary, if a witness as a potential suspect betrayed that he would not testify because it would tend to incriminate himself, he could be subject to torture as a real suspect on the basis of his suspicious statement. In 1876, being urged by Professor Boissonade,<sup>14</sup> the government revised *Kaitei-ritsurei* by replacing Article 318 which provided that "the accused shall be found guilty by the conviction of the court based upon his confession"<sup>15</sup> by the new provision that "the accused shall be found guilty by evidence".<sup>16</sup> This was the first step toward innovation. In 1879 the age old torture system was statutorily abolished.<sup>17</sup> In 1880 *Chizai-ho* or the Criminal Procedure Law drafted by Boissonade after the model of French laws was enacted.<sup>18</sup> Thus the new Japan gradually paved her way to the modernization of her legal systems under the influence of the European legal culture of the 19th century.

#### B. SELF-INCRIMINATION UNDER THE OLD JAPANESE CONSTITUTION AND CRIMINAL PROCEDURE

In 1889 the Imperial Constitution of Japan was promulgated and came into effect one year later. It was a compromise between the traditional principle of the government by the Emperor (*Tenno Sei*) and the ideal of modern constitutionalism. It was bolstered, by and large, by the principles of the threefold "separation of powers" and "protection of civil rights", which the Declaration of Human Rights of 1789<sup>19</sup> had regarded as *sine qua non* for modern constitutional law. However, it was a question

<sup>14</sup> BOISSONADE, GUSTAVE ÉMILE (1825-1910). Honorary Professor at the *Faculté de Droit de Paris*. He came to Japan in 1873 and contributed to the drafting of the Civil Code of 1890, the Penal Code, and the Code of Criminal Procedure of 1880. The following anecdote is told about him: One spring afternoon in 1875 a Frenchman with grey hair and moustache was passing by the Tokyo Higher Court in the vicinity of the Law School of the Japanese Ministry of Justice where he was going to give a lecture. Suddenly he knit his brows dubiously at a strange noise, something like the moan or scream of a human being. Out of irresistible curiosity he hurried toward the court house, making his way to the room from which the noise was issuing. Opening the door, he was taken aback by the horrible scene of a man seated on a rigidly corrugated board with big slabs on his lap, screaming under the heavy pressure, apparently the object of brutal torture. How could he have imagined such ferocity within the very domain of the sacred court in broad daylight in the nineteenth century! From indescribable shock, he even began to cry like a child who was told a most dreadful ghost story for the first time. The gentleman was Professor Boissonade who had been invited by the Japanese government to codify and modernize the legal systems of Japan. Promptly he urged the Minister of Justice to abolish the torture practice as manifestly repugnant to the modern administration of criminal justice. The incident eventually led to the legislative steps for abolition of legalized torture in 1876 and 1879. DANDO, *Keiji Sosho Ho Koyo* (Outlines of Criminal Procedure), 33, 34 (1943); SUGIMURA, *Gomon Haishi to Boissonade shi no Koseki* (The Abolition of Torture and the Contribution of Mr. Boissonade), *Horitsu oyobi Seiji* (Law and Politics), Vol. 6, No. 8, 109-116 (1927).

<sup>15</sup> *Horei Zensho* (1873), 293.

<sup>16</sup> *Dajokan-fukoku* (Cabinet Order), No. 86, at *Horei Zensho* (1876), 67.

<sup>17</sup> *Dajokan-kukoku* (Cabinet Order), No. 42 at *Horei Zensho* (1879), 78.

<sup>18</sup> *Horei Zensho* (1880), 163.

<sup>19</sup> *Déclaration des droits de l'homme et du citoyen* (1789), art. 16me: "Toute société dans laquelle la garantie des droits n'est pas assurée, ni la séparation des pouvoirs déterminée, n'a pas de constitution"

whether the Japanese people at that time actually realized the true spirit of constitutional government.

Prince Ito, who was the chief drafter of the constitution as well as a chairman of the Constituent Privy Council, had learned the theory of constitutional government from Dr. Gneist in Germany and Dr. Stein in Austria.<sup>20</sup> As a result, he was much influenced by the German way of political thinking and the Prussian style of constitutional government. As for the rest of the members of the constituent conference, we would say that most of them had little idea of the significance of the "bill of rights" in constitutional law.<sup>21</sup>

On February 11, 1889, the whole country celebrated the birth of the Imperial Constitution enthusiastically by fireworks and tabernacle processions. However, we doubt that many people realized the actual significance of the new constitution.<sup>22</sup> Such political immaturity on the part of the people allowed the rise of militaristic totalitarianism, which eventually succeeded in paralyzing the functions of the parliament.

The Penal Code of 1907 and the Code of Criminal Procedure of 1890 were enacted under the constitution. The latter was replaced by the Code of Criminal Procedure of 1922. Judging from the wording of the new statutes, there seemed to be no substantial difference between the modernized judicial system of Japan and that of a European country. The administration of criminal justice based on these new laws was much influenced by German legal theories and more or less colored by the liberalism of the 19th century. It adopted the accusatorial system<sup>23</sup> and the principle of trial on evidence.<sup>24</sup>

<sup>20</sup> OSATAKE, *Nihon Kensei Shi Taiko* (An Outline of the History of the Japanese Constitutional Government), Vol. II, 672-712 (1939).

<sup>21</sup> In the course of the constituent conference in the privy council the following dialogue is said to have been exchanged between the Chairman Ito and Mori, one of the privy councillors with regard to the chapter entitled "The Rights and Duties of Subjects": Mori (with an air of indignation), "Chairman! I object to the wording 'the rights . . . of the subjects'. It is repugnant to our national tradition. We Japanese subjects may be bestowed with limited status of responsibility to the Emperor, but never with rights." Ito (calmly), "Your argument rejects the theories of constitutional law. A main objective of setting forth a constitution exists first in the limitation of the sovereign power, and secondly in the protection of the people's rights. If not so, the sovereign will have infinite and uncontrolled power, whereas the people will owe unlimited responsibility to it. Such is an absolute monarchy. If we eliminate the bill of rights from the constitution, how can it be a protector of the people?" Cf. SHIMIZU, *Teikoku Kempo Seitei Kaigi* (The Constituent Privy Council for the Imperial Constitution of Japan), 216 *et seq.* (1940). It was rather astonishing that such a primitive objection to the bill of rights came from Mr. Mori who was regarded as one of the most western-minded and ultra-progressive politicians of the age. It was he who first objected to the uncivilized customs of the Samurai Society such as *Harakiri* or wearing swords. It was he who proposed that the English language be adopted as a national tongue of Japan. He was assassinated by a fanatic nationalist on the morning of February 11, 1889, when he was going to attend the ceremony of the promulgation of the constitution held in the palace. While his body in full dress dramatically lay in a pool of blood as if a symbol of the tragic misunderstanding and confusion of the transition period, the constitution was granted to his Japanese subjects by Emperor Meiji who was believed to reign over the land and people with the authority of an incarnate god. Cf. OSATAKE, *op. cit.*, 796.

<sup>22</sup> OSATAKE, *op. cit.*, 798.

<sup>23</sup> For the development of the accusatorial system in Japanese law, see DANDO, *op. cit.*, 34 *et seq.*

<sup>24</sup> *Ibid.*, 342, 343.

The blueprint of the guarantees against self-incrimination<sup>25</sup> under this reformed Japanese criminal procedure also appeared not too unsatisfactory. However, the practice went along in a divergent direction from that originally expected. In criminal trials the efforts were focused upon the interrogations of defendants rather than on the examinations of real or circumstantial evidence. The preliminary examination, which was kept secret from the public, became a sort of "Star Chamber". Most preliminary judges were eager to force the accused to confess. For that purpose they sometimes used threats and inducements, if not physical tortures. Once a defendant gave way to the tenacious persuasion of the examining judge and did confess, for him the game was almost up. The confession was recorded in detail and subsequently the defendant was referred to the main trial with the practically indisputable evidence of his confession.<sup>26</sup> The situation was worse with investigation by public prosecutors; all the more so with the police station inquiry. To avoid trouble, the police invented sly techniques of torture.<sup>27</sup> The stronger the centralized police power of Japan grew, the more atrocious the lawlessness of the law enforcing officers became. After the famous "*Tei-jin*" case,<sup>28</sup> where bigwigs were allegedly subjected to torture on the

<sup>25</sup> The privilege against self-incrimination under those laws can be substantially summarized as follows: (1) The accused was incompetent to be a witness. The court could and should interrogate the defendant, but could not compel him to incriminate himself. He had not only a privilege to refuse to answer the questions but also had a right to be exonerated from the liability of perjury for false statement. (2) The witness as a potential defendant, especially the accomplice of the defendant at bar, had a privilege either to refuse to be a witness against himself (or certain people in such intimate relations with him as prescribed by law) or testify without oath. In the latter case, he was absolutely free from the liability of perjury for his false testimony, because the unsworn witness cannot commit perjury under the Japanese criminal law. In order to take advantage of this privilege, the witness was required to prove or at least swear that his prospective testimony would tend to incriminate him or certain intimate persons as prescribed by law. (3) The suspect was in the similar situation as the defendant in this respect. There was no legal penalty for the suspect's refusal of statement or his false statement. For fair interrogation, the law required a bystander be present when a police officer questioned the suspect. (4) Neither the constitution nor the laws clearly prohibited the torture practice, because the abolition of torture had been already declared by a cabinet order which was regarded as equivalent to a law in its effect. Unlawful violence constituted a crime. (5) Confession did not require corroboration. However, the criminal court (except summary court) was required to examine other evidence than the defendant's confession, despite the fact that it was persuaded of his guilt solely upon his confession and the parties were unanimous in dispensing with further examination of the other evidence. Cf. DANDO, *op. cit.*, 416, 422, 454.

<sup>26</sup> *Ibid.*, 537.

<sup>27</sup> One of their favorite methods was pouring water from a hose into a suspect's nostrils or mouth; another was inserting a pencil between fingers and wrenching it. One of the characteristics of those new methods was said to consist in giving pain without leaving any scars which might serve as evidence against those unlawful officers. As a result of their "smart" ways of torture most victims of police violence had to let the matter drop. Moreover, partly because of the servility of the people who had long been accustomed to oppressive government, partly because of the lack of rules of evidence which excluded involuntary confessions as incompetent, only a few cases of torture used to be brought to light in open courts.

<sup>28</sup> The *Teikoku Jinken* (Imperial Rayon Company) case (1934-1937) in which the first challenge was made to the conventional atrocity of the judicial officers. In this giant corruption case which led to the resignation of the cabinet, high ranking bankers and government officials were put into jails where mosquitoes swarmed at that season of the year. Moreover, they were even kept handcuffed in jail in view of the probability of suicide. In the course of the investigation by public prosecutors and

suspicion of taking bribes, judicial officers became more cautious in dealing with influential or intellectual people, but continued to be harsh with the common people. The militarization of Japan accelerated unlawfulness in law enforcement. *Kempei-tai* (Military Police) and *Tokko* (the GPU in Japan), the two watch-dogs of militaristic totalitarianism, played major roles in this respect. Progressive people used to shudder at the mere names of these horrible agencies of armed despotism. There was no doubt about the atrocities behind the black curtains of those Star Chambers, though they were almost entirely concealed from public view and criticism. It was under such hopeless circumstances that Japan entered World War II and experienced the blast of the first A-bomb. Among the victims of the bloody torture by *Tokko*, the name of Takiji Kobayashi, a Communist writer who was tortured to death, shall be noted.<sup>29</sup> If we had made such a large-scaled survey of the "third degree" in Japan as was carried out in the United States by the National Commission on Law Observance and Enforcement at the expenditure of \$50,000,<sup>30</sup> only a few Japanese policemen would have been free from the suspicion of "third degree". A report of the National Commission on Law Observance and Enforcement<sup>31</sup> exposed an astonishing picture of police violence in the United States.

As to the delay of arraignment or illegal custody in the United States it was reported among others by the Commission that in Cleveland suspects were held for several days without being charged so that their attorneys were misled as to their whereabouts, and that in Detroit police used the method of the so-called "trip around the loop" or the shifting of a prisoner from one station to another so that his attorney might not get in contact with him.<sup>32</sup> However, it was not too rare in prewar Japan for a suspect to be kept practically "incommunicado" for over a month or so,<sup>33</sup>

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preliminary judges the aristocratic nervous system of the defendants succumbed to the persistent threats and inducements. In the trial court the defendants simultaneously renounced their confessions; the defense staff of 53 lawyers furiously attacked the case as an air-castle based upon the involuntary and incredible confessions extorted by substantial tortures. The incessant infringement upon civil rights by the prosecuting officials was hotly discussed and criticized in the parliament and newspapers. Journalism coined two neologisms—"fascitized prosecution" and "Jinken Jurin" (infringement upon human rights). Finally the prosecution lost the case, and almost all the defendants were acquitted. Cf. NONAKA, *Teijin o Sabaku* (A Criticism of the *Teijin* case) (1938).

<sup>29</sup> Takiji Kobayashi (1903-1933), who was one of the most brilliant proletarian writers in Japan. One day he was called to a police station in Tokyo for investigation. After several hours his corpse was handed to his family without any explanation. However, a lot of scars and bruises all over the body betrayed the manifest fact of the torture inflicted upon him. One of his friends took a picture of the body and kept it secret from the curious eyes of the police. After the War this picture showing the dead body of Mr. Kobayashi surrounded by his friends was published in a graphic modern history of Japan. No one can look at this exhibit No. 1 against the brutal prewar police without a shudder and indignation.

<sup>30</sup> The amount was told me personally by Professor Chafee, who headed the survey team under the Commission.

<sup>31</sup> 4 NATIONAL COMMISSION ON LAW OBSERVANCE AND ENFORCEMENT, *Report on Lawlessness in Law Enforcement* (1931), usually called "Wickersham Report".

<sup>32</sup> *Id.* at 121.

<sup>33</sup> For example, in the "Tei-jin" case mentioned above, one of the defendants, the President of the Tei-jin Company, was kept in custody for 207 days. Another defendant, suffering from serious tuberculosis, made his false confession after being kept in jail for about two months. Cf. NONAKA, *op. cit.*, 52, 99, 100.



because there was no such system as arraignment before a custody judge within certain hours combined with the right of free communication between attorney and prisoner. Getting freed on bail was also very difficult in practice. The law limited the power of detention exercised by investigating officers and left it, primarily, with judicial courts. However, the device of *Yobo-Kokin* (Preventive Detention) under the "Law for the Maintenance of the Public Peace" made it practically possible for an investigating agency to keep a communist in its custody for an indeterminate period for the purpose of further investigation after the execution of his sentence.<sup>34</sup> Moreover, the "Administrative Arrest" under the "Administrative Execution Law" (1900) and the custody on the "Summary Sentence for Misdemeanors" under the "Procedure of the Summary Sentence for Violating Police Regulations" (Cabinet Order No. 31, 1885) were misused as substitutes for unlawful custody without judicial warrant for the purpose of investigation.<sup>35</sup> In the former case the law provided for the release of the arrestee before sunset on the following day; in the latter case criminal law fixed the maximum term of custody at less than 30 days. However, such guarantees made no practical difference before the loophole of shifting a prisoner from one police station to another just before the expiration of the prescribed term of custody. This "trip around the loop" in Japan was called "*Tarai-Mawashi*" or turning around a tub. Thus, the Japanese people in prewar Japan were practically deprived of the privilege against self-incrimination in spite of the beautiful guarantees provided in the statutes. Moreover, in prewar Japan the loyalty to the Emperor somewhat condoned brutality to political offenders as the enemies of the Emperor's government. This makes a clear contrast to the American "third degree" which had relatively little to do with the defects of the social structure itself.<sup>36</sup>

A glance at the histories of the privilege against self-incrimination in Japan and the United States will reveal that in the former the privilege was given, so to speak in a heteronomous way, from outside and above, whereas in the latter it was obtained as a trophy of the bloody and patient campaigns of the Anglo-American ancestors against the oppressive powers, waged over the last six centuries. The Anglo-American

<sup>34</sup> The Revised Law of 1941 for the Maintenance of Public Peace §§ 39, 40ff., 53, 55; MASAKI *Keijiseshaku Hanron* (outlines of Criminal Policy), 259 *et seq.* (5th revised ed. 1943); ONO *Keiho Kogi* (A textbook of Criminal Law), 367, 368 (2nd revised ed. 1946).

<sup>35</sup> DANDO, *op. cit.*, 794 *et seq.*

<sup>36</sup> We have no definite interpretation of the social background serving as a cause of the prevalent police brutality in the United States during the decade from 1920 to 1930 as described in the Wickersham Report. It was a prosperous period of national development, succeeding World War I and preceding the times of the great depression. It seems to me that this flourishing period was not entirely free of some dark social phenomena. It may be fair to say that it was a hasty time of the rising nationalism accompanied by some racial prejudice against the colored people and lack of sympathy for the minority classes, and also the time of the organized criminality under the prohibition law, such as gangsters and bootleggers. The society was rapidly outgrowing the old police system of America. Under such circumstances it was not too unnatural that the rather old-fashioned and poorly equipped police attempted a hasty attack at the growing social menace, brought about by organized criminality equipped with modern weapons, with less attention to the liberty of the criminals. Thus, it will not be too unfair to conclude that the brutality of the overzealous police in the United States at that time was a kind of by-product of the unbalanced social development and that it had little to do with the defects of the social structure itself.

privilege against self-incrimination has been gradually developed through the creative tension between individuals and the sovereignty, being so closely interwoven with the social tradition, that even oppressive governments cannot and should not deny the crystallized wisdom in the age old maxim *nemo tenetur seipsum prodere*.<sup>37</sup>

## II. PRIVILEGE AGAINST SELF-INCRIMINATION UNDER THE NEW JAPANESE CONSTITUTION

### A. THE BIRTH OF THE JAPANESE NEW CONSTITUTION OF 1946

As had been generally the case in her history, the revolutionary change of political structure in the post-war Japan was accelerated by stimulation from "outside", and this time even by the War and the alien military occupation. The occupation authority dictated a series of drastic social reforms, by and large disregarding the cultural and historical backgrounds of Japanese society. As a result of such poor recognition of the national tradition those reformatory measures were mostly too idealistic or experimental. The New Constitution of Japan was born on November 3, 1946 under such circumstances. Though promulgated as the amendments of the Imperial Japanese Constitution of 1889, it was an entirely new constitution aiming toward the democratic revolution of Japan. The emperor ceased to be the political ruler of the country and descended to the status of a mere symbol of the national unity. It renounced war and provided for the essential equality of the sexes. Fundamental human rights were given clearer and more definite constitutional guarantees than before.

The statutes concerning the privilege against self-incrimination under the New Constitution of Japan are as follows:

The Japanese Constitution, Art. 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.<sup>38</sup>

*Ibid.*, Art. 36 provides: The infliction of torture by any public officer and cruel punishments are absolutely forbidden.<sup>39</sup>

The Japanese Code of Criminal Procedure of 1948, Art. 311 provides in part: The accused may be silent at all times or refuse to answer any question during the course of the trial.<sup>40</sup>

<sup>37</sup> For the origin and development of the privilege against self-incrimination in Anglo-American Law see e.g. 8 WIGMORE, EVIDENCE § 2250 (3rd ed. 1940); MORGAN, *The Privilege Against Self-Incrimination*, 34 MINN. L. REV. 1 (1940); M. H. MAGUIRE, *Attack of the Common Lawyers on the Oath Ex Officio as Administered in the Ecclesiastical Courts in England*, in *Essays in History and Political Theory in Honor of Charles Howard McIlwain*, Ch. VII, 199 (Cambridge, 1936); MARY BALLANTINE HUME (Mrs. Maguire), *The History of the Oath Ex Officio in England*, 1 (1923), a doctoral thesis available at Radcliffe College Library, Cambridge; PITTMAN, *The Colonial and Constitutional History of the Privilege Against Self-Incrimination in America*, 21 VA. L. REV. 763 (1935).

<sup>38</sup> Attorney-General's Office, Japanese Government, *The Constitution of Japan and Criminal Laws*, 5-6 (1951); also see the Japanese Code of Criminal Procedure, § 319, *id.* at 84.

<sup>39</sup> *Id.* at 5.

<sup>40</sup> *Id.* at 83.

*Ibid.*, Art. 291 provides in part: After the indictment has been read, the presiding judge must notify the accused that he may be silent at all times and refuse to answer any question, . . .<sup>41</sup>

*Ibid.*, Art. 146: A person [i.e., witness] may refuse to answer to any question which may tend to incriminate him.<sup>42</sup>

*Ibid.*, Art. 147: A witness may refuse to answer [to] any question which may tend to incriminate the following persons:

- (1) The spouse, a relative by blood within the third degree of relationship or a relative by affinity within the second degree of relationship, of the witness, or a person who was in any of such relationships to the witness;
- (2) The guardian, supervisor of guardianship or curator, of the witness;
- (3) A person of whom the witness is the guardian, supervisor of guardianship or curator.<sup>43</sup>

*Ibid.*, Art. 198, sec. 2: In the case of questioning mentioned in the preceding paragraph [viz. the questioning by a public prosecutor, secretary of public prosecutor's office and judicial police official], the suspect shall in advance, be notified that he need not answer to any question against his will.<sup>44</sup>

*Ibid.*, Art. 319: Confessions 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. The accused shall not be convicted in the case where his own confession whether made in open court or not, is the only proof against him. . . .<sup>45</sup>

## B. THE MERITS AND DEMERITS OF THE NEW SYSTEM

The characteristics of the privilege against self-incrimination under the new system will be summarized as follows:

(1) The privilege is now enshrined in the bill of rights, as one of the eternal and inviolate human rights. Under the old system the totalitarian power could have deprived the people of the privilege by a law passed by the paralyzed parliament, but under the new system no one can do so except through the constitutional amendment.

(2) The prohibition of torture has been declared constitutionally. A criminal case for the illegal violence by a judicial officer can, under certain conditions, be prosecuted compulsorily upon a court's order by an attorney for the government appointed by the court from among private lawyers. Public Prosecution Observation Boards, consisting of laymen commissioners selected by lot, also can check the improper "nol. pros." practice of alleged torture cases.<sup>46</sup>

(3) The confession rule as a companion of the privilege against self-incrimination has been explicitly provided in the constitution.

(4) It has been declared that sole confession needs corroboration.

(5) In view of the unenlightened people, the procedure of the notification of the privilege of silence is legally required before criminal interrogation.

<sup>41</sup> *Id.* at 81.

<sup>42</sup> *Id.* at 62.

<sup>43</sup> *Ibid.*

<sup>44</sup> Cf. *id.* at 68, but see *infra* Note 53. This provision was revised in part in 1953; "he need not. . ." is quoted from the revised version and is translated here by H. Abe.

<sup>45</sup> *Id.* at 84.

<sup>46</sup> THE JAPANESE CODE OF CRIMINAL PROCEDURE, §§ 262ff., *id.* at 77-78; *Kensatsu Shinsakai Ho* (The Public Prosecution Observation Board Law of 1947), §§ 30ff.

(6) The prompt arraignment before a custody judge (within 73 hours after arrest)<sup>47</sup> and the liberal communication between counsels and prisoners<sup>48</sup> are designed to prevent the prolonged custody "incommunicado".

For a short period after its enactment, the new system functioned far better than had been expected by the legislators. The Japanese people, who are prone to be influenced by the mass-communication from above, accepted the imperative of the new system at over its face value. Judicial investigators became too humble and timid before criminals. The privilege of silence became the favorite weapon of the experienced criminal. Sometimes the most suspicious persons escaped punishment thanks to the new "amulet". The underground organs of the Communist Party in Japan urged their members to exercise the privilege of silence to its extremity. Communist defendants, even after taking the stand on their behalf, customarily refuse to disclose their own names<sup>49</sup> just to annoy the courts and retard the procedure. In 1951 the court of appeals for Sapporo District in Japan dismissed an appeal on the ground that the communist appellant, when filing the appeal, used the alias signature "Unknown A" which was not recognized as an ordinary signature required by the rule of criminal procedure, the court saying in substance that the moving party should reveal his name, because he actively asked the appellate court for relief.<sup>50</sup> However, the opinion of the court was criticized as conservative even by the fellow judiciary because it demanded of the appellant a kind of feudalistic courtesy. Since the practice (1) gives the phrase "against himself" in Art. 38 of the constitution as broad an interpretation as "against his will on any ground" and (2) lets the witness himself judge the possibility of self-incrimination, the function of the privilege is far-reaching. It must be also noted here that under the Japanese laws the defendant speaks in the trial always in the capacity of defendant not of witness, even after he voluntarily takes the stand, and that, consequently, he can enjoy the ultimate prerogative of keeping silence or giving false explanation, without risking perjury. There is no such device as "contempt of court". Therefore, there is no effective way of compelling a witness<sup>51</sup>, who arbitrarily exercises the privilege against self-incrimination, to testify. However, even "contempt of court" would not improve the situation very much;

<sup>47</sup> THE JAPANESE CODE OF CRIMINAL PROCEDURE, §§ 202ff., esp. § 205; *The Constitution of Japan and Criminal Laws*, op. cit., 69, 70.

<sup>48</sup> THE JAPANESE CODE OF CRIMINAL PROCEDURE, §§ 39, 77, 203, 204, *id.* at 48, 53, 69.

<sup>49</sup> This can happen also in the United States insofar as the defendant who does not take the witness stand is concerned. For he has the privilege of silence, as distinguished from the privilege against self-incrimination for witnesses. THAYER, *Cases on Evidence*, 1066 (2d ed. 1900). Where defendant stands mute in the arraignment process, the court shall generally order plea of not guilty to be entered. 16 C.J. § 721. As to whether witness can refuse to disclose his name on the ground of self-incrimination, see e.g. *O'Connell v. United States*, 40 F. 2d 201 (1930).

<sup>50</sup> Sapporo Court of Appeals Decision on May 24, 1951, *Koto Saibansho Hanreishu*, vol. 4, No. 5, p. 512.

<sup>51</sup> Theoretically the Code of Criminal Procedure [of Japan], §§ 160, 161, Attorney General's Office, Japanese Government, *The constitution of Japan and Criminal Laws*, 64 (1951), provide for the sanction of illegal refusal of oath and testimony, but actually does not function.

because of the timidity of the Japanese judiciary who would still hesitate<sup>52</sup> to resort to such an instrument.

Against those inefficiencies under the new system a natural reaction arose on the part of conservative and old-fashioned investigating officers. They cursed the privilege of silence and ground their teeth at the sly criminals who were walking out of jails with flying colors. Most investigators were reluctant to notify the suspects of their privilege. While a judicial apprentice, I learned that about one third of the criminal interrogators in the Tokyo District Attorney's Office practically dispensed with the notification of the privilege, whereas another third of them used to tell of the privilege in such a sarcastic manner that the suspects might take the meaning adversely. Such an antagonism to the device of notification of the privilege led even to the partial revision of the pertinent provision in 1953,<sup>53</sup> though fortunately the House of Representatives succeeded in making the modification minimal.

Professor Kaino, among others, warned against such dangerous reaction, saying that we should be able to reach the ideal of criminal justice only through the painful period in which sly criminals rid themselves of justice wholly unpunished, that the privilege against self-incrimination, though seemingly inefficient, has the disciplinary effect on the development of the scientific and circumstantial investigations and that "It is better to let ten guilty go, than to punish one innocent."

#### C. DISCIPLINARY EFFECTS OF THE PRIVILEGE AGAINST SELF-INCRIMINATION

The disciplinary effects of the privilege are gradually showing their merits. The emphasis in criminal investigation is shifting from confessions to circumstantial evidence. If a kind of confession is needed at all, a humane and scientific approach is usually taken instead of a vulgar one. People begin to know that "abuse of violence simply shut the criminal up. . . . The cruel third degree is a thing of yesterday."<sup>54</sup>

<sup>52</sup> In lieu of the "contempt of court" device the Japanese courts have an "Act for Establishing Order in Court" and some other instruments prescribed in the "Judicial Court Law", for the purpose of keeping order in courts. But actually they are very seldom used. This tendency comes partly from the timidity of the Japanese lawyers who are afraid of being labeled "fascist" by the communists, and partly from the people's poor realization of the judicial function in a democratic society. When several communists were arrested in my home town, Sapporo, hundreds of threatening letters were sent to judicial officers including judges. A child of a judge was even kidnapped. A communist sent a judge a threatening letter from jail, demanding his instant release. However, in most cases judges were reluctant to have the offenders investigated or punished. Some judges seem eventually to have succumbed to the "terror" tactics. In a court I attended a communist defendant scorned the presiding judge, crying, "Out with you, you old donkey! Go and wash your face with a horse's u—" The judge still did not take any legal step against this affront just to show his "democratic broadmindedness." It was such timidity of the judiciary which allowed the temporary occupation of the bench by fanatic communist defendants in the course of the trial of the "People's Electric Trains" case at the Yokohama District Court in 1949. *Asahi Shinbun*, August 24, 1949, reduced size ed., No. 338, p. 58; *Id.*, August 30, 1949, reduced size ed., No. 338, p. 72.

<sup>53</sup> The Japanese Code of Criminal Procedure of 1948, § 198 provided in part, "In the case of questioning . . . the suspect shall, in advance, be notified that *he may refuse answer to any question* [italics supplied]." Compare the italicized part with the corresponding part of the present provision as set forth at page 11 *supra*.

<sup>54</sup> DOUGHERTY, *The Criminal as a Human Being* (New York, 1924), as quoted at National Commission on Law Observance and Enforcement, *op. cit.*, 43.

The humane approach is gaining favor among the younger criminal investigators in Japan. Our experience showed that friendly talking and, sometimes, discussions of literature, say Dostoyevsky's "Crime and Punishment" were effective. In this country Mr. Inbau's "Lie Detection"<sup>55</sup> has pioneered the way of scientific interrogation. In Japan, for instance, Public Prosecutor Takagi, who solved the famous "Hirasawa" case where allegedly an ingenious painter poisoned simultaneously thirteen clerks at a bank in broad daylight for a robbery, is one of the masters of scientific and psychological investigation. He instructs young investigators as follows: "Collect circumstantial evidence carefully. Never show it to the suspect. Interrogate the suspect as you would a subject in a psychological experiment. Try to catch and analyze even his subtlest reactions and responses. Whether he admits or denies his charge is of little importance." The episode of Officer Komaya's<sup>56</sup> investigation will help you visualize what a change is taking place in police investigation in postwar Japan. In one of the murder cases which I handled myself Officer Komaya had conducted the interrogation in substance as follows:

Q. What did you do after coming home, for instance in the streets or at some other places?

A. Are you saying that I stole something, say paper, from school?

Q. Well . . . it might be. But besides that, what wrong did you do? I know something about it . . . (pretending to look at something in his pocket notebook).

A. . . . (D tried to look into the pages. Mr. K. withdrew it.)

Q. You don't need to look at it. You had better ask your own conscience. You need not say, if you don't want to, but you had better clear your conscience.

A. . . . (D kept silent, beginning to tremble and gasping a little, as if he had a fever.)

Q. If you don't care to say it aloud, . . . all right . . . you may put it on the paper. (Handing a slip of paper and a pencil to him.)

A. . . . (After hesitating about ten minutes, D wrote down a tiny Japanese letter presumably purported to indicate "murder".)

Q. (Loudly) You did it while you were staying at home, didn't you?

A. (Nodding).

Q. Where?

<sup>55</sup> INBAU, *Lie Detection and Criminal Interrogation* (3rd ed., 1953).

<sup>56</sup> Our hero, Mr. Komaya, was a minor police officer who had not even had a secondary school education. Before the war he might have been one of those small devils who believed their fists rather than circumstantial evidence. Now, in 1950 and 1951 two similar murder cases successively happened in his home town. In each case a young couple on a date at a lonely place were attacked. Two of the four victims were killed. The detective headquarters assumed that those were committed from personal jealousy. There was no clue to the solution. But Mr. Komaya thought that the offender might be sexually abnormal, judging from the circumstances. Meanwhile a citizen told him that one D, a school attendant in the vicinity, was sexually abnormal. Mr. Komaya had some other evidence against him. At last D consented to be questioned by Mr. Komaya at the police station. Soon Mr. Komaya found D had a low I.Q. Then the interrogation went as set forth in the text. Immediately after his confession, D was taken over by a sergeant. D again made a detailed confession which was reduced into a signed document. In the trial the counsel attacked the admissibility of the confession on the ground of inflicted torture. But the contention was simply overruled. Although this questioning was somewhat subtle and tricky, the latter part of the interrogation carefully avoided leading questions, thus giving the confession high credibility. Compare this with the way of interrogation in American police stations, say the attitude of Mr. Lieutenant McDermott, an experienced detective, in the famous Snyder case. Cf. F. G. COOK, *The Girl in the Death Cell*, pp. 38-44 (New York, 1953).

A. At "Telegram Beach".

Q. When, approximately?

A. In June or July.

Q. What time?

A. At one or two in the morning.

Q. Who was your opponent in the quarrel?

A. A man and woman.

Q. What type of man?

A. With long hair.

Q. (Kindly) Will you smoke?

A. No, thanks, I don't smoke, sir.

Of course, the very attitude of depending on confession of any kind is repugnant to our spirit of scientific approach, and even devilish, if we try to extract evidence from the lips of suspects under the mask of humanitarianism as Porphyrius Petrovitch did in "Crime and Punishment." However, the first step on the way to the ideal shall be to make police officers realize that psychological tactics function better than fists and leading questions.

#### D. ESSENTIAL INEFFICIENCY UNDER THE NEW JAPANESE SYSTEM

One of the merits of democratic guarantees is their designed obstructionism. In other words the law is, in its essence, "the science of inefficiency".<sup>57</sup> However this does not necessarily mean that the obstructionism of law is always justifiable. On the contrary, for instance, if law wants to ban self-incrimination, it must supply the prosecution beforehand with ample ground upon which justice can be carried out fairly without the help of self-incrimination. Let us examine whether the Japanese prosecution is ever supplied with such fair basis of criminal justice in the light of the total balance of judicial mechanism.

a. Japanese judges find much persuasive power in confession, being reluctant to rely upon circumstantial evidence. Suppose the famous Sheppard case which occurred in 1954 had been tried in a Japanese court, the judge would have categorized it as a typical *in dubio pro reo* case. Most Japanese district attorneys would have even dropped the case before trial as "nol. pros.", unless supported by other stronger evidence.

b. Poor presumptive devices cause the prosecution much difficulty. Japanese judges seldom use presumptions as rules of experience. The legal presumptions, rebuttable or nonrebuttable, require specific statutory provisions in Japan. However, there are quite a few such provisions.

c. Over-strict exclusionary rules of hearsay under the new criminal procedure. Japan has no jury system in action. Still she adopted the Anglo-American hearsay rules without any appropriate modification. They are even stricter than those in Anglo-American laws, because some of the important common law relaxation of the exclusionary rules were boldly cut off when they were imported.<sup>58</sup>

d. Excessive case-load and poor mobility in the investigating mechanism inflict a great handicap upon the prosecution in Japan.

e. Among the other disadvantages for the prosecution in Japan the following should be enumerated: (1) The prosecution cannot cross-examine the defendant who chooses to take

<sup>57</sup> WILLIAM SEAGLE, *Law, The Science of Inefficiency*, 1 (1952).

<sup>58</sup> Cf. The Japanese Code of Criminal Procedure, §§ 321 ff.

the stand in his own behalf. (2) The defendant has the privilege of "speaking last".<sup>59</sup> The prosecuting attorney does not have the right of the second or last closing summation, even though he has the burden of pleading and proof. (3) The prosecution cannot summon nor ask the court to summon the suspect or defendant for interrogation. Of course the prosecution can arrest the suspect on the warrant of the court, but this is sometimes impractical in minor cases.

### III. WHAT LESSONS DOES THE EXPERIENCE OF THE UNITED STATES OFFER JAPAN, AND VICE VERSA, REGARDING THE THEORY OF THE PRIVILEGE AGAINST SELF-INCRIMINATION?

Only high-lights shall be set forth in brief. To begin with, what may Japan learn from Anglo-American experience? Attention should be drawn to the following points. First, the rationale or philosophy of the privilege against self-incrimination should be developed along Anglo-American theories. Since this topic has not yet been fully discussed among Japanese scholars, they have much to learn from Anglo-American theories. Special attention shall be paid to those topics as (1) the humanitarian reason,<sup>60</sup> (2) "fox hunter's reason",<sup>61</sup> (3) prevention of false confession, (4) prevention of the inquisitorial practice,<sup>62</sup> and (5) disciplinary purpose.<sup>63</sup> Secondly, the legal notion of "tending to incriminate" as interpreted among Japanese scholars should be elaborated after the experience in this country.<sup>64</sup> Thirdly, a kind of "contempt of court" device should be considered for checking clearly arbitrary exercise of the privilege. Fourthly, the theory of the "waiver of privilege" by voluntary taking of the stand should be introduced. It seems to be unfair that the defendant can speak in his own behalf without exposing himself to cross-examination. Finally, the "immunity statute" device with some modification should also be considered in Japan.

What, then, can America learn from the experience in Japan? Of course the present writer is fully aware that this topic involves too many difficult problems to be solved within such a limited compass. Therefore the discussion below should be taken as an offer of issues rather than a proposal of conclusions. In the first place, in the eyes of foreign students all the vicissitudes of the dualism<sup>65</sup> of state and federal jurisdictions regarding the privilege against self-incrimination appear to be somewhat unwise. The federal rule of dualism established by the *Murdock* case<sup>66</sup> and elaborated by

<sup>59</sup> Cf. The Japanese Rule of Criminal Procedure, § 211.

<sup>60</sup> BENTHAM, *Rationale of Judicial Evidence*, in BOWRING, *The Works of Jeremy Bentham*, vol. 7, c. 3, sec. 3, pp. 452 et seq.

<sup>61</sup> *Id.* at 454.

<sup>62</sup> *Watts v. U. S.* 338 U.S. 49, 69 Sup. Ct. 1374, 93 L. Ed. 1801 (1949); FRANCIS A. ALLEN, *The Wolf Case: Search and Seizure, Federalism, and the Civil Liberties*, 45 ILL. L. REV. 1, 27-29; *Watts v. U.S.*, 338 U.S. 49, 54-55.

<sup>63</sup> STEPHEN, *History of the Criminal Law*, I, 442.

<sup>64</sup> For instance, refusing to disclose one's name on the ground of possible self-incrimination is a rather common practice in Japan. Such a broad invocation of the privilege should be limited to the cases of criminal fraud or forgery in which the use of a false name itself is an ultimate fact. On the other hand, evidence detected on the basis of clues which have been extorted from the lips of the defendant is usually regarded as admissible, simply because the offered evidence itself was not taken compulsorily. However, all fruit growing from a poisonous root should be excluded.

<sup>65</sup> For a concise view of this topic see RUSSELL J. BORDEN, *The Effect of Dual Sovereignty on the Privilege Against Self-Incrimination*, 26 TEMP. L. QU. 64.

<sup>66</sup> *U.S. v. Murdock*, 284 U.S. 141, 52 Sup. Ct. 63, 76 L. Ed. 210 (1931).



the Feldman case<sup>67</sup> "cuts into the very substance of the Fifth Amendment"<sup>68</sup> and is "subversive of the spirit and letter of the Bill of Rights."<sup>69</sup> A full discussion on this topic would require a whole volume. To cut the long discussion short, let us ask, "What is the rationale of the dualism in the privilege against self-incrimination?" Wigmore's view was that:<sup>70</sup> (a) the privilege is not substantially curtailed by the dualism because the danger of prosecution is remote and (b) the difficulty of ascertaining what is criminal in another jurisdiction should make a different rule impractical. However, the world has become much narrower than in the days of Wigmore. Testimony in court might be reported to every corner of the country in a few hours through radio, television, and newspapers. The police network will be quick enough to detect new evidence against the witness, using his testimony as a clue. On this new basis a state witness might be prosecuted in a federal court and *vice versa*. It is not correct to say that a state jurisdiction, say that of New York State, should be regarded as foreign to national, say New York Federal, jurisdiction in much the same relation as China or Peru are to the United States. Under such circumstances, is it fair for a federal court to pretend to be "blind" to the laws and facts of a state jurisdiction, and *vice versa*? Is there any difference in the inadmissibility of testimony taken compulsorily by an official agency, whether it was taken in a federal court, in a state court, or on the summit of Mount Everest? In this direction the DiCarlo<sup>71</sup> and the Adams<sup>72</sup> cases suggested the possibility of a realistic, though not satisfactory, solution of the problem.

In the second place, should the privilege against self-incrimination protect a person from producing a writing in his possession? If so, to what extent? Anglo-American law has answered the question in the affirmative, although it is making continuous efforts to limit the scope of the privilege which has been improperly far-reaching. Thus, official documents, corporation records have been taken out of the protection of the privilege, on the basis of the "personal nature doctrine" or "public or quasi-public record doctrine." Of course, the compulsory production of writings by means of subpoena is sometimes as harsh as the coercive taking of evidence from the "lips" of a person. However, generally speaking, once an incriminating piece of information has been embodied voluntarily in a documentary material the problem of compulsory self-incrimination will not be as great.<sup>72a</sup> This will still be true if the prosecution can

<sup>67</sup> Feldman v. U.S., 322 U.S. 487, 64 Sup. Ct. 1082, 82 L. Ed. 1408 (1944).

<sup>68</sup> *Id.*, 322 U.S. 498. See also the view of Chief Justice White in *Bram v. U.S.*, 168 U.S. 532, 542-43, 548, 556, 559 (1897).

<sup>69</sup> A dictum in *In re Watson*, 293 Mich. 263, 284, 291 N.W. 652, 661 (1940).

<sup>70</sup> 8 WIGMORE, § 2258; BORDEN, *op. cit.*, 69.

<sup>71</sup> *U.S. v. DiCarlo*, 102 F. Supp. 597 (N.D. Ohio, 1952).

<sup>72</sup> *Adams v. State of Maryland*, 347 U.S. 179 (1954). In this case it was held that a self-incriminating testimony given by a witness in a senate investigating committee under a federal immunity statute cannot be introduced in evidence against him in the state court of Maryland. The solution of this case is insufficient for the following reasons: (1) it will be still possible to use self-incriminating testimony given in a state court as evidence in a federal court. (2) it jumped back to the age-old dilemma of *Brown v. Walker* (161 U.S. 591, 606-608), by simply declaring the superiority of the law of Congress.

<sup>72a</sup> But see note 62, *supra*.

obtain a self-incriminating writing through a search warrant without the coercion or cooperation of the people against whom the warrant has been issued. In this respect the flexible solution of the problem in the Japanese system will be referred to.<sup>73</sup>

The problem of physical evidence compulsorily taken also has been much discussed with regard to blood tests, alcoholic intoxication tests, etc., under the topic of self-incrimination. From my experience, the admission of such evidence has the pleasing effect of killing the need for confession and of stimulating the scientific investigation.<sup>74</sup> Again the more flexible approach under the Japanese law shall be noted here.<sup>75</sup>

Finally, Wigmore's opinion<sup>76</sup> that the privilege has no application to police investigation sounds somewhat unreasonable. Of course, police investigation is subject to other restraining devices such as the confession rule and ideas of due process anyway. The experience in Japan, however, has shown that it is in police investigation that the privilege is most urgently needed.<sup>77</sup>

#### IV. THE PRIVILEGE AGAINST SELF-INCRIMINATION AND SUBVERSIVE ACTIVITIES—A POLITICO-PHILOSOPHICAL INSIGHT

The proposals to limit the privilege against self-incrimination have been frequently made. Insofar as the arguments are based upon the ground that efficiency in criminal justice should be maintained for the public interest, they shall be flatly denied because the state is a "Leviathan".

However, we should like to present here a more elaborate view which has its footing on the notion of the "clear and present" danger. We can make a distinction between two kinds of dangers—(a) the imminent danger to the ordinary social values, such as morals of youth, safe traffic, etc., and (b) the peril to the highest social value, i.e. the safety of the very structure upon which our democratic society is based. In the former case, the peril to the social values caused by the exercise of constitutional

<sup>73</sup> Under Japanese law, the scope of the compulsory search and seizure covers "any articles" whatsoever, which a court believes should be used as evidence, or liable to confiscation. These articles are thought to comprise all sorts of real and documentary evidence which will be relevant and admissible in a court. And the Japanese law has no rule excluding documentary evidence, simply because it tends to self-incriminate. The requirement of warrant (an order of the court) secures a guaranty against the possible misuse of these devices. This system seems to work satisfactorily. Cf. The Japanese Code of Criminal Procedure, §§ 99ff.

<sup>74</sup> Inbau concluded from his historical survey over the development of the privilege that it was originally designed to prohibit "the practice of extracting incriminating statements from accused persons." INBAU, *Self-Incrimination: What Can an Accused Person be Compelled to Do?*, 5 (1950). But again see note 62, *supra*.

<sup>75</sup> Under the Japanese laws the problem of the admissibility of physical evidence is answered expressly in the affirmative, in the provisions about "evidence by inspection [*kensho*]" and "expert evidence [*kantei*]". See the Japanese Code of Criminal Procedure, §§ 128ff., especially § 167 providing for confining the accused in a certain place if necessary for an expert examination, e.g. for insanity tests; also see the Japanese Code of Civil Procedure, §§ 333, 334, 335. However, for preventing misuse all these devices are subject to the order of the court. It must be noted here that in the Japanese courts such physical evidence is highly evaluated as the most reliable and scientific basis of fact finding, and with satisfactory results. The witnesses lie sometimes, but the things and circumstances do not.

<sup>76</sup> 8 WIGMORE, § 2266

<sup>77</sup> See also MORGAN, *op. cit.*, 27.

rights must be actually concrete and imminent in order to be able to restrict the exercise of such rights. In the case of totalitarian subversive activities menacing the foundation of democracy, however, the danger need not be too urgent for the restriction; because here we have a conflict of superior and inferior values.<sup>78</sup> Of course, we agree to the policy of the "free marketing of thoughts". We also agree with Brandeis' opinion that "if there be time to expose through discussing the falsehood and fallacies . . . the remedy to be applied is more speech, not enforced silence."<sup>79</sup> However, for several reasons<sup>80</sup> derived from the very nature of subversive activities, it will be "too late",<sup>81</sup> if we try to check the well organized attempt to overthrow the government by force and violence on the very morning of the armed uprising. Such a view will be at least true in Japan where the Communist Party is deemed to have adopted the so-called "military thesis",<sup>82</sup> with the concrete intention of overthrowing the government. Ihering suggested, *Vivat justitia, ut floreat mundus*, and *pereat justitia, vival mundus*.<sup>83</sup> Are we to follow the foolish example of the "Mercy of Lord Hsiang"<sup>84</sup> in ancient Chinese folklore? However, let us refrain from a hasty approach and thoughtless generalization.

Shall the subversive activities of Communists in this country be regarded as a "clear and present" danger to American society? We should like to answer this question in the negative for the moment. Insofar as the situation in the United States is concerned, we are against the opinion in the Dennis case.<sup>85</sup> As Mr. Justice Douglas said in his dissenting opinion, the Communists in America are "miserable merchants of unwanted ideas."<sup>86</sup> Moreover, there was no evidence in that case tending to

<sup>78</sup> See MR. JUSTICE VINSON in *Dennis v. U.S.*, 341 U.S. 494, 509, 71 Sup. Ct. 857, 867, 95 L. Ed. 1137, 1152 (1927).

<sup>79</sup> BRANDEIS, concurring with Holmes, in *Whitney v. California*, 274 U.S. 357, 47 Sup. Ct. 641, 71 L. Ed. 1095 (1927).

<sup>80</sup> (1) They don't exchange their thoughts through the free market place, but through secret and one-sided individual solicitation, using sugar-coated phraseology. (2) They don't allow their members to criticize their own dogma. (3) They don't intend to work through the majority in Congress. (4) In the course of proletarian revolution they will monopolize the market of thoughts, using their skilled "menticide" systems. (5) Once they succeed in establishing their government, they will never allow any other party to take their place through free general election.

<sup>81</sup> Cf. Mr. Judge Medina's words quoted at N. L. NATHANSON, *The Communist Trial and the Clear-and-Present Danger Test*, 63 HARV. L. REV. 1167, 1175 (1950).

<sup>82</sup> The resolution of the fourth general assembly of the Japanese Communist Party (*Yon Zen Kyo*) in 1950 adopted the so-called military thesis in an abstract manner, and subsequently the fifth assembly (*Go Zen Kyo*) in 1951 adopted the new platform and the more concrete military thesis, both aiming at proletarian revolution by armed uprising as soon as possible. The technical schemes for this military thesis were set forth in a series of succeeding military treatises. All these resolutions and directives appeared in the secret periodicals called *Naigai Hyoron* (*The World Review*) with the seeming innocent covers, entitled "A Catalogue of Used Books" and then "How to Raise Flower Bulbs"

<sup>83</sup> IHERING, *Der Zweck im Recht*, Bd. 1, s. 422ff. (3. Aufl., 1893); DANDO, *Keiji Sosho Ho Koyo*, 113 (1943).

<sup>84</sup> Lord Hsiang, a feudal king of Sung, one of the ancient Chinese kingdoms, declared war against a neighboring country. His son suggested he attack the enemy instantly, but he refused to follow the advice, saying, "No gentleman shall make a treacherous attack, before his enemy gets ready." Soon thereafter he was defeated by the enemy. Therefore, the phrase "Mercy of Lord Hsiang" has been used for describing excessive and unpractical benevolence for one's enemy.

<sup>85</sup> *Dennis v. U.S.*, 341 U.S. 494, 71 Sup. Ct. 857, 95 L. Ed. 1137.

<sup>86</sup> *Id.*, 341 U.S. 494, 589.

show such important points, as the adoption of the military thesis, the underground "bureau" system, the "technical" communication network, the relationship with Moscow, the collection and production of firearms and so on. The Dennis case would have been a typical "nol. pros." case if investigated in Japan. Let us be careful of the "red hysteria" stimulated by contemporary demagogues.<sup>87</sup> Experience shows that constitutional crisis is apt to be overlooked or minimized in the face of exaggerated political peril. Sometimes, human rights are impaired under the sly subterfuges of an intentionally exaggerated danger. The "Otsu" case in Japan (1891)<sup>88</sup> gives us a good lesson. There we see the wisdom of the maxim *fiat justitia, ruat caelum*.

#### V. EPILOGUE

In this technological age, liberty has been constantly sacrificed for efficiency of government. The executive has marched into the domain of liberty in the name of public welfare. A series of devices for restricting the privilege against self-incrimination such as "the compulsory waiver of the privilege under legislative immunity", "dismissal of public officers", "non-Communist affidavit requirement for Labor Management Relations Board procedure", and "waiver contract theory" are more or less subtle techniques designed by the executive for encroaching upon liberty. It is, therefore, time to stop and think, not to stop thinking. Be pessimistic, rather than optimistic. An early diagnosis of symptoms of political hysteria is important. Here is the medicine administered by an ingenious poet. What wisdom do you see in it?

*Der Stabsarzt sieht, als Optimist,  
Dich viel gesünder, als du bist.*<sup>89</sup>

<sup>87</sup> FRANCIS BIDDLE, *The Fear of Freedom*, 12 et seq., 246 et seq. (1951).

<sup>88</sup> In 1891, three years after the enactment of the Japanese Constitution, a fanatic Japanese policeman attempted to kill and succeeded in injuring the Russian Crown Prince who was visiting Japan at the city of Orsu. The members of the Japanese cabinet, afraid of having difficulty with their powerful neighbor empire, tried to suggest to the district judges that the poor accused be sentenced to death in order to express the great feeling of regret for the incident and to curry favor with Russia. Under the provisions of the constitution and the penal code, the highest possible punishment for him would be life imprisonment; but high officials of the government maintained that the provision for attempted murder against the members of the Japanese royal family should be analogously applied to this case and that the accused should be given capital punishment. Some of them cried out, "What would law be, were it not for the state?" Fortunately, by virtue of the great efforts of Mr. Kojima, then Chief Justice of the Supreme Court, who protected the principle of judicial independence from the arbitrary interference of the executive, the defendant was sentenced to life imprisonment, escaping death. The maxim "*fiat justitia, ruat caelum*" has always been of an enlightening value. For details see KOJIMA AND HANAI, *Otsu Jiken Tenmatsu Roku* (1931); TAKEO NUMANAMI, *Golio no Kami Kojima Iken* (1926); HOZUMI, *Hoso Yawa*, 28 et seq. (1932).

<sup>89</sup> EUGEN ROTH, *Der Wunderdoktor*, s. 16 (1954). The Surgeon-Major, as an optimist, sees thee much healthier than thou art. (tr. by Haruo Abe)