Electronically Recording Custodial Interrogations in Japan

Can the Revised CCP Provide Hope for the Reform of Custodial Interrogation?

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I. INTRODUCTION

In November 2018, the world business community was shocked to witness the arrest of Nissan's former chairman, Carlos Ghosn, on suspicion of falsifying financial reports. This not only shocked the economic world but also drew international attention to the criminal justice system in Japan, which relies excessively on custodial interrogations. After Ghosn's arrest, he sat in a humble cell for more than a month, interrogated day in and day out, without a lawyer being present.[1] The treatment of the former chairperson shed

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1 "Carlos Ghosn's detention puts Japan's justice system under microscope", CNBC, 23 December 2018, *at https://www.cnbc.com/2018/12/23/carlos-ghosns-detention-puts-japans-justice-system-under-microscope.html.*

light on the dark side of Japanese criminal procedure. Nevertheless, it should be noted that his case came just after a reform of the criminal justice system that was initially aimed at the implementation of fair and proper custodial interrogations. The National Diet passed a bill on the reform of the criminal justice system on 24 May 2016 to revise the *Keiji soshō-hō* (Code of Criminal Procedure, hereafter: CCP)[2] and other laws. This reform covered various issues, including expanding the evidence to be disclosed and the number of crimes subject to wiretapping, but, most importantly, it also addressed the mandatory audio/video recording of interrogations.

This criminal justice reform could have resolved the structural issues inherent in the Japanese criminal system, but Carlos Ghosn's case revealed that the reform did not go far enough. Mandatory audio/video recording may help to prevent interrogators from using violence against suspects, but it applies in only a small percentage of all criminal cases. The revised CCP does not require a lawyer to be present during interrogations, and the Japanese investigating authorities still rely excessively on custodial interrogations. Additionally, some scholars are concerned that if there are no restrictions on the use of video records as evidence, this might create a new risk of wrongful convictions because of the impact of such records. Is the criminal justice reform compatible with international human rights standards? In other words, can the revised CCP provide hope for the reform of custodial interrogation? This article examines the revised CCP in relation to international human rights standards, focusing especially on the mandatory audio/video recording of custodial interrogations. For this purpose, Part II overviews the provisions of, and background to, the revised CCP, and Part III explores human rights standards for custodial interrogations. The cause of the gap between the revised CCP and international human rights standards is then examined in Part IV. Part V introduces a new problem regarding the evidentiary use of video records. Given the strong impact of video-recorded confessions, some scholars are concerned that, without restrictions on the use of video records, there could be wrongful convictions. Part V considers the pros and cons of the evidentiary use of video-recorded interrogations. Finally, in Part VI some proposals are made for how defence counsel could ensure better justice under the revised CCP.

2 *Keiji soshō-hō* [Code of Criminal Procedure], Law No. 131/1948, as amended by Law No. 54/2016.

II. Overview of and Background to the Revised CCP

1. Overview

The revised CCP introduced mandatory audio/video recording of custodial interrogations for the first time in the history of Japanese criminal justice. Article 301-2 of the revised CCP imposes an obligation on the investigating authorities to make an audio/video recording of custodial interrogations in the following instances:[3] (1) cases involving offences punishable by death or by life imprisonment with or without work; (2) cases involving crimes subject to imprisonment for a minimum period of not less than one year where the offence caused a victim to die as a result of an intentional criminal act; and (3) cases other than those sent to the public prosecutor by the judicial police official. The first two of these categories correspond to cases tried before a panel including lay judges, which is a procedure introduced in May 2009, and the last to cases exclusively investigated by the public prosecutor's office without the involvement of a police official.

The cases subject to mandatory audio or video recording are limited to these three – making up 3% of all court cases[4] – and a recording is not required when someone is interrogated during a voluntary appearance without being arrested or detained. In the mandatory recording clause, the revised CCP obliges the prosecutor to present to the court – from the beginning to the end – only those audio/video-recorded interrogations in which the statements are made, if the defence counsel challenges the voluntary nature of the confession.[5]

At the same time, the amended CCP tolerates broad exceptions.[6] It provides that the prosecutor or the judicial police official may be exempt from carrying out mandatory audio/video recording in the following cases: (1) when audio/video recording is impossible because of unavoidable matters such as equipment breakdown; (2) when audio/video recording seems to hinder them from obtaining sufficient statements from the suspect, judging from the remarks of the suspect; (3) when the case is an offence carried out by a member of a designated *organised crime group;* and (4) when audio/video recording seems to hinder them from obtaining sufficient statements from the suspect because of a risk of physical or property harm.

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3 Art. 301-2, para. 1 and 4 CCP.

4 Nichiben-ren [Japan Federation of Bar Associations (JFBA)], *Torishirabe no kashika de kaeyō, keiji shihō!* [Reform Criminal Justice by Transparency of Interrogations] (10th ed., Tōkyō 2016) 8, at *https://www.nichibenren.or.jp/library/ja/special_theme/data/pam_10.pdf*.

5 Art. 301-2, para. 1 CCP.

6 Art. 301-2, para. 4 CCP.

One of the concerns arising among scholars and practitioners is the breadth of these exceptions. Given the abstract wording of the revised CCP, the exceptional circumstances clause can be interpreted loosely, which could render the mandatory recording provisions ineffective. Bearing in mind these concerns, the Japanese bar organisations closely watched the development of trial-period recordings that the investigating authorities conducted before the amended CCP came into force. According to the statistics, more than 99% of custodial interrogations by the public prosecutor were audio- or video-recorded if they fell into certain categories, including those that made them subject to mandatory recording under the revised CCP. On the other hand, only 81.9% of interrogations in lay judge cases were fully recorded when the police office conducted the interrogations. The results of the trial recordings suggest that the public prosecutor's office does not at present loosely interpret the exceptional circumstances clause. Nevertheless, the police office seems to use a less strict interpretation than the public prosecutor's office. It seems that the police office does not in principle video/audio record in cases relating to an offence by a member of a designated *organised crime group*.[7] One will need to observe how the trend develops and how the court makes decisions after the new law came into force on 1 June 2019.

2. Background

a) Evidence Tampering Scandal and Criminal Justice Reform

The present criminal justice reform, which advocates the establishment of "Criminal Justice in a New Era", was triggered by the Postal Abuse Case, in which the Ōsaka District Court delivered a not guilty judgment on 10 September 2010.[8] In the Postal Abuse Case, Atsuko Muraki, a former senior official of the health ministry, was arrested and later indicted on a charge of forging a document to enable an organisation to wrongly take advantage of the postal discount system for handicapped people. The Court acquitted her, denying the admissibility of written statements submitted by the prosecutors. After the acquittal, the falsification of evidence by the prosecutor was uncovered. The challenges this case threw at the Japanese criminal justice system relate to criminal investigations and court proceedings, which rely heavily on written statements obtained during interrogations behind closed doors.[9]

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7 H. KOSAKAI, *Heisei 30-nen kashika jisshi jōkyō ni tsuite* [Video/Audio Recordings of Interrogations in 2018], Torishirabe No Kashika Nyūsu 13 (2018) 1, 1, at *https://www.nichibenren.or.jp/library/ja/committee/list/data/kashika_news_181101.pdf*.

8 Ōsaka District Court, 10 September 2010, Hanrei Taimuzu 1397 (2014) 309.

The unprecedented scandal of an incumbent prosecutor intentionally altering a piece of evidence attracted mass media attention and significantly undermined confidence in the public prosecution services. After this scandal of evidence tampering by the Ōsaka District Public Prosecutor Office, the Study Group on the Role of Prosecution was established as an advisory panel to the Minister of Justice, and it published a recommendation, "Towards Rehabilitation of the Prosecution Services", on 31 March 2011.[10] While the study group did not propose any specific reform plan, it recommended that – in order to re-examine the role of criminal investigations and court proceedings that rely heavily on custodial interrogations and written statements, and to create a new criminal justice system including the "transparency" of custodial interrogations – the government should establish a forum and start discussions promptly. Following the recommendations of the study group, the Minister of Justice constituted a legislative council to look at issues such as the reform of criminal investigations and court proceedings, examining substantive criminal law and procedural law.[11] The legislative council published a final report on 9 July 2014 after three years of discussion that began in 2011,[12] and the CCP was amended consistent with the final report.

b) From the beginning of "transparency of custodial interrogations" to the present criminal justice reform

It was Makoto Mitsui who used the term "transparency of custodial interrogations" for the first time in Japan. At the 62nd Conference of the Criminal Law Society of Japan in 1984, Mitsui proposed that the CCP should be construed in such a way that a suspect had, in principle, no legal obligation to endure a custodial interrogation, and that such an obligation should exceptionally be imposed only when the suspect's access to legal assistance was effectively guaranteed by allowing defence counsel to be present during the interrogation. Mitsui then proposed the introduction of several

9 H. KAWASAKI/S. MISHIMA/T. FUCHINO, *2016-nen kaisei keiji soshō-hō, tsūshin bōju-hō jōbun kaiseki* [Commentary on the 2016 Amended CCP and Wiretapping Act] (Tōkyō 2017) 2.

10 KENSATSU NO ARIKATA KENTŌ KAIGI [Study Group on the Role of Prosecution], *Kensatsu no saisei ni mukete* [Towards Rehabilitation of Prosecution Services] (2011), at *http://www.moj.go.jp/content/000072551.pdf*.

11 HŌMU-SHŌ [Minister of Justice], *Shimon* [Consultation Document] No. 92 (2011), at *http://www.moj.go.jp/content/000075551.pdf*.

12 HŌSEI SHINGI-KAI [Legislative Council], *Aratana keiji shihō seido no kōchiku ni tsuite no chōsa shingi no kekka an* [Draft Results of Deliberations on Creation of a New Criminal Justice System] (July 2014), at *http://www.moj.go.jp/content/000125178.pdf*.

measures, including the video/audio recording of interrogation processes to ensure proper custodial interrogations.[13]

The Japanese investigating authorities constructed a particular form of criminal investigation over several decades after World War II. The police undertake an elaborate investigation to ascertain the truth. Once the case is sent to a prosecutor, he or she indicts the defendant only when there is strong evidence that a guilty judgment will be handed down. The trial in court proceeds on the basis of written statements rather than an examination in court, allowing the judge to develop his or her decision by reviewing (outside the court room) these statements. This form of criminal justice is often called "precise justice", and it has the particular feature of detailed judgments and an extremely high conviction rate. Some appreciate this form of criminal investigation, but excessive dependence on custodial interrogations has been found to have adverse effects.[14] As a result of the overall dependence on written statements and interrogations outside the court, the investigative authorities put more effort into interrogations and obtaining confessions. Excessive reliance on interrogations has led to forced and false confessions. Especially after being arrested, suspects are legally obliged to endure interrogations, and interrogators continue to force them to confess during the period of arrest and detention, which lasts for a maximum of 23 days. As judges develop their decisions by reviewing written statements including confessions, forced and false confessions produced in this way have caused numerous wrongful convictions in Japan.

Mitsui's proposal for the "transparency of custodial interrogations" was aimed at reviewing the interrogation methods, breaking away from the heavy reliance on confessions, and instituting fair and proper interrogations.[15] Meanwhile, "precise justice" was at its peak at that time, and the rigid investigative practice had made defence counsel and scholars evaluate it as "hopeless".[16] As the courts had assumed that suspects were obliged to endure custodial interrogation, the investigating authorities apparently regarded Mitsui's proposal – which could drastically change the form of interrogations – as unrealistic. It was after the Justice System Reform

13 T. AOKI, *Torishirabe no kashika-ron no seiri to kentō* [The Arrangement and Examination of a Dispute over Visualising the Suspect's Interrogation], Ryūdai Law Review 81 (2009) 41.

14 M. MITSUI, *Kagi wa keiji bengo* [The key is effective criminal defence], Ronkyū Jurisuto 12 (2015) 110.

15 *Ibid*.

16 R. HIRANO, *Genkō keiji soshō-hō no shindan* [Examining the Current Code of Criminal Procedure], in Yasuharu et al. (eds.), *Dandō Shigemitsu hakase koki shukuga ronbun-shū dai-yon-kan* [Festschrift in Honour of Dr Shigemitsu Dandō, Vol. 4] (Tōkyō 1985) 407.

Council proposed the establishment of a lay judge system in June 2001[17] that the situation changed. In advance of the introduction of trials featuring lay judges serving alongside professional judges, some former judges argued that the whole process of custodial interrogations should be audio- or video-recorded.[18] In the background of their proposals, there were practical challenges over deciding on whether confessions were made voluntarily and were credible. It was not rare, at the time, for roughly ten years to be spent on examining a large number of witnesses when defence counsel seriously disputed the voluntary nature or credibility of a confession. In addition, making judgments on this issue was far from easy. Without objective evidence regarding custodial interrogations, endless arguments took place as to whether or not an interrogator had illegally forced a suspect to confess. As a court has the responsibility to encourage lay judges to participate in the deliberations, it became important for arguments on the voluntary nature or credibility of confessions to be easy for lay judges to understand. Judges, therefore, naturally sought objective records of interrogations so as to avoid pointless and endless arguments at lay judge trials.[19] Scholars of criminal law, and criminal defence counsel, have criticised the fact that court practice – which tolerates the prolonged interrogation of a suspect in police detention by accepting that suspects are obliged to endure custodial interrogation – brought about an excessive reliance on custodial interrogations and the distortion of the whole criminal process. As the courts were not expected to change their view on suspects' obligation to endure interrogations, there seemed to be no possibility that they would reach a consensus with scholars and criminal defence counsel on the "transparency of custodial interrogations". Nevertheless, the criminal justice reform – the introduction of lay judge trials – changed the courts' view about the requirement for audio/video-recorded interrogations.

Generally speaking, the video/audio recording of custodial interrogations can be seen as pursuing two distinct aims: i) ensuring legitimate interrogations and ii) effectively establishing that confessions were made voluntarily.[20] The

17 JUSTICE SYSTEM REFORM COUNCIL, Recommendations "For a Justice System to Support Japan in the 21st Century" (12 June 2001), at *https://japan.kantei.go.jp/judiciary/2001/0612report.html*.

18 M. YOSHIMARU, *Saiban-in seido no moto ni okeru kōhan tetsuzuki no arikata ni kansuru jakkan no mondai* [Issues in Court Proceedings under the Lay Judge System] Hannrei Jihō 1807 (2003) 3. F. SATŌ, *Saiban-in saiban ni fusawashii shōko shirabe to gōgi ni tsuite* [Court examination and conference appropriate for lay judge trial], Hanrei Taimuzu 1110 (2003) 4.

19 T. AOKI, *supra* note 13, 64.

20 H. KUZUNO, *Torishirabe no rokuon rokuga seido* [Audio or Video Recording Interrogations], Hōritsu Jihō 86 (10) 16.

view that emphasises the former aim corresponds to the proposal of Mitsui and criminal defence counsel, while the judges' view mentioned above highlights the latter aim. The first view requires that all interrogations should be monitored and recorded, whereas the second does not. In the second view, it is crucial to record the portions of interrogations where confessions are made, but it is not necessary to record the whole interrogation process, although this is preferable. In the debate that occurred at the legislative council, these two stances faced off against one another. It is not going too far to say that the revised CCP is the product of a compromise between these opposing views. Because of this compromise, the revised CCP seems to have failed to bridge the gap between the previous system and international human rights standards.

III. Precedents of International and Regional Bodies on Custodial Interrogations

In contrast with the situation in Japan, the United States Supreme Court established the landscape of constitutional law in *Miranda v Arizona* in 1966. The Court stated that interrogating police officers should advise a suspect that he or she has the right to remain silent, the right to consult with a lawyer, and the right to have a lawyer with him or her during interrogations in order to dispel the inherent pressure on a suspect in a police-dominated atmosphere. The Court continued by holding that, when an interrogation is conducted without an attorney being present and a statement is taken, a heavy burden rests on the government to demonstrate that the defendant knowingly and intelligently waived his or her right to counsel.[21] *Miranda v Arizona*, which acknowledged a suspect's right to have a lawyer during interrogations, had a measurable influence on international and regional bodies as well as setting a precedent for other countries. Mitsui proposed enhancing the transparency of custodial interrogations using the idea that sprang from *Miranda*.

Since *Miranda v Arizona*, international and regional bodies, including the European Court of Human Rights, have developed arguments about the right to have a lawyer during interrogations and the mandatory electronic recording of interrogations. This part of the article gives an overview of the precedents and human rights standards developed after *Miranda.* The next part of the article examines the background to the gap between the revised CCP and international human rights standards.

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21 *Miranda v Arizona*, 384 US 436 (1966); see L. Lewis, Rethinking Miranda: Truth, Lies and Videotape, Gonzaga Law Review 43 (2007) 199.

1. The View of UN Treaty Bodies

The International Covenant on Civil and Political Rights (ICCPR)[22] does not have any provisions that clearly mention the transparency of custodial interrogations, but Article 14(3)(b), which lays down the defendant's right to "have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing" would relate to this issue. In General Comment No. 32, the UN Human Rights Committee (HRC) clarifies the meaning of the phrase "adequate facilities" as follows:[23]

> "Adequate facilities" must include access to documents and other evidence; this access must include all materials that the prosecution plans to offer in court against the accused or that are exculpatory. Exculpatory material should be understood as including not only material establishing innocence but also other evidence that could assist the defence (e.g. indications that a confession was not voluntary). In cases of a claim that evidence was obtained in violation of article 7 of the Covenant, information about the circumstances in which such evidence was obtained must be made available to allow an assessment of such a claim."

This comment is important, as the HRC apparently requires state parties to provide defendants with electronic records of custodial interrogations. In order to make it possible to claim that a confession or statement was obtained in violation of Art. 7, "information about the circumstances in which such evidence was obtained" (as set out in the above comment) should include not just the confession or statement itself but also electronic records of interrogations, and such records should cover the whole of any interrogation, not just part.

Moreover, the HRC states the following with regard to the right to communicate with defence counsel:[24]

> "The right to communicate with counsel requires that the accused is granted prompt access to counsel. Counsel should be able to meet their clients in private and to communicate with the accused in conditions that fully respect the confidentiality of their communications. Furthermore, lawyers should be able to advise and to represent persons charged with a criminal offence in accordance with generally recognised professional ethics without restrictions, influence, pressure or undue interference from any quarter."

It may be possible to interpret "to advise and to represent persons charged with a criminal offence […] without restrictions, influence, pressure or undue interference" in the above comment to mean that the HRC requires state par-

22 UN General Assembly, International Covenant on Civil and Political Rights, 16 December 1966, 999 UNTS 171.

23 UN Human Rights Committee, General Comment No. 32: Art. 14 (Right to equality before courts and tribunals and to a fair trial), UN Doc. CCPR/C/GC/32, 23 August 2007, para. 33.

24 *Ibid*., para. 34.

ties to allow defence counsel to attend interrogations. Nevertheless, there is no clear wording here on the right to have a lawyer during interrogations.

On the other hand, the HRC recommended as follows in its concluding observations on one of the periodical reports submitted by the Japanese government:[25]

"The State party should adopt legislation prescribing strict time limits for the interrogation of suspects and sanctions for non-compliance, ensure the systematic use of video-recording devices during the entire duration of interrogations and guarantee the right of all suspects to have counsel present during interrogations, with a view to preventing false confessions and ensuring the rights of suspects under article 14 of the Covenant. It should also acknowledge that the role of the police during criminal investigations is to collect evidence for the trial rather than establishing the truth, ensure that silence by suspects is not considered inculpatory, and encourage courts to rely on modern scientific evidence rather than on confessions made during police interrogations."

The HRC again issued recommendations in concluding observations made six years later:[26]

"The State party should take all measures to abolish the substitute detention system or ensure that it is fully compliant with all guarantees in articles 9 and 14 of the Covenant, inter alia, by guaranteeing:

[....]

(b) That all suspects are guaranteed the right to counsel from the moment of apprehension and that defence counsel is present during interrogations;

(c) Legislative measures setting strict time limits for the duration and methods of interrogation, which should be entirely video-recorded;"

Based on the ICCPR, the HRC has recommended that the government should introduce mandatory video recording and guarantee the right to have defence counsel during interrogations, with a view to ensuring proper interrogation methods. Looking through these concluding observations, it can be seen that it is the HRC's view that Article 14(3)(b) requires mandatory video recordings of interrogations and that it also guarantees the right to have a lawyer during an interrogation.

In addition to the HRC's view, the UN Committee against Torture (CAT) has in the past issued recommendations regarding custodial interrogations in concluding observations. It has recommended that:[27]

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25 UN Human Rights Committee, Consideration of reports submitted by States parties under Article 40 of the Covenant: International Covenant on Civil and Political Rights: concluding observations of the Human Rights Committee: Japan, UN Doc. CCPR/C/JPN/CO/5, 18 December 2008, para. 19.

26 UN Human Rights Committee, Concluding observations on the sixth periodic report of Japan, UN Doc. CCPR/C/JPN/CO/6, 20 August 2014, para. 18.

27 UN Committee Against Torture, Conclusions and recommendations of the Committee against Torture; Japan, 3 August 2007, UN Doc. CAT/C/JPN/CO/1, para. 16.

"The State party should ensure that the interrogation of detainees in police custody or substitute prisons is systematically monitored by mechanisms such as electronic and video recording of all interrogations; that detainees are guaranteed access to and the presence of defence counsel during interrogation; and that recordings are made available for use in criminal trials."

In the subsequent periodic report, the CAT further recommended that, consistent with Article 38(2) of the Constitution, Article 319(1) of the Code of Criminal Procedure and Article 15 of the Convention, the Japanese government take all necessary steps to ensure in all cases the inadmissibility in court – in practice – of confessions obtained under torture or during ill-treatment by, inter alia:[28]

"(a) Establishing rules concerning the length of interrogations, with appropriate sanctions for non-compliance;

(b) Improving criminal investigation methods to end practices whereby confession is relied on as the primary and central element of proof in criminal prosecution;

(c) Implementing safeguards such as electronic recordings of the entire interrogation process and ensuring that recordings are made available for use in trials."

According to these concluding observations, the CAT is of the view that the UN Convention against Torture requires state parties to introduce mandatory video recording of interrogations and to ensure access to and the presence of defence counsel during interrogations.

2. UN General Assembly Resolutions

Other than the views of UN treaty bodies, the UN General Assembly has adopted useful standards regarding access to defence counsel in criminal justice procedures. Among others, the Body of Principles for the Protection of All Persons under any Form of Detention or Imprisonment[29] provides in its principle 23 that:

"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 in paragraph 1 of the present principle."

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28 UN Committee Against Torture, Concluding observations on the second periodic report of Japan, adopted by the Committee at its fiftieth session (6–31 May 2013), UN Doc. CAT/C/JPN/CO/2, 28 June 2013, para. 11.

29 UN General Assembly, Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment, UN Doc. A/RES/43/173, 9 December 1988.

Additionally, in 2012 the UN General Assembly adopted a new resolution that focuses on access to legal aid in criminal justice systems. The UN Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems[30] (the UN Principles and Guidelines) require states to prohibit, in the absence of any compelling circumstances, any interviewing of suspects in the absence of a lawyer (unless the suspect gives his or her informed and voluntary consent to waive the lawyer's presence), and to prohibit the initiation of an interview until the lawyer arrives. The UN Principles and Guidelines do not always require state parties to allow a lawyer to be present during interrogations, allowing possible exemptions for "compelling circumstances". While it is not clear what "compelling circumstances" means, there may be an exemption from the obligation to accept the presence of a lawyer in European countries when a lawyer cannot attend the interrogation because the suspect is interrogated in a remote province, or when an urgent interrogation is truly needed. General Assembly Resolutions are not legally binding, but they provide telling clues about the current international human rights standards for criminal justice systems.

Judging from these views of treaty bodies and human rights standards, it can be argued that the right to have a lawyer during an interrogation can be derived from Article 14(3)(b) of the ICCPR. Refusing to allow a lawyer to be present at interrogations might constitute a breach of Article 14(3)(b) of the Convention, in combination with other factors such as an excessive reliance on confessions through the whole of the interviewing process, prolonged pretrial detention and restrictions on access to defence counsel.[31]

3. European Court of Human Rights

Before the UN treaty bodies developed their views on the transparency of custodial interrogations, the European courts accumulated precedents on this issue. The question of whether a suspect's lawyer is entitled to be present during interrogations was first raised at the European Court of Human Rights in *Imbrioscia v Switzerland*.[32] In that case, the applicant was ques-

30 UN General Assembly, Resolution adopted on 20 December 2012, United Nations Principles and Guidelines on Access to Legal Aid in Criminal Justice Systems, UN Doc. A/RES/67/187, 28 March 2013.

31 Y. KITAMURA, *Keisatsu torishirabe ni okeru bengonin tachiaiken o meguru jinken jōyaku no kaishaku, tekiyō mondai: Yōroppa shokoku no ugoki o chūshin toshite* [The Right of a Suspect to Have Access to a Lawyer while Police Interviews: An Analysis on the Interpretation of the European Convention on Human Rights and its Effects on the EU New Directives], Hōgaku Shinpō 120 (9–10) (2014) 161, 178.

32 *Imbrioscia v Switzerland*, ECHR, 24 November 1993, No. 13972/88, A 275 (1993); 17 EHRR 441.

tioned by the police and the district prosecutor in the absence of his lawyer, but the Court held that Articles 6(1) and 6(3)(c) of the European Convention on Human Rights (ECHR)[33] had not been infringed. What the Court revealed in the case is that Article 6(3)(c) does not require a state to take the initiative to invite a suspect's lawyer to attend interrogations. However, it would seem from the tenor of its judgment that if the suspect or his lawyer requests the latter's attendance, this must be allowed if there is a risk that the information obtained will prejudice the suspect's defence. The question of whether the suspect must be asked if he wishes to have his lawyer present during interrogations was not examined in *Imbrioscia*.[34]

It was not until *Salduz v Turkey*[35] in 2008 that the European Court re-examined the right to have a lawyer during interrogations. In *Salduz v Turkey*, the applicant, an 18-year-old, was arrested on suspicion of aiding and abetting a terrorist organisation. In accordance with the legislation, he was interrogated by a police officer without a lawyer being present and made a confession. He denied his statement at trial, but the State Security Court found that his confession to the police was authentic and convicted him as charged. Given these facts, the Grand Chamber indicated that there could be a breach of Art. 6(3)(c) if incriminating statements made during police interrogation without access to a lawyer were used for a conviction.

The Grand Chamber confirmed that, in accordance with Article 6 of the ECHR, an accused would normally be allowed to benefit from the assistance of a lawyer in the initial stages of a police interrogation, while leaving the door open to exceptional restrictions for good cause. The Grand Chamber underlined the significant role of legal assistance at the investigation stage, stating that:[36]

> "At the same time, an accused often finds himself in a particularly vulnerable position at that stage of the proceedings, the effect of which is amplified by the fact that legislation on criminal procedure tends to become increasingly complex, notably with respect to the rules governing the gathering and use of evidence. In most cases, this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect for the right of an accused not to incriminate himself."

The Court held that early access to a lawyer is a component of the procedural safeguards and that it would have particular regard for these when examining

33 Convention for the Protection of Human Rights and Fundamental Freedoms, opened for signature on 4 November 1950, entry into force on 3 September 1953.

34 D. HARRIS/M. O'BOYLE/E. P. BATES/C. M. BUCKLEY, Law of the European Convention on Human Rights (3rd ed., Oxford 2014) 475.

35 *Salduz v Turkey* [GC], ECHR 27 November 2008, No. 36391/02.

36 *Ibid*., para. 54.

whether a procedure had extinguished the very essence of the privilege against self-incrimination. It also noted the recommendations of the European Committee for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment, which repeatedly state that the right of a detainee to have access to legal advice is a fundamental safeguard against ill-treatment. The Grand Chamber then found that, in order for the right to a fair trial to remain sufficiently "practical and effective", Article 6(1) requires that, as a rule, access to a lawyer should be provided from the time of the first interrogation of a suspect by the police, unless it is demonstrated in the light of the particular circumstances of a case that there are compelling reasons to restrict this right. The rights of the defence will, in principle, it added, be irretrievably prejudiced when incriminating statements made during police interrogation without access to a lawyer are used for a conviction.

In *Salduz v Turkey*, the Grand Chamber perceived that there was a breach of Article 6, mainly because the applicant's right to have a lawyer during interrogations was legally denied and the confession obtained during police interrogation without access to a lawyer was used for the conviction. The Court's view that state parties are required to allow defence counsel to attend interrogations can be seen in subsequent cases.

In *Panovits v Cyprus*,[37] the applicant, a 17-year-old, was arrested for murder and robbery and interrogated. He was interrogated without a lawyer being present, although his father was allowed to attend. As a result of the police interrogations, he made a confession, and this was used for the conviction. The European Court held that the right to silence and the right not to incriminate oneself are generally recognised international standards which lie at the heart of the notion of a fair procedure under Article 6. With regard to the rationale, it observed that these rights lead to the protection of the accused against improper compulsion, thereby contributing to the avoidance of miscarriages of justice and to the fulfilment of the aims of Article 6. The Court decided that there had been a breach of Article 6, stating that:[38]

> "As regards the applicant's complaints which concern the lack of legal consultation at the pre-trial stage of the proceedings, the Court observes that the concept of fairness enshrined in Article 6 requires that the accused be given the benefit of the assistance of a lawyer already at the initial stages of police interrogation. The lack of legal assistance during an applicant's interrogation would constitute a restriction of his defence rights in the absence of compelling reasons that do not prejudice the overall fairness of the proceedings."

Since *Salduz v Turkey*, the European Court has delivered similar judgments regarding access to defence counsel in more than 50 cases. Through this

37 *Panovits v Cyprus,* ECHR, 11 December 2008, No. 4268/04.

38 *Ibid*., para. 66.

series of cases, it has revealed that Article 6 requires the accused to be given access to a lawyer at the initial stages of a police interrogation and that this access to a lawyer includes the right to have a lawyer present during interrogations, which has as its legal basis the privilege against self-incrimination and the right to remain silent.[39]

4. EU Directives

With the development of the precedents of the European Court, the European Parliament and the Council of the European Union have adopted several Directives regarding suspects' rights. Among others, in October 2013 they adopted the EU Directive on the right of access to a lawyer in criminal proceedings.[40] This Directive lays down minimum rules concerning the right of access to a lawyer in criminal proceedings, with the aim of promoting the application of the EU Charter of Fundamental Rights, particularly Article 4 (Prohibition of torture and inhuman or degrading treatment or punishment), Article 6 (Right to liberty and security), Article 7 (Respect for private and family life), Article 47 (Right to an effective remedy and to a fair trial), and Article 48 (Presumption of innocence and right of defence).

The Directive has detailed provisions on the right of access to a lawyer, including the scope of this right and the point in time from which access to a lawyer should be provided. It indicates that suspects or accused persons must have access to a lawyer before they are questioned by the police, and that the access to a lawyer incorporates the right for the lawyer to be present at interrogations. It provides that:[41]

> "Member States shall ensure that suspects or accused persons have the right for their lawyer to be present and participate effectively when questioned. Such participation shall be in accordance with procedures under national law, provided that such procedures do not prejudice the effective exercise and essence of the right concerned."

The right of access to a lawyer can be waived by the accused, but the Directive requires Member States to ensure that the suspect or accused person has been provided with sufficient information about the content of the right, and that any waiver is given voluntarily and unequivocally. It then demands

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39 KITAMURA, *supra* note 31, 193.

40 Directive 2013/48/EU of the European Parliament and of the Council of 22 October 2013 on the right of access to a lawyer in criminal proceedings and in European arrest warrant proceedings, and on the right to have a third party informed upon deprivation of liberty and to communicate with third persons and with consular authorities while deprived of liberty.

41 *Ibid*., Art. 3.

that the waiver and the circumstances under which the waiver was given are noted, using the recording procedure in accordance with the national law.[42]

IV. Unresolved Problems: Why does the Revised CCP Fail to Reach the International Human Rights Standards?

1. Criticisms of the Revised CCP

Balancing the two conflicting views – the one that emphasises making interrogations legitimate and the other that puts a heavy weight on the effective establishment of the voluntary nature of confessions – the revised CCP is often criticised as failing to achieve its original objectives. The criminal justice reform that led to the revised CCP initially aimed to implement fair and proper custodial interrogations, but the following features of the revised CCP show that it deviated from its original aims.

First, the scope of mandatory video/audio recording is extremely limited. Under the revised CCP, there is a requirement to record custodial interrogations only in cases that will be tried by a lay judge and in cases that are exclusively investigated by the public prosecutor's office, and the investigating authorities are not obliged to record interrogations during a voluntary appearance. In addition, the revised CCP includes broad exemptions. Given the limited scope of mandatory recording, a member of the legislative council has criticised the revised CCP on the grounds that it seemed to be aimed at narrowing the scope of recording as much as possible.[43]

Secondly, the revised CCP provides for mandatory recording in the chapter of the CCP that lays down rules on evidence. It states that mandatory recording is a way to establish the voluntary nature of a confession when this is contested by defence counsel. Nevertheless, the primary aim of the "transparency of custodial interrogations" should be to prevent the investigating authorities from inappropriate custodial interrogations that could block a suspect from exercising his or her right to remain silent. Providing a remedy after a suspect's rights have been violated would be a secondary objective. Obviously, it would be better to prevent any infringement than to remedy a violation of a suspect's human rights after those rights have been infringed. In order to show that the aim of the revised CCP was to legitimise custodial interrogations, the investigating authorities' obligation to audio/video record

42 *Ibid.,* Art. 9.

43 Hōsei Shingi-kai, Shinjidai no keiji shihō seido tokubetsu bukai [Legislative Council, Special Section on the New Era of the Criminal Justice System], *Jidai ni sokushita aratana keiji shihō seido no arikata ni tsuite* [New Criminal Justice System Suitable to the Era], Minutes of Special Section on the New Era of the Criminal Justice System], 18 January 2013, at *http://www.moj.go.jp/content/000108753.pdf*.

interrogations should have been inserted immediately following Article 198, which contains stipulations for interrogations, rather than being included as a way to establish the voluntary nature of a confession.[44]

Thirdly, the criminal justice reform confirmed the legal obligation to endure custodial interrogations as well as the court practice regarding the establishment of the voluntary nature of confessions. Some members mentioned the legal obligation to endure interrogations at the legislative council, but this was easily removed from the issues to be examined. The courts had generally been inclined to accept that confessions were made voluntarily even when they were obtained after extremely prolonged interrogations,[45] and this court practice has remained unchanged. Given that the amended CCP accepts this court practice regarding the establishment of the voluntary nature of a confession, it is doubtful that the revised CCP could prevent prolonged and persistent interrogations, although it would curb abusive and coercive interrogations – which current court practice already sees as illegal. Nevertheless, even prolonged and persistent interrogations can psychologically exhaust suspects, making it impossible for them to exercise their right to remain silent. In consideration of the aim of improving the excessive reliance on custodial interrogations, the CCP should be amended in a way that restricts interrogations that could hinder the effective exercise of suspects' rights.

Looking at these features, the revised CCP could be seen as failing to achieve its original aim, namely the implementation of fair and proper custodial interrogations. Why did the criminal justice reform fail to realise its initial aim? In looking behind this question, it is important to identify established practice and the Supreme Court's view on the legal obligation to endure interrogation.

2. Arguments over the Legal Obligation to Endure Custodial Interrogation

There has been a huge gap that can never be bridged between investigative practice, which accepts that a suspect is obliged to endure custodial interrogation, and the academic view, which has rejected this for decades. The investigating authorities insist that arrested or detained suspects in the pre-indictment stage cannot refuse to appear in an interview room if the authorities ask them to do so and that they cannot leave that room without permission. Their argument has its basis in the wording of the CCP. Article 198(1) of the CCP provides as follows:

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44 KAWASAKI/MISHIMA/FUCHINO, *supra* note 9, 124–125.

45 The Supreme Court has accepted confessions as voluntary even when they were made after all-night interrogations. Supreme Court, 4 July 1989, Keishū 43, 581.

Article 198(1) CCP

Japanese	*English*
検察官、検察事務官又は司法警察職員は、犯罪の捜査をするについて必要があるときは、被疑者の出頭を求め、これを取り調べることができる。但し、被疑者は、逮捕又は勾留されている場合を除いては、出頭を拒み、又は出頭後、何時でも退去することができる。	A public prosecutor, public prosecutor's assistant officer or judicial police official may ask any suspect to appear in their offices and interrogate him/her if it is necessary for the crime investigation. However, the suspect may refuse to appear or leave the offices at any time after the appearance, *unless being arrested or detained.*

The wording of this provision can be interpreted to mean that arrested or detained suspects are not allowed to refuse to appear in interview rooms or to leave them, such that they have a legal obligation to endure a custodial interrogation. Investigative practice takes this view. The factual background supporting this view is that custodial interrogations are quite useful and are necessary to ascertain the truth in a criminal case.[46]

On the other hand, scholars argue that an arrested or detained suspect should not be legally obliged to stay in an interview room, as this infringes his or her right to remain silent. The CCP guarantees a suspect the right to remain silent from the beginning to the end of the interview.[47] This right is derived from Article 38 of the Constitution, which provides for the privilege against self-incrimination. The obligation to endure an interrogation would be almost the same as compelling the suspect to speak, which violates the right to remain silent. Meanwhile, this view of certain scholars has been criticised as it makes it difficult to give the wording of Article 198(1) a reasonable interpretation. Emphasising the importance of custodial interrogations in ascertaining the truth, as well as the wording of the CCP, the investigating authorities have turned a deaf ear to scholars' criticisms.

In these circumstances, Mitsui proposed improving the "transparency of custodial interrogations", with the aim of bridging the gap between investigating authorities and scholars. He proposed that the legal obligation to attend an interrogation could be tolerated so long as some safeguarding measures were introduced, such as the presence of a lawyer during the interrogation and mandatory audio/video recording. If the court had agreed that there was no such legal obligation unless adequate safeguards were provided, as Mitsui proposed, the present criminal justice reform would

46 R. INADA, *Migara kōsokuchū no higi-sha torisirabe no hōteki seikaku ni tsuite* [Legal Nature of Custodial Interrogation], Hōsei Riron 45 (2013) 230.

47 Art. 198(2) CCP.

have gone further towards achieving fair and proper custodial interrogations. However, in reality, the court did not support the scholars' view.

3. Supreme Court's View

The Supreme Court rendered a significant judgment on the legal obligation to attend interrogations on 24 March 1999.[48] It affirmed that there was such a legal obligation, stating:

> "It would be obvious that imposing the legal obligation on suspects in custody to appear at the offices for interviews and to stay there does not necessarily mean compelling them to make statements against their will."

The Court further explained that safeguards protecting a suspect's right to remain silent are a matter for legislative policy. It stated:

> "The safeguards needed to effectively guarantee the privilege against self-incrimination, as quaranteed by Article 38(1) of Constitution, are basically a question of legislative policy", and "Article 38(1) – the privilege against self-incrimination – does not always lead to protection of the confidential communications between defence counsel and suspects in custody."

Article 38(1) of Constitution provides that "No person shall be compelled to testify against himself". In accordance with this provision, the CCP provides that any person may refuse to give testimony if such testimony may result in his or her criminal prosecution or conviction,[49] and it also guarantees the right of suspects or defendants to remain silent. The Supreme Court finds, however, that Article 38(1) does not further require a lawyer to be present during custodial interrogations. It believes that the safeguards for protecting the right to remain silent should be a matter for legislative policy, and not a human-rights or constitutional issue. The Supreme Court's view is substantially different from that of the European Court of Human Rights. Taking into consideration the vulnerable position of an accused in custody, the European Court underlines the significant role of legal assistance. It stated that "this particular vulnerability can only be properly compensated for by the assistance of a lawyer whose task it is, among other things, to help to ensure respect of the right of an accused not to incriminate himself".[50]

Unlike the European Court of Human Rights, the Supreme Court sees the issue as one of legislative policy, as noted above, and this makes it theoretically possible for the investigating authorities to oppose both the

48 Supreme Court, 24 March 1999, Minshū 53, 514 [the subsequent translations are by the author].

49 Art. 146 CCP.

50 *Salduz v Turkey, supra* note 35, para. 54.

presence of a lawyer during interrogations as well as mandatory audio/video recordings, emphasising the significant role that custodial interrogations play in Japanese criminal justice. After the unprecedented scandal regarding the public prosecutor who fabricated evidence, the introduction of mandatory audio/video recording seemed politically unavoidable. Nevertheless, the investigating authorities were successful when they tried to resist reform and limit the scope of mandatory recordings. In the end, the present criminal justice reform failed to achieve international human rights standards in Japan, leaving the revised CCP as the product of a compromise with the investigating authorities. Although the main factor obstructing the reform was the strong opposition from the investigating authorities, it was established practice and the Supreme Court's view that enabled them to succeed in their opposition.

As the revised CCP has remained, and the problems of custodial interrogations are unchanged, the introduction of mandatory audio/video recording has created a new risk of wrongful convictions. In the following part, a new issue – the evidentiary use of video-recorded interrogations – is examined.

V. Evidentiary Use of Video-Recorded Interrogations

The revised CCP requires the public prosecutor to present audio/video records of custodial interrogations to establish the voluntary nature of confessions,[51] but it does not specify whether or not the audio/video records can themselves be used to prove criminal offences. At the legislative council, one of the members argued that audio/video records of custodial interrogations could be used without any problem under the current law in order to prove a criminal offence, and not just to prove that a confession was made voluntarily. Nevertheless, some scholars have expressed deep concern about using audio/video records of confessions without any restriction.[52] Can lay judges adequately evaluate video records where suspects "sincerely confess" with gestures? Innocent people cannot imagine that they will receive a guilty sentence. Their utmost concern is to break free from the rigid inquiries of the police staff. To obtain relief from this pain, they sometimes make confessions with gestures, as if they really had committed the crime, in the belief that the court will understand what they are saying. Because of the impact of video records, lay judges can make erroneous findings, which may lead to another risk of wrongful convictions. In the *Imaichi* case, such concerns became reality.

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51 Art. 301-1 CCP.

52 Kawasaki / Mishima / Fuchino, *supra* note 9, 200–202.

1. Imaichi Case[53]

On 8 April 2016, the Utsunomiya District Court pronounced a life sentence on a defendant for murdering a girl. The defendant insisted he was innocent. He had first been arrested and indicted for having fake designer goods. Even after this indictment, the investigating authority continued to interrogate him about the murder case, taking advantage of his post-indictment detention. This continued for three-and-a-half months. He did not have any obligation to endure the interrogation, as he had not been arrested for murder at that time. The investigating authority, however, interrogated him under the pretence that he was "voluntarily" cooperating with the investigation. While some of the prosecutor's interrogations were video-recorded, the police interrogations were not recorded at all. This case was heard before the revised CCP came into force, though the investigating authority does not have an obligation to audio/video record interrogations even under the amended law if the suspect "voluntarily" cooperates with the interrogation, as happened in the *Imaichi* case. The defendant insisted in court that the interrogators had slapped him and hit his forehead into the wall when he had denied the murder. He also stated that the interrogators had compelled him to say "I'm sorry for killing her" more than fifty times. Nevertheless, these interrogations were not video-recorded. After the interrogations lasting for three-and-a-half months, he finally confessed to the murder. The investigating authority then arrested him and started video recording all the interrogations, but the scene in which he confessed to his alleged crime for the first time, before the arrest, was not recorded.[54]

The defence counsel contested the admissibility of the confession in court, arguing that the defendant had not made his confession voluntarily. Following the objection, the prosecutor requested the court to play the video recording of 81 hours of interrogation, including the confession that had been recorded, in order to establish the criminal offence and the voluntary nature of the confession. As the defence counsel agreed with the request on the condition that the recording should be played only to establish the voluntary nature of the confession, the court accepted a seven-hour video as evidence after the two parties edited and shortened the full recording.

The Utsunomiya District Court sentenced the defendant to life, accepting the voluntary nature and credibility of his confession. In the *Imaichi* case,

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53 Utsunomiya District Court, 8 April 2016, Hanrei Jihō 2313, 126. The Tōkyō High Court overturned the ruling, as is described below, but it again handed down a life sentence.

54 S. KOIKE, *Kashika wa bengo o dō kaeruka* [How will transparency change criminal defence?], in: Murai/Kaido (eds.), *Kashika tōchō shihō torihiki o tou* [Questioning Transparency, Wire-tapping and Plea Bargaining] (Tōkyō 2017) 56.

there was very little objective evidence, and the court felt it had no choice but to state that the objective evidence was not enough to establish guilt; it would not have been able to announce a guilty verdict without the defendant's confession. The definitive evidence that established his guilt was the video recording of the confession. In a press interview after the judgment, one of the lay judges stated, "I could not make a decision without the video", and "I could see his gestures and facial expressions very well, and I reached the judgment based largely on such videos". The confession contradicted the objective evidence in many respects, but it was revealed that the judges convicted him on the basis of the video recordings. In the video recording played in court, there was a scene where the defendant shouted "I can't take it any more" and rushed towards a window after harsh interrogation by the prosecutor. The defence counsel argued that he was making a suicide attempt and criticised the prosecutor for continuing the forceful interrogation. The court, however, did not perceive any compulsion to confess, regardless of this shocking scene.[55] Even where people watch the same movie, they may take away different impressions. The impact of the video in which he confessed to the offence could have strongly influenced those who watched it, and it could have affected the way in which they examined other evidence inconsistent with the confession. Many scholars have expressed their concern about the method adopted by the court to determine the facts. In particular, they are concerned that judges might put too much emphasis on confessions because of the strong impact of video recordings. The impact of a video could mislead judges, effectively shutting their eyes to objective evidence.[56]

2. *New Concern over Video Recording: How Should Defence Counsel Protect Defendants' Rights?*

The concerns revealed by the *Imaichi* case can be divided into two aspects. One is that the revised CCP will not end the "endless arguments" over whether confessions are made voluntarily. Since the revised CCP removes interrogations conducted when suspects have not been arrested from the scope of mandatory audio/video recording, the investigating authorities do not have a legal obligation to audio/video record the whole process of an interrogation, particularly when suspects are interrogated for a long period without being arrested and then finally confess after a fierce interrogation.

55 F. IGARASHI, *Imaichi hanketsu de mieta aratana enzai genin = "torishirabe no kashika" to dō tatakau ka* [A New Cause of Wrongful Convictions Seen from Imaichi Judgment: How Can We Fight against Transparency of Interrogations?], Kikan Keiji Bengo 87 (2016) 159, 161–162.

56 KAWASAKI/MISHIMA/FUCHINO, *supra* note 9, 198–199.

Even if the scene in which they make their confession is electronically recorded, the suspicion that it is a forced confession cannot be dispelled unless the whole interrogation process is recorded, including the interrogations conducted before arrest or detention. Retracting a confession requires great courage once a suspect has confessed. Some suspects cannot reverse their confession and stick to it even after video recording starts, despite the confession having been forced and wrongful. Therefore, "endless arguments" will continue in court about whether or not the interrogators forced the defendant to confess before they made the arrest.

The other issue that the *Imaichi* case reveals is the impact of video records. This issue was not clearly recognised by the members of the legislative council. One of the members stated that "the evidential use of video records of interrogations was discussed at an earlier stage"; the member then went on to say "but such evidence had already been used in some criminal cases. It became a dominant view that the video records can theoretically be used as evidence to establish criminal offences, which ends the discussion on this issue".[57] Nonetheless, it would be difficult for judges to observe video records of confessions through impartial eyes where lawyers are not allowed to attend the interrogations and where long custodial interrogations – over as many as 23 days – are prevalent. The judges will have the vicarious experience of interrogating the suspect when they watch the video recording, which can mislead them and turn their eyes away from the facts.

After the district court's decision in the *Imaichi* case, there were court rulings that showed careful attitudes being taken towards the use of videos of interrogations as evidence. On 10 August 2016, in a different case, the Tokyo High Court followed the lower court's judgment and rejected the use of video images of interrogations. It stated that the court would have received a strong impression from watching the defendant's attitude as it appeared in the video, and that this could negatively influence a cautious evaluation of the credibility of the confession.[58] Subsequently, as to the *Imaichi* case, the High Court overruled the lower court's judgment, stating that the earlier ruling was illegal because the court had directly judged the credibility of the confession on the basis of the defendant's attitude toward the interrogators as shown in the video. The High Court emphasised the danger of an "intuitive judgment based on impression" left by the video images, and it criticised the district court ruling for not considering the possibility that the accused might have been making things up in his state-

57 *Ibid*., 200.

58 Tōkyō High Court, 10 August 2016, Hanrei Taimuzu 1429, 132.

ment. At the same time, the High Court found him guilty of killing the girl – citing circumstantial evidence – and upheld the life sentence.[59]

How, then, can defence counsel respond to the evidential use of video-recorded interrogations? Before examining this issue, it is important to confirm when the evidential use of such videos can be discussed in court. The public prosecutor may only request that the videos be shown in court when the suspect has given an oral or written statement in the interrogation and this statement is inconsistent with their arguments in court. The priority issue for defence counsel is, therefore, to avoid such situations. Suspects can fully exercise their right to remain silent when custodial interrogations are video-recorded. Defence counsel are required to advise and encourage them to remain silent in cases in which they deny the allegations. Nevertheless, it is possible that a suspect will give a statement despite these efforts, and the public prosecutor could then request that the video be shown. In such a case, some scholars argue that the defence counsel can contend that it is not necessary to show the videos in court.[60] The revised CCP requires the public prosecutor to present video records of interrogations, but it does not oblige the court to investigate all the videos absent a consideration of whether this is necessary. Reviewing the high court decisions above, it can be seen that the number of cases that truly require a video to establish the voluntary nature of a confession or the defendant's guilt would be few. It is the responsibility of defence counsel to avoid the unlimited use of video records in court so that the court can adequately and impartially judge the credibility of the statements.

VI. Conclusion

The introduction of mandatory audio/video recordings would undeniably be a historical step forwards, even if these are partial recordings. However, the amended CCP falls far short of the ideal in that the scope of mandatory recording is limited (it applies in only 3% of all court cases) and broad exceptions are tolerated. In the background of the legislative debate there was strong opposition from the investigating authorities, as buttressed by both established practice that relies heavily on custodial interrogations and the Supreme Court's view supporting this practice. The barrier to the do-

59 Tōkyō High Court, 3 August 2018, Hanrei Jihō 2389 (2019) 3. "Interrogation videos as evidence", Japan Times, 18 August 2018. For the text, please see the following website; *https://www.japantimes.co.jp/opinion/2018/08/18/editorials/interrogation-videos-evidence/#.XaFRtEl7ljo*.

60 S. Oka, *Torisirabe no rokuon rokuga kiroku baitai no shōko riyō* [Evidential Use of Audio/Video Records of Interrogations], Kikan Keiji Bengo 91 (2017) 48.

mestic implementation of international human rights standards is another issue. Japan has not ratified any optional protocols to the UN human rights treaties, and it does not have any national human rights institutions. As there is no chance that Japanese court judgments will be reviewed by UN treaty bodies, the courts are not familiar with international human rights law and scarcely take such law into consideration when they interpret the domestic law.[61] Accordingly, it is not easy to implement international human rights standards domestically. With regards to measures to safeguard the accused's right to remain silent, in particular, the Supreme Court has already expressed its view that such measures should flow from legislative policy and that they are not human rights issues. It would be far from easy for members of the legislative council to include in the amended law a requirement for a lawyer to be present during interrogations – which would comply with international human rights standards – when this would be contrary to a past Supreme Court judgment. In the *Imaichi* case, the risk of video-recording interrogations without removing the essential flaws inherent in the Japanese investigation method – a heavy reliance on interrogations and a refusal to allow lawyers to be present – was realised.

Nevertheless, it is not only the present criminal justice reform that produces problems: all the criminal justice reforms thus far undertaken by Japan have various flaws. Civil society needs to take a step forwards to ensure there are further reforms. The JFBA has already declared its aim to push forward with a civil movement for the presence of lawyers during custodial interrogations by adopting a resolution entitled "Opinion Calling for the Establishment by Law of the Right to Have Counsel Present in Interrogations".[62] It is not just movements like this towards criminal justice reform but also the efforts of individual defence counsel that is significant. Given that the established practice – an excessive dependence on custodial interrogations – was one of the reasons why the present criminal justice reform failed to match the international human rights standards, defence counsel need to continue to challenge this practice. To break down the heavy reliance on interrogations, defence counsel can advise and encourage suspects to exercise their right to remain silent. These efforts by defence counsel would

61 NICHIBEN-REN [JFBA], *Kojin tsūhō seido no dōnyū to kokunai jinken kikan no setchi wo motomeru ketsugi* [Resolution Requesting the Implementation of an Individual Complaints Procedure and the Establishment of a National Human Rights Institution] (2019), at *https://www.nichibenren.or.jp/activity/document/civil_liberties/year/2019/2019_2.html*. For the text of the resolution in English see *https://www.nichibenren.or.jp/en/document/statements/2019_2.html*.

62 NICHIBEN-REN [JFBA], Opinion Calling for the Establishment by Law of the Right to Have Counsel Present in Interrogations (summary) (2018), at *https://www.nichibenren.or.jp/en/document/opinionpapers/20180413.html*.

eventually establish an investigative practice that does not depend on custodial interrogations. Additionally, defence counsel should repeatedly ask public prosecutors and the police to allow them to attend interrogations. Currently, such requests have often been rejected, even where the suspect is voluntarily cooperating with the interrogation and has not been arrested or detained. There have, however, been some cases reported in which lawyers have been able to attend interrogations after negotiations with the police.[63] Accumulating successful cases would change the current practice and finally pave the way towards further reforms. The revised CCP obliges the investigating authorities to make audio/video recordings of interrogations in certain cases, and they are encouraged to do so in cases outside this scope as long as it is necessary.[64] Audio/video recording would prevent harsh and forceful interrogations, and it would make it easier for the accused to exercise their rights. In this regard, the revised CCP provides us with an important clue for improving current practice. It would not be too much to say that whether or not the Japanese custodial interrogation reforms move forward is in the hands of individual defence counsel.

SUMMARY

The National Diet passed a bill on the reform of the criminal justice system on 24 May 2016 to revise the Code of Criminal Procedure (CCP) and other laws. This reform covered various issues, including expanding the evidence to be disclosed and the number of crimes subject to wiretapping, but, most importantly, it addressed the mandatory audio/video recording of interrogations. This criminal justice reform could have resolved the structural issues inherent in the Japanese criminal system, but it did not go far enough. Mandatory audio/video recording may help to prevent interrogators from using violence against suspects, but it applies in only a small percentage of all criminal cases. The revised CCP does not require a lawyer to be present during interrogations, and the Japanese investigating authorities still rely excessively on custodial interrogations. Additionally, some scholars are concerned that if there are no restrictions on the use of video-recorded confessions as evidence, this might

63 NICHIBEN-REN [JFBA], *Torishirabe no tachiai ga keiji shihō o kaeru: Bengonin no enjo o ukeru kenri no kakuritsu o* [Lawyers' presence at interrogations will change criminal justice: Towards establishment of the right to legal assistance by defence counsel] (Tōkyō 2019) 98–104.

64 Additional resolution to a bill for partial amendments to the Code of Criminal Procedures, *Kaku-hō* No. 42, 189th Session of the National Diet (2015).

create a new risk of wrongful convictions because of the impact of such recordings. Is the criminal justice reform compatible with international human rights standards? In other words, can the revised CCP provide hope for the reform of custodial interrogation? This article examines the revised CCP in relation to international human rights standards, focusing especially on the mandatory audio/video recording of custodial interrogations.

ZUSAMMENFASSUNG

Am 24. Mai 2016 verabschiedete das Parlament ein Gesetz zur Reform des Strafjustizwesens, das unter anderem das Strafprozessgesetz änderte. Die Reform betrifft verschiedene Aspekte, darunter eine Erweiterung der offenzulegenden Beweise und die Anzahl der Straftaten, in deren Zusammenhang abgehört werden kann, sowie insbesondere die obligatorische Audio-/Videoaufzeichnung von Verhören.

Diese Strafjustizreform hätte die dem japanischen Strafrechtssystem innewohnenden strukturellen Probleme lösen können, ging dafür aber nicht weit genug. Verpflichtende Audio-/Videoaufzeichnungen können dazu beitragen, Vernehmungsbeamte und -beamtinnen daran zu hindern, Gewalt gegenüber Verdächtigen anzuwenden. Die Verpflichtung betrifft jedoch nur einen kleinen Prozentsatz aller Straf- und Ermittlungsverfahren. Das geänderte Strafprozessgesetz verlangt (auch) nicht die Anwesenheit eines Rechtsanwalts oder einer Rechtsanwältin während der Verhöre, sodass die japanischen Ermittlungsbehörden sich nach wie vor zu sehr auf Verhöre in der Untersuchungshaft verlassen. Zudem sind einige Wissenschaftler und Wissenschaftlerinnen besorgt, dass ohne Beschränkungen für die Verwendung von aufgenommenen Geständnissen als Beweismittel diese Aufzeichnungen wegen der Wirkung, die sie insbesondere auf das Gericht haben können, ein neues Risiko ungerechtfertigter Verurteilungen mit sich bringen könnten. Ist die Strafjustizreform mit internationalen Menschenrechtsstandards vereinbar? Oder, anders ausgedrückt, kann das geänderte Strafprozessgesetz Anlass zur Hoffnung geben, dass Verhöre in der Haft reformiert werden? Der Beitrag untersucht das geänderte Strafprozessgesetz in Bezug auf internationale Menschenrechtsstandards und konzentriert sich dabei insbesondere auf die obligatorische Audio-/Videoaufzeichnung von Vernehmungen in Untersuchungshaft.

(Die Redaktion)