

COMPARATIVE ANALYSIS OF CERTAIN CRIMINAL PROCEDURE TOPICS IN ISLAMIC, ASIAN, AND COMMON LAW SYSTEMS

Angela Tang

INTRODUCTION

This paper will analyze two criminal procedure topics in Islamic, Asian, and Common Law systems. The criminal procedure aspects of a legal system are particularly interesting from a legal justice standpoint. In the United States, the Innocence Project has gained recognition for its efforts in exonerating wrongly-convicted persons. The Project has been able to prove exonorees' innocence through a variety of ways, often through DNA analysis that was not available at the time of the defendant's trial. As a result of these exonerations, law scholars have identified the mistakes that lead to wrongful convictions. Armed with the knowledge of how wrongful convictions arise, actors in the legal justice system can institute reforms to reduce the likelihood of wrongful convictions. The paper will generally describe the legal systems' criminal procedure aspects and will focus on the right against self-incrimination and the right to counsel.

ISLAMIC LEGAL SYSTEM

Foundations

The Islamic legal system, known as *Shari'ah* law, has its foundations in the *Qur'an*, the holy book of Islam, and in the *Sunnah*, the tales of the Prophet Muhammad.¹ The *Qur'an* is believed to be the "actual word of Allah."² During the lifetime of the Prophet, Allah "revealed" the *Qur'an* to Muhammad.³ Although Muhammad was illiterate, he relayed the verses of the *Qur'an* to his followers, who recorded the book in Arabic.⁴ The *Qur'an* is not a "code of law."⁵ The *Qur'an* covers topics as broad as "moral and religious themes," "history of the bygone events,"

¹ See Irshad Abdal-Haqq, *Islamic Law: An Overview of Its Origin and Elements*, in UNDERSTANDING ISLAMIC LAW 1, 4 (Hisham M. Ramadan ed., 2006).

² *Id.* at 11.

³ *Id.*

⁴ *Id.*

⁵ MOHAMMAD HASHIM KAMALI, *SHARI'AH LAW* 19 (2008).

“devotional matters,” and certain legal issues ranging from marriage, commercial transactions, and crime and punishment.⁶ Legal verses account for only 140 verses of a total 6235 verses in the *Qur’an*.⁷ The legal *Qur’anic* verses “expound general principles, without encumbering them with specific details.”⁸ The *Sunnah* “elaborate” on the “general principles” contained in the *Qur’an*.⁹

Sunnah are stories of the words the Prophet said, actions the Prophet took, and actions the Prophet tacitly approved by abstaining from condemnation when he could have acted.¹⁰ The *Sunnah* are reported in works known as *Hadith*, “verbalized accounts” of Muhammad “as reported by his contemporary followers” that were later “reduced to writing.”¹¹ Some *Hadith* are of dubious authenticity.¹² The “most highly regarded” *Hadith*, Al-Bukhari and Muslim, have reliable chains of transmission of the Prophet’s deeds from the Prophet’s contemporaries, all the way through the person who recorded the Prophet’s *Sunnah*.¹³ *Sunnah* “stand on the same footing” with the *Qur’an* as a source of *Shari’ah* law.¹⁴ The *Qur’an* demands this result by requiring Muslims to “submit ... without question” to Muhammad’s “judgment” and “authority.”¹⁵

Thus, the *Qur’an* is the foundation of *Shari’ah* law, as supplemented and elucidated by the equally authoritative mandates of the *Sunnah*. Together, the *Qur’an* and *Sunnah* provide clear guidance on “the fundamentals of Islam,” such as “moral values ... practical duties ... and other

⁶ *Id.*

⁷ *Id.*

⁸ *Id.* at 22.

⁹ *Id.* at 21.

¹⁰ Abdal-Haqq, *supra* note 1, at 4.

¹¹ *Id.* at 12.

¹² *Id.* at 13.

¹³ *Id.* at 13-14.

¹⁴ HASHIM KAMALI, *supra* note 5, at 23.

¹⁵ *Id.* at 24.

devotional matters.”¹⁶ In the area of criminal law, however, the *Qur’an* and *Sunnah* are “generally flexible” and proscribe only a few specific offenses, known as *hudud*.¹⁷ How then can *Shari’ah* law be applied to modern criminal problems that were not foreseen by God or the Prophet? *Shari’ah* is supplemented by “human understanding and knowledge,” or *fiqh*, which is “derived from ... detailed evidence” in the *Qur’an* and the *Sunnah*.¹⁸ *Fiqh* that are the product of human reason, or *ijtihad*,—as opposed to directly commanded by the *Qur’an* or *Sunnah*—are of secondary authority because they are subject to the fallibility of human reason.¹⁹ Only a qualified scholar, or *mujtahid*, able to read the *Qur’an* in Arabic, may practice *ijtihad*.²⁰ *Ijtihad* that enjoys the support of the “general consensus” of scholars, or *ijma*, becomes binding *Shari’ah* law.²¹

Within *Shari’ah* law, scholars have divided over the continued use of *ijtihad* to deduce new rules from the *Qur’an* and the *Sunnah*.²² Jurists in the tenth century C.E. refrained from practicing *ijtihad*, relying only on prior *ijma* decided by earlier scholars.²³ Advocates of “closing the door” were conservatives who believed that ending *ijtihad* would protect Islam against changes they believed would “threaten[]” Islam.²⁴ By 1258 C.E., some schools of Islam formally “closed the door” to further practice of *ijtihad*.²⁵ Abdal-Haqq analogizes this “closing of the door” to a situation in which American judges were to rely solely on *stare decisis* to decide cases, could not

¹⁶ *Id.* at 41.

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *Id.* at 42.

²⁰ *Id.* at 41-42.

²¹ *Id.* at 42.

²² See Abdal-Haqq, *supra* note 1, at 20.

²³ *Id.*

²⁴ *Id.* at 21.

²⁵ *Id.* at 21; Hashim Kamali writes that the year 1500 marked the decline of *ijtihad*. HASHIM KAMALI, *supra* note 5, at 169.

look directly to the law to make their own analyses, and the legislatures made no new laws.²⁶ Thus, the legal system would stagnate, being tied only to the reasoning of prior scholars and unable to adapt to modern exigencies. Scholars dispute whether the door was actually “closed,” and the question of continued *ijtihad* is one of the great controversies within modern *Shari’ah* law.²⁷

As *Shari’ah* law derived from the *Qur’an* and the acts of the Prophet by way of the *Sunnah*, *Shari’ah* law is intertwined with morality.²⁸ *Shari’ah* divides its dictates into five different shades of obligation: “obligatory;” “recommended;” “reprehensible;” “permissible;” and “forbidden.”²⁹ As a legal system, however, *Shari’ah* law treats religious and moral transgression different from legal transgressions in that “only the legal rules of *Shari’ah* are justiciable.”³⁰ Only the “obligatory” and “forbidden” categories can be the subject of legal action.³¹

Shari’ah criminal law is divided in to three categories of crimes: *hudud*, *qiyas*, and *ta’zir*. *Hudud* crimes are specifically mentioned in the *Qur’an* and have “predetermined punishments.”³² *Hudud* crimes include: “adultery or fornication;” “false accusations” of adultery or fornication; apostasy; drinking alcohol; theft; “armed gangstery;” and “rebellng against the ruler.”³³ These crimes warrant strict punishments including limb amputation and death by stoning or beheading.³⁴ As the *Hudud* crimes are specifically prescribed by God in the *Qur’an*, the

²⁶ Abdal-Haqq, *supra* note 1. at 20.

²⁷ *See id.* at 21-22.

²⁸ *See* HASHIM KAMALI, *supra* note 5. at 44.

²⁹ *Id.* at 47.

³⁰ *Id.*

³¹ *Id.*

³² GEORGE N. SFEIR, MODERNIZATION OF THE LAW IN ARAB STATES 124 (1998).

³³ *Id.* Some scholars dispute whether apostasy, drinking alcohol, and attempts to overthrow the government are *hudud* crimes. There is general agreement that the other listed crimes are, in fact, *hudud*. Adel Omar Sherif, *Generalities on Criminal Procedure under Islamic Shari’a*, in CRIMINAL JUSTICE IN ISLAM, 3, 5-6 (Muhammad Abdel Haleem, et al. eds., 2003).

³⁴ SFEIR, *supra* note 32, at 124.

commission of these crimes is an offense against God and the punishment cannot be mitigated by man's mercy.³⁵ *Qiyas* crimes “justify[] retaliation for homicide or bodily harm”³⁶ and include the “homicide, manslaughter and any ... injury” to another.³⁷ The family of the *qiyas* crime victim can decide whether to exact the retributive punishment or to accept *diya*, blood money, instead.³⁸ *Ta'zir* crimes are those crimes described in the *Qur'an* that are neither *hudud* nor *qiyas*.³⁹ Hashim Kamali describes punishments for *ta'zir* crimes as being “deterrent” punishments in which judges are left broad discretion to choose the appropriate punishment.⁴⁰

Shari'ah criminal law is infused with legality. Errant judges cannot “create” offenses that are not forbidden by the *Qur'an* or the *Sunnah*.⁴¹ That which is not specifically forbidden—by *Shari'ah* or by legislation—is allowed, and judges cannot punish offenses of which the populace has had no notice.⁴² The original sources broadly describe offenses but leave the specific details of those offenses open to “human legislation” by governments.⁴³

General Criminal Procedure Aspects

Shari'ah criminal procedure seeks to satisfy “twin” goals of “due judicial process” and “effective control of crime.”⁴⁴ Criminal procedure seeks to accommodate “protections” for the “accused” while promoting society's “interest in crime detection and prevention.”⁴⁵ The system

³⁵ *Id.*

³⁶ *Id.*

³⁷ *Id.* at 125.

³⁸ *Id.* at 125.

³⁹ *Id.* at 124, 126.

⁴⁰ HASHIM KAMALI, *supra* note 5, at 191.

⁴¹ *Id.*

⁴² *Id.* at 187.

⁴³ *Id.*

⁴⁴ *Id.* at 179.

⁴⁵ *Id.*

focuses on “efficient prosecution and conviction of the guilty” while trying to “minimize the possibility of unjust ... convictions.”⁴⁶

Shari’ah law focuses on the individual as well as the good of the community.⁴⁷ “Islam pursues its social objectives through reforming the individual in the first place.”⁴⁸ “The individual is thus seen as a morally autonomous agent who plays a distinctive role in shaping the community’s sense of direction and purpose.”⁴⁹ *Shari’ah* law has a role for individual rights, but those individual rights are exercised within a system that is “primarily concerned with human relations.”⁵⁰

To serve these ends, the system is engineered for simple, “expeditious,” but just proceedings.⁵¹ The judge, rather than a prosecutor, investigates the case, even if police initiate the case.⁵²

Shari’ah law recognizes the fundamental premise of innocent until proven guilty.⁵³ In the *Qur’an*, it is written:

Why did not the believers - men and women - when ye heard of the affair, - put the best construction on it in their own minds and say, "This (charge) is an obvious lie"? Why did they not bring four witnesses to prove it? When they have not brought the witnesses, such men, in the sight of Allah, (stand forth) themselves as liars!⁵⁴

Innocence is presumed to be a “certainty” that cannot be negated by a “mere accusation,”⁵⁵ but must be proven by the government “beyond reasonable doubt,”⁵⁶ or as

⁴⁶ *Id.*

⁴⁷ *See id.* at 61.

⁴⁸ *Id.*

⁴⁹ *Id.*

⁵⁰ *Id.* at 201.

⁵¹ Adel Omar Sherif, *supra* note 34, at 3,4.

⁵² *Id.*

⁵³ HASHIM KAMALI, *supra* note 5, at 181.

⁵⁴ Qur’an 024.12-024.13 (Yusufali trans.). This verse was noted in Liaquat Ali Siddiqui, *The Conception of Justice: Western and Islamic*, in JUSTICE AND HUMAN RIGHTS IN ISLAMIC LAW 23, 38 (Gerald E. Lampe ed., 1997)

⁵⁵ HASHIM KAMALI, *supra* note 5, at 181.

⁵⁶ *Id.* at 182.

alternately described “beyond any doubt whatsoever.”⁵⁷ It is notable that hearsay evidence is completely inadmissible “in the execution of penalties.”⁵⁸ Perhaps because the *hudud* penalties are so severe, guilt must be proven by either a freely given confession or by independent non-hearsay proof.⁵⁹ Only reliable witnesses may testify, and some *hudud* crimes with capital punishment can be proven only by four witnesses.⁶⁰ “And those who launch a charge against chaste women, and produce not four witnesses ... flog them with eighty stripes; and reject their evidence ever after....”⁶¹

Judges and law enforcement officials must be impartial, because the *Qur’an* demands it.⁶² Punishments must not be excessive in comparison to the crime.⁶³ *Shari’ah* law guarantees several other rights that are viewed as necessary for a just legal system, including: exclusion of illegally-obtained evidence; right to confront accuser; right to inspect evidence against the defendant; and right to cross-examine witnesses.⁶⁴

Right Against Self-Incrimination

A defendant cannot be compelled to give a confession, and has the “right to remain silent.”⁶⁵ A coerced confession, or confession “taken under force” is not admissible.⁶⁶ A confession, once given, can be withdrawn “even after the sentence has been passed or during its execution.”⁶⁷ A valid confession cannot be given by a person who does not have “full possession

⁵⁷ Gamil Muhammed Hussein, *Basic Guarantees in the Islamic Criminal Justice System*, in *CRIMINAL JUSTICE IN ISLAM* 35,49 (Muhammad Abdel Haleem, et al. eds., 2003).

⁵⁸ HASHIM KAMALI, *supra* note 5, at 183.

⁵⁹ *Id.*

⁶⁰ MUHAMMAD IQBAL SIDDIQUI, *THE PENAL LAW OF ISLAM* 19 (2003).

⁶¹ *Qur’an* 024:004 (Yusufali trans.).

⁶² HASHIM KAMALI, *supra* note 5, at 184.

⁶³ *See id.* at 185.

⁶⁴ Adel Omar Sherif, *supra* note 33, at 8-9.

⁶⁵ Adel Omar Sherif, *supra* note 33, at 8.

⁶⁶ *Id.*

⁶⁷ HASHIM KAMALI, *supra* note 5, at 183.

of his faculties.”⁶⁸ The judge must not blindly accept an offered confession, but must verify that the defendant’s confession was not made “merely to protect another person.”⁶⁹ For a confession to be accepted, the defendant must not only admit to the category of crime, but must provide “relevant details” to support his assertion of guilt.⁷⁰

The strict requirements for acceptance of confessions stem from the concept that there is a higher justice than the justice in the courts. If the defendant is truly guilty, but his guilt may not be fairly proven in court, the defendant will still have to answer to God.⁷¹ “The hidden truth...is considered to be a matter between the individual and his Creator.”⁷²

Right to Counsel

Shari’ah law recognizes a defendant’s right to be present at trial, or at a minimum, to be “represented by an authorized person” at trial.⁷³ The accused may present a defense at trial.⁷⁴

There is no explicit right to counsel under *Shari’ah* law.⁷⁵ Before modern times, there was “no perceived need” for legal representation because “legal scholars and experts” were at the trial to “actively assist[] the judge in deciding the case.”⁷⁶ Nothing in *Shari’ah* law precludes the defendant from using legal representation, and representation is “routinely allowed.”⁷⁷ As the trial is not conducted in adversarial fashion by a prosecutor, there is no imbalance if the defendant is not represented by a lawyer. The judge has a professional and *religious* duty to impartially investigate the case, so the defendant should be able to rely on the judge’s

⁶⁸ *Id.* at 183.

⁶⁹ *Id.* at 183.

⁷⁰ *Id.* at 183.

⁷¹ *Id.* at 183-84.

⁷² *Id.*

⁷³ *Id.* at 182.

⁷⁴ *Id.*

⁷⁵ Adel Omar Sherif, *supra* note 33, at 7.

⁷⁶ *Id.*

⁷⁷ *Id.*

impartiality. It is written in the *Qur'an*, “If then they have recourse unto thee (Muhammad) judge between them or disclaim jurisdiction. If thou disclaimest jurisdiction, then they cannot harm thee at all. But if thou judgest, judge between them with equity.”⁷⁸ One writer notes that the accused has “the right to the assistance of the court” in matters of the accused person’s defense.⁷⁹

When an accused uses legal representation, the representative may not “seek to distort justice and advocate falsehood by recourse to deceitful and time-consuming methods.”⁸⁰ The *Qur'an* commands, “And be not thou a pleader for the treacherous...”⁸¹

Reasons for Criminal Procedure Protections

The *Qur'an* was revealed to the Prophet Muhammad during a period of excess and lawlessness on the Arabian Peninsula. Pre-Islam Arabic society “was generally nomadic” and tribal.⁸² There was an “ancient Arab tendency to go to excesses in retaliation and revenge.”⁸³ For example, pre-*Qur'an* Arab justice would often “double[]” penalties or “claim[] more than one life in retaliation” for the loss of one life.⁸⁴ Although some of the mandatory punishments for *hudud* crimes are viewed as barbaric by Western standards, the *Qur'anic* emphasis on impartial trials with the highest standards of reliable evidence demonstrate that the *Shari'ah* law system sought to end the brutality of the pre-*Qur'an* Arabic justice system. One writer notes that the harsh corporal punishments for the *hudud* crimes may be implemented only when “very heavy

⁷⁸ Qur'an 005.42 (Pickthal trans.).

⁷⁹ Gamil Muhammad Hussein, *Basic Guarantees in the Islamic Criminal Justice System*, in CRIMINAL JUSTICE IN ISLAM 35, 48 (Muhammad Abdel Haleem et al. eds., 2003).

⁸⁰ Mohammad Hashim Kamali, *The Right to Personal Safety (Haqq al-Amn) and the Principle of Legality in Islamic Shari'a*, in CRIMINAL JUSTICE IN ISLAM 57, 90 (Muhammad Abdel Haleem, et al. eds., 2003).

⁸¹ Qur'an 004.105 (Pickthal trans.). The Shakir translation uses “advocate” rather than “pleader.” Qur'an 004.105 (Shakir trans.).

⁸² S. H. AMIN, MIDDLE EAST LEGAL SYSTEMS 309 (1985).

⁸³ HASHIM KAMALI, *supra* note 5, at 185.

⁸⁴ *Id.* at 185.

burden of proof” requirements have been met.⁸⁵ These strict requirements for acceptance of confessions show an early concern for fair justice with strong rights for accused persons. However, with the movement against *ijtihad*, the “closing of the door,” the system has lost crucial abilities to change in response to modern times.

Modern Use of *Shari’ah* Law

Not all Islamic states directly apply *Shari’ah* law.⁸⁶ Many Arab nations have adopted legislative forms of criminal procedure, often derived from European codes, although influenced by *Shari’ah* law.⁸⁷ Among Arab nations, Saudi Arabia is one of the rare nations to directly apply *Shari’ah* law.⁸⁸

ASIAN LEGAL SYSTEM- JAPANESE LAW

Basic Features

Japanese law is a hybrid legal system. It is a civil law system with features of common law. The system features a modern constitution, adopted after World War II. Case law is a “source of law” but is not binding in the same way as in a common law system that uses *stare decisis*.⁸⁹ Codes and statutes are primary authority, but after studying those sources, lawyers consult case “commentaries” and sometimes case opinions.⁹⁰ Courts tend to follow their own prior decisions, although the Constitution Article 76(3) requires judges to be “independent in

⁸⁵ Hisham M. Ramadan, *On Islamic Punishment*, in UNDERSTANDING ISLAMIC LAW 43,49 (Hisham M. Ramadan ed., 2006). The author also notes that the punishment of cutting of a thief’s hands is administered only when the thief stole an item of a certain minimum value. *Id.*

⁸⁶ Adel Omar Sherif, *supra* note 33, at 11.

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ MERYLL DEAN, JAPANESE LEGAL SYSTEM 135 (2nd ed., 2002).

⁹⁰ *Id.* at 136.

the exercise of their conscience” and “bound only by [the] constitution and the laws.”⁹¹

However, the Code of Criminal Procedure allows an appeal when a lower court issues an opinion different from “established precedent of the Supreme Court or the High Court.”⁹²

Foundations

Asian culture has been greatly influenced by Chinese culture.⁹³ Asian law is no different.⁹⁴ Asian law is secular and not based on any particular religion.⁹⁵ The Asian legal tradition has been described as “largely informal ... though informed by great learning,” such that the rule of “secular law-makers” is limited.⁹⁶ Asian law was greatly influenced by the Chinese philosophy of Confucianism.⁹⁷ Asian religions Buddhism, Taoism, and Shintoism also influenced Asian law.⁹⁸

Colonization by the Western powers has left a “legacy of western law” throughout Asia.⁹⁹ The Western influences persist even today to “varying” degrees.”¹⁰⁰ Beginning in the late nineteenth century, Asian nations began to “westernize” their legal systems, and Japan led the way.¹⁰¹

Asian law as implemented in Japan is different from other Asian nations because of Japan’s unique history. Japan is a relatively small island nation.¹⁰² Its exposure to foreign

⁹¹ *Id.* at 136 (quoting Constitution of Japan, Art. 76(3)).

⁹² *Id.* The High Court is the court of first appeal; the Supreme court is highest court in the land, the “court of last resort with powers of constitutional review.” *Id.* at 372-73, 451.

⁹³ See H. PATRICK GLENN, LEGAL TRADITIONS OF THE WORLD 310 (3rd ed. 2007).

⁹⁴ *Id.* at 328.

⁹⁵ *Id.* at 311.

⁹⁶ *Id.*

⁹⁷ *Id.* at 304.

⁹⁸ *Id.*

⁹⁹ *Id.* at 329.

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² PHILIP L. REICHEL, COMPARATIVE CRIMINAL JUSTICE SYSTEMS 359 (4th ed. 2005).

influences was limited, by reason of geography and in later years, by design.¹⁰³ Before any foreign influence affected Japanese law, the law was a mix of “unofficial clan law” and “court law” that allowed the shaman Queen a semblance of power over the various clans.¹⁰⁴ Law was largely unwritten, and unofficial laws existed alongside official laws.¹⁰⁵

China was the first major foreign influence on Japan, from “around 300 B.C. to A.D. 500.”¹⁰⁶ Before allowing Chinese influence, Japan had less extensive contacts with Korea.¹⁰⁷ As Japan increased contact with China in 600-700 A.D., Japan decided to “transplant” China’s advanced legal system and adopted a *ritsuryo* legal system based on Chinese Code.¹⁰⁸ From the mid sixteenth century into the early seventeenth century, Japan had limited contacts with the West, first with Portuguese traders, then Spanish missionaries.¹⁰⁹ Suspicious of Western influence and motives, in the 1630s, Japan adopted a “rigid isolationist policy” that allowed contacts with only China and Holland.¹¹⁰

Japan recommenced relations with Western nations in 1853, when Commodore Perry forced Japan to allow contact with the United States.¹¹¹ In 1868, Japan abandoned its shogunate (feudal) structure of decentralized governance in favor of returning control of the government to the emperor in what is known as the “Meiji Restoration.”¹¹² The Meiji Restoration “create[d] a sovereign state out of the chaos of a feudal state.”¹¹³ From that point on, Japan looked to the

¹⁰³ *Id.* at 363.

¹⁰⁴ See Masaji Chiba, *Japan*, in *ASIAN LEGAL SYSTEMS* 82, 91 (Poh-Ling Tan ed., 1997).

¹⁰⁵ *Id.*

¹⁰⁶ REICHEL, *supra* note 102, at 363.

¹⁰⁷ Chiba, *supra* note 104, at 92.

¹⁰⁸ *Id.* at 93.

¹⁰⁹ REICHEL, *supra* note 102, at 363.

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² *Id.*

¹¹³ Dean, *supra* note 89, at 92 (quoting K. Takayanagi, *A Century of Innovation: The Development of Japanese Law 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* (A.T. Mehren ed., 1963)).

West as a source of inspiration.¹¹⁴ In relation to other Asian nations, Japan had earlier and more extensive contacts with the Western world.¹¹⁵

Japan adopted a German style system of governance because it fit well with Japan's parliamentary system headed by an emperor.¹¹⁶ Japan first adopted a German style civil code in the late nineteenth century.¹¹⁷ Frenchmen and Germans assisted in drafting the new codes.¹¹⁸ In adopting Western influenced civil law, Japan took steps to tailor the law to its needs and to integrate Japanese customary law into the new codes.¹¹⁹ For instance, in response to vigorous dissent against the original Civil Code, the Japanese re-wrote the German-inspired code to protect the patriarchal extended family.¹²⁰

The Meiji legal modernization effort culminated in completing a Criminal Code, a Constitution, Commercial, Criminal Procedure, Civil Procedure, and a Civil Code between 1880-1898.¹²¹ The Constitution established “national sovereignty, fundamental human rights, separation of powers, a representative government and state-controlled finances”¹²² while retaining the “divine authority” of the Emperor's ruling family over Japanese “subjects” who were divided into a hierarchical nobility system.¹²³ Only landowners could vote or serve in Parliament.¹²⁴ These holdovers from the shogunate feudal system provided continuity rather than radical upheaval.¹²⁵

¹¹⁴ REICHEL, *supra* note 102, at 363.

¹¹⁵ Chiba, *supra* note 104, at 100-01.

¹¹⁶ REICHEL, *supra* note 102, at 363.

¹¹⁷ GLENN, *supra* note 93, at 329.

¹¹⁸ Chiba, *supra* note 104, at 103.

¹¹⁹ *Id.*

¹²⁰ *Id.* at 106.

¹²¹ *Id.* at 99.

¹²² *Id.* at 104.

¹²³ *Id.* at 105.

¹²⁴ *Id.* at 107.

¹²⁵ *Id.* at 107.

Japan's current legal system was born from the new 1947 Constitution of Japan, developed following Japan's loss in World War II, while Japan was occupied by the Allied Forces.¹²⁶ The constitution "transplant[ed] the American common law system," eradicated the divine right of the Emperor and replaced it with a democratic system, and renounced war.¹²⁷ The new system revoked family heads' powers to control their family members, allowed women's suffrage, and eliminated the hierarchical land ownership system.¹²⁸ Instead of an extended family, hierarchical, patriarchal system, Japan became a society based on the nuclear family and individual autonomy.¹²⁹

The 1947 Constitution and its accompanying legal reforms ostensibly abolished prior unofficial family law and Tenno (emperor law) and created a single "unifying official law."¹³⁰ In reality, Japanese people retained and unofficially abode by traditional family law and Tenno law. One author describes that, although both bodies of law were officially abolished, they really resulted in only a "covert reversion to their former influence as unofficial law."¹³¹ It serves as "social" law, ordering society even though it lacks coercive force of official law.¹³² This results in Japan having relatively "little" law for such an ordered society. "It is well known that arbitration mediation or conciliation are official means of conflict management...."¹³³ Administrative agencies can "announce uniform practices" that the Japanese people willingly follow even without the practices being reduced to writing.¹³⁴ Although Japan has a civil code, it has

¹²⁶ *Id.* at 108.

¹²⁷ *Id.*

¹²⁸ *Id.* at 109.

¹²⁹ *See id.*

¹³⁰ *Id.* at 110.

¹³¹ *Id.* at 110.

¹³² *See id.* at 110-11.

¹³³ *Id.* at 111.

¹³⁴ *Id.*

relatively “few lawyers ... few judges and ... few lawsuits” compared to similarly developed civil code systems.¹³⁵

General Criminal Procedure Aspects

Criminal law was harsh, and criminal procedure was non-existent before the legal innovations of the Meiji Restoration. “The main criminal punishments were whipping, stick-beating, imprisonment, exile and death; punishments were ordered by governmental authorities in the absence of a specialised judicial institution.”¹³⁶ The 1880 Penal Code adopted during the Meiji Restoration ushered in an era of legality. The “most ‘revolutionary’” provisions were those that required “*nulle crimen, nulla poena sin lege*,” or, no crime and no punishment without law.¹³⁷ These ideas were not known in Japan prior to the 1880 Penal Code.¹³⁸ The Code also required “equality before law,” whereas Japan’s prior feudal legal system described different crimes applicable to persons of different social classes.¹³⁹ The Code also made “guilt ... personal” and reversed the prior law allowing “[c]ollective criminal responsibility and guilt by association.”¹⁴⁰ The 1880 Penal Code was developed in cooperation with French jurists.¹⁴¹ A 1907 revision of the Penal Code was based on German law; it shortened the preceding code by 166 articles, but made no drastic changes.¹⁴²

The 1880 Penal Code was accompanied by the 1880 Code of Criminal Instruction, the first criminal procedure code.¹⁴³ It largely adopted the “French semi-inquisitorial method.”¹⁴⁴

¹³⁵ GLENN, *supra* note 93, at 330.

¹³⁶ Chiba, *supra* note 104, at 93.

¹³⁷ Dean, *supra* note 113, at 96 (quoting K. Takayanagi, *A Century of Innovation: The Development of Japanese Law 1868-1961*, in *LAW IN JAPAN: THE LEGAL ORDER IN A CHANGING SOCIETY* (A.T. Mehren ed., 1963)).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ *Id.* at 96.

¹⁴² *Id.* at 98.

¹⁴³ *Id.*

¹⁴⁴ *Id.*

The Code granted for the first time the right to have a defense attorney.¹⁴⁵ The attorney did not have the same broad discretion as the prosecutor and had to cross examine witnesses “only through the judge.”¹⁴⁶ However, the defendant had no right to counsel at the “preliminary investigation.”¹⁴⁷ The trial judge did not review the case “*de novo*,” but rather merely “review[ed]” the findings of the preliminary judge’s investigation.¹⁴⁸ Thus, the lack of counsel at the preliminary investigation made the right to counsel at trial all but illusory.

The Code of Criminal Procedure of 1948, as well as the new Constitution, which contains nine articles “directly affecting criminal procedure,” established modern Japanese criminal procedure.¹⁴⁹ Anglo-American influence is strongly reflected in Japanese criminal procedure.¹⁵⁰ The new Code of Criminal Procedure entered into effect on January 1, 1949 and introduced extensive new individual rights that did not previously exist.¹⁵¹ “The purpose of this Code ... is to reveal the true facts of cases and to apply and realize criminal laws ... regulations quickly and appropriately, while ensuring the maintenance of public welfare and the guarantee of the fundamental human rights of individuals.”¹⁵² The Code contains no right to a jury trial.¹⁵³

Privilege Against Self-Incrimination

The Japanese defendant has a right to remain silent and not make an incriminating statement. A coerced confession cannot be used as evidence against the defendant. The

¹⁴⁵ *Id.* at 99.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

¹⁴⁸ *Id.*

¹⁴⁹ *Id.* at 100.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* at 124 (quoting A.C. OPPLER, LEGAL REFORM IN OCCUPIED JAPAN: A PARTICIPANT LOOKS BACK (1976)).

¹⁵² Keiji soshoho, (Japanese Code of Criminal Procedure) KEISOHO art. 1, available at http://www.cas.go.jp/jp/seisaku/hourei/data/COCP_1-2.pdf.

¹⁵³ *Id.* at 126. Japan will implement jury trials by May of 2009. The change is hoped to reduce the number of wrongful convictions and to speed the trial procedure and reduce case backlogs. Yuriko Nagano, *Japan Preps its Citizens for a New Role: Jurors*, CHRISTIAN SCI. MONITOR, Sept. 11, 2007, at 4.

Japanese Constitution states, “No person shall be compelled to testify against himself.”¹⁵⁴ The Constitution specifically indicates, “Confessions made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.”¹⁵⁵ The Code of Criminal Procedure reiterates, “Confession under compulsion, torture, threat, after unduly prolonged detention or when there is doubt about it being voluntary may not be admitted as evidence.”¹⁵⁶

Additionally, the constitution provides that defendant may not be convicted of a crime if the sole proof of guilt is the defendant’s own confession.¹⁵⁷ The Code of Criminal Procedure buttress this limitation in that, “The accused shall not be convicted when the confession, whether it was made in open court or not, is the only piece of incriminating evidence.”¹⁵⁸

Going a step further than most systems, the Japanese system does not require the defendant to testify under oath in his own defense.¹⁵⁹ The defendant may testify without danger of risking charges of perjury.¹⁶⁰ As such, the defendant is technically allowed to lie when testifying in his own defense.¹⁶¹ However, this is a dangerous path because the defendant “risks loss of his credibility when the lie is discovered.”¹⁶² In allowing testimony without oath, the defendant is not faced with the dilemma of choosing between perjury and letting the jury believe that the defendant’s failure to testify is evidence of guilt.¹⁶³

The defendant’s right to remain silent is also enshrined in the Code of Criminal Procedure. “The accused may remain silent at all times or may refuse to answer particular

¹⁵⁴ Nihonkoku Kenpo (Constitution of Japan) KENPO, art. 38 (Promulgated Nov. 3, 1946, entered into effect May 3, 1947).

¹⁵⁵ *Id.* At art. 38(2).

¹⁵⁶ KEISOHO, *supra* note 152, at art. 319(1).

¹⁵⁷ KENPO, *supra* note 154, at art. 38(3).

¹⁵⁸ KEISOHO, *supra* note 152, at art. 319(2).

¹⁵⁹ Dean, *supra* note 113, at 127.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ *Id.* Although in the American system, the defendant’s failure to testify cannot be taken to be evidence of guilt, and the jury may be instructed on that fact, no jury instruction can convince the juror to act against his own instincts if the juror is suspicious of the defendant’s failure to testify.

questions.”¹⁶⁴ Also, “When the accused makes a statement voluntarily, the presiding judge may ask the accused any necessary questions at any time,” subject to the defendant’s right to remain silent.¹⁶⁵ Via the judge, “the public prosecutor, the counsel, the codefendant or his ... counsel” may also ask the defendant questions.¹⁶⁶

Right to Counsel

The Japanese Constitution guarantees the right to counsel. Article 34 states, “No person shall be arrested or detained without ... the immediate privilege of counsel....”¹⁶⁷ Furthermore, Article 37(3) provides that “At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the state.”¹⁶⁸ As noted above, the 1880 Code of Criminal Procedure guaranteed counsel at trial, but not during the preliminary investigation in which guilt was primarily established. The post-war Code of Criminal Procedure abolished the preliminary investigation, effectively closing the loophole that undercut the right to counsel.¹⁶⁹

The Constitution only guarantees the right to counsel to a person who has been arrested or accused, and the status as an “accused” begins after “initiation of public prosecution.”¹⁷⁰ Thus, the criminal *suspect*, neither arrested nor accused, lacks a *constitutional* right to counsel.¹⁷¹ The Code of Criminal Procedure extends the right to counsel to criminal suspects.¹⁷² Article 30(1) of the Code states, “The accused or the suspect may appoint counsel at any time.”¹⁷³ A

¹⁶⁴ KEISOHO, *supra* note 152, at art. 311.

¹⁶⁵ *Id.* at art. 311(2).

¹⁶⁶ *Id.* at art. 311(3).

¹⁶⁷ KENPO, *supra* note 154, at art. 34

¹⁶⁸ *Id.* at art. 37(3).

¹⁶⁹ Dean, *supra* note 113, at 125.

¹⁷⁰ B. J. George, *Rights of the Criminally Accused*, in JAPANESE CONSTITUTIONAL LAW 289, 304 (Percy R. Luney, Jr., & Kazuyuki Takahasi eds., 1993).

¹⁷¹ *Id.*

¹⁷² *Id.*

¹⁷³ KEISOHO, *supra* note 152, at art. 30(1).

legal representative or close relative may also appoint counsel for a criminal suspect or accused.¹⁷⁴ However, this is not the right to appointed counsel if the suspect cannot afford to pay a lawyer—only indigent accused persons or arrestees, not suspects, are entitled to government-furnished counsel.¹⁷⁵ Regarding court-appointed counsel for indigents, the Code states, “When the accused is unable to appoint counsel because of indigency or other reasons, the court shall appoint counsel for the accused upon his/her request; provided, however, that this shall not apply when counsel has been appointed by a person other than the accused.”¹⁷⁶

The Code of Criminal Procedure somewhat limits the defense counsel’s access to his client when the client is a suspect and not yet an accused.¹⁷⁷ Article 39 of the Code states, “The accused or the suspect in custody may, without any official being present, have an interview with ... counsel ... upon ... request”¹⁷⁸ However, “A public prosecutor... may, when it is necessary for investigation, designate the date, place and time of the interview ... prior to the institution of prosecution; provided ... that such designation shall not unduly restrict the rights of the suspect to prepare for defense.”¹⁷⁹ One author notes that defense attorneys have complained that some police and prosecutors “abuse” this power in ways that are not “necessary for investigation,” as required by the Code.¹⁸⁰

The post-war Code of Criminal Procedure revised the procedure at trial, making the defense counsel of equal importance as the prosecutor. The old procedure was modeled on civil code trials, in which the trial judge and prosecutor had a large role in trying the case, but the

¹⁷⁴ KEISOHO, *supra* note 152, at art. 30(2).

¹⁷⁵ George, *supra* note 170, at 304.

¹⁷⁶ KEISOHO, *supra* note 152, at art. 36.

¹⁷⁷ See George, *supra* note 170, at 305.

¹⁷⁸ KEISOHO, *supra* note 152, at art. 39(1).

¹⁷⁹ *Id.* at art. 39(2).

¹⁸⁰ George, *supra* note 170, at 304.

defense attorney was a mere mouthpiece for the defendant.¹⁸¹ The trial judge's first contact with the case came from a "dossier" prepared by the prosecutor that presented the prosecution case against defendant, which "inevitably influenced [the judge] in favor of the prosecution."¹⁸² The new Code requires all evidence to be "provided by testimony or documentary evidence in the presence of the parties," normally in open court.¹⁸³ The new Code maintains some inquisitorial features of the judge.¹⁸⁴ These features include a judge's limited power to "determine ... the scope, order, and method of examination of evidence after hearing the ... suggestions of the litigants."¹⁸⁵ Additionally, the "presiding judge usually starts the examination of witnesses and is followed by the parties."¹⁸⁶ Both defense counsel and prosecutor can direct and cross-examine witnesses.¹⁸⁷

COMMON LAW SYSTEM, AS IMPLEMENT IN ENGLAND

Foundations

The Common law system was born from the Norman conquest of England in 1066.¹⁸⁸ Before the Norman conquest, England had unwritten oral law.¹⁸⁹ Britain had been briefly conquered by the Romans in the first four centuries A.D.¹⁹⁰ The Romans replaced Britain's previously oral chthonic law system with Roman law.¹⁹¹ When the Roman conquerors left England, England rejected Roman law and returned to unwritten "local custom" law.¹⁹² Different

¹⁸¹ Dean, *supra* note 113, at 125.

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.* at 126.

¹⁸⁵ *Id.* at 126.

¹⁸⁶ *Id.*

¹⁸⁷ *Id.*

¹⁸⁸ MARY ANN GLENDON ET AL., *COMPARATIVE LEGAL TRADITIONS* 268 (1985).

¹⁸⁹ *Id.* Glenn describes pre-Norman English law as "chthonic." GLENN, *supra* note 93, at 224.

¹⁹⁰ GLENDON, *supra* note 188, at 269.

¹⁹¹ *Id.*

¹⁹² *Id.*

customary law systems existed in different areas of England.¹⁹³ The disparate coverage of the law was a result of a weak central government in which the king “had little control over the country as a whole.”¹⁹⁴ Customary law was practiced in the local courts, known as “shire courts” and “hundred courts.”¹⁹⁵ Matters in shire court were decided by the sheriff; matters in hundred courts were decided by a bailiff.¹⁹⁶ The shire courts dealt with the more “serious cases which were considered to pertain to the king.”¹⁹⁷ The hundred courts heard disputes between two parties who both lived within the territorial jurisdiction of the hundred court.¹⁹⁸ This was the state of the law when William the Conqueror took control of England in 1066. The Norman conquerors did not lay down a new system of laws. They accepted “important elements of English custom, whilst imposing some of their own ideas and practices.”¹⁹⁹

William sought to strengthen central government and to “standardise the law.”²⁰⁰ The Normans heading the government spoke French, whereas their conquered English subjects spoke English.²⁰¹ The Norman conquerors were few, whereas the English subjects were many.²⁰² Having few English-speaking administrators with which to rule all of England, William established a “centralized” system of rule.²⁰³ Priests were appointed as a “kind of permanent judicial officer” because they were unique among Englishmen in that they were literate.²⁰⁴ There being a limited number of priests to cover all of the royal courts, the priest-judges needed to

¹⁹³ CATHERINE ELLIOT & FRANCES QUINN, ENGLISH LEGAL SYSTEM 9 (7th ed., 2006).

¹⁹⁴ *Id.*

¹⁹⁵ JOHN HUDSON, THE FORMATION OF THE ENGLISH COMMON LAW 34-40 (1996).

¹⁹⁶ *Id.*

¹⁹⁷ *Id.* at 39.

¹⁹⁸ *Id.* at 40.

¹⁹⁹ *Id.* at 17.

²⁰⁰ *Id.* at 9.

²⁰¹ See GLENN, *supra* note 93, at 225.

²⁰² See GLENDON, *supra* note 188, at 270.

²⁰³ *Id.*

²⁰⁴ GLENN, *supra* note 93, at 226.

quickly and efficiently dispose of cases.²⁰⁵ In order to give judicial proceedings an air of legitimacy, the judge left the decision making to “local folks,” a predecessor to modern juries.²⁰⁶ Involving the local populace also resulted in a “more efficient” process because the judge – being an outsider – knew little of the case and could rely on local persons’ knowledge of the dispute.²⁰⁷

William maintained the pre-existing shire and hundred courts.²⁰⁸ The shire and hundred courts were controlled by local barons and handled issues of local concern.²⁰⁹ The king also established royal courts, including Courts of Common Pleas.²¹⁰ These common law courts could hear cases that “did not involve a direct interest of the king.”²¹¹ Common law courts were located throughout England and began to hear cases that had previously been heard in the shires and hundreds.²¹²

The common law courts had “limited” jurisdiction because of the writ system.²¹³ A case could be heard only if the king had issued a writ allowing that type of action.²¹⁴ If the case could not be fit within a writ, it could not be heard.²¹⁵ If the claimant pleaded to the wrong writ, the claimant could not change writs.²¹⁶ In this manner, the common law had a great “emphasis on procedure.”²¹⁷ If a claimant could allege facts within an allowed writ, then the case could be referred to a jury, and the jury would make a substantive decision.²¹⁸ Thus, the writ is a procedural device that serves as the gate keeper to the jury, in whose minds the substantive

²⁰⁵ *Id.*

²⁰⁶ *Id.*

²⁰⁷ *Id.*

²⁰⁸ HUDSON, *supra* note 195, at 40.

²⁰⁹ GLENDON, *supra* note 188, at 270, 272.

²¹⁰ *Id.* at 270.

²¹¹ *Id.*

²¹² *Id.* at 271.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Id.*

²¹⁷ *Id.*

²¹⁸ GLENN, *supra* note 93, at 230.

decision is made and the substantive law was created based on the old chthonic law.²¹⁹ Over time, judges' decisions as to which facts fit within designated writs became a type of unofficial *stare decisis*.²²⁰ And juries created substantive law that “emerge[d] from the facts it had to regulate.”²²¹ People could look to prior jury outcomes and expect that if they alleged the same facts, that they would receive the same outcome.²²² “Where you could previously get to the jury, and win if they believed you, it can now be said that you are entitled as a matter of substantive law...”²²³ By the nineteenth century, substantive and procedural law became national, common all throughout England.²²⁴

In 1285, the Statute of Westminster prohibited the creation of new writs.²²⁵ In order to increase common law courts' jurisdiction to encompass new cases not specifically covered by existing writs, the court began to extend writs by logic and analogy.²²⁶ Eventually the common law courts replaced the local courts as the exclusive avenue of justice.²²⁷ And the concept of *stare decisis* was firmly established, such that each “decision of the court would represent a rule of law.”²²⁸ Due to the harsh nature of the writ system, the king began to allow equitable claims.²²⁹ The Court of Chancery was created to hear equitable claims for injunctive relief and specific

²¹⁹ *Id.* at 230, 232.

²²⁰ *Id.* at 231.

²²¹ *Id.* at 237.

²²² *Id.* at 243.

²²³ *Id.*

²²⁴ *Id.* at 246.

²²⁵ GLENDON, *supra* note 188, at 271.

²²⁶ *Id.*

²²⁷ *See id.* at 272.

²²⁸ GLENN, *supra* note 93, at 246.

²²⁹ GLENDON, *supra* note 188, at 273.

performance.²³⁰ In the nineteenth century, the “rigid” writ pleading system was abolished, and equity and common law were merged into one body of law.²³¹

General Criminal Procedure Aspects

Britain does not have a written constitution.²³² The Magna Carta, combined with the Bill of Rights of 1689, form the “foundation” of the unwritten constitution.²³³ The basis of criminal procedure is therefore statutory. The Police and Criminal Evidence Act of 1984 (PACE) governs behavior of police throughout England and Wales.²³⁴ In 2005, the “main rules on criminal procedure” were codified into the “Criminal Procedure Rules” so as to make the rules “more accessible” by putting them into one document.²³⁵ The Crown Prosecution Service was created in 1985 to conduct all prosecutions in England.²³⁶ Prior to that time, police made the decision of how and whether to prosecute crimes.²³⁷

Serious criminal cases—murder, rape, and “serious” offenses against the person—are tried in the Crown Court before a jury of twelve persons, requiring an unanimous verdict.²³⁸ Summary offenses are tried in Magistrates’ Courts in front of a panel of 3 “lay” judges “advised by a legally trained Clerk.”²³⁹ Offenses that are neither summary nor serious may be tried at either the Magistrates’ Court or the Crown Court depending on whether the defendant wishes his case to be tried before a jury.²⁴⁰

²³⁰ *Id.*

²³¹ *Id.* at 277.

²³² ELLIOT & QUINN, *supra* note 193, at 1.

²³³ GLENDON, *supra* note 188, at 275.

²³⁴ Dr. A.T.H. Smith, *England and Wales*, in CRIMINAL PROCEDURE SYSTEMS IN THE EUROPEAN COMMUNITY 73, 73-74 (Christine Van Den Wyngaert ed., 1993).

²³⁵ ELLIOT & QUINN, *supra* note 193, at 362.

²³⁶ A.T.H. Smith, *supra* note 234, at 76.

²³⁷ *Id.*

²³⁸ *Id.* at 77-79.

²³⁹ *Id.* at 77,79.

²⁴⁰ *Id.* at 79.

Right Against Self-Incrimination

The common law right against self-incrimination evolved in conjunction with the right to defense counsel.²⁴¹ In the early sixteenth century, a defendant could not use counsel, so the defendant had to advocate for himself.²⁴² “Refusing to speak would have amounted to a forfeiture of all defense.”²⁴³ This early trial conception was one in which the “accused speaks.”²⁴⁴ By the late eighteenth century, defendants were allowed defense counsel and many defendants used counsel.²⁴⁵ With a defense counsel to speak for the accused, the accused now had an opportunity to remain silent that did not previously exist.²⁴⁶ With both defense and prosecution counsel, the criminal trial evolved into an adversary system that sought to “test[] the prosecution” case rather than let the “accused speak.”²⁴⁷

In addition to the prominent role now played by defense attorneys, English law was receptive to a privilege against self-incrimination because it was a rejection of the brutal practices of the Star Chamber.²⁴⁸ In the fifteenth century, Henry VII decreed criminal judicial power to the Star Chamber.²⁴⁹ The Chamber featured an “inquisitorial” procedure and used coercive methods to “extract confessions and the names of accomplices.”²⁵⁰ The accused had to “swear an oath to answer any questions that the court might ... put to him,” and a defendant

²⁴¹ John H. Langbein, *The Privilege and Common Law Criminal Procedure: The Sixteenth to the Eighteenth Centuries*, in *THE PRIVILEGE AGAINST SELF-INCRIMINATION* 82,82 (R. H. Helmholz et al. eds., 1997).

²⁴² *See id.* at 82-83.

²⁴³ *Id.* at 83.

²⁴⁴ *Id.*

²⁴⁵ *Id.*

²⁴⁶ *Id.* at 82.

²⁴⁷ *Id.* at 83.

²⁴⁸ *See id.* at 101.

²⁴⁹ GLENDON, *supra* note 188, at 274.

²⁵⁰ *Id.*

“who refused to take that oath could be imprisoned for contempt.”²⁵¹ The Chamber was abolished during a period of civil war in the early seventeenth century.²⁵²

The final blow to compelled defendant testimony came in 1898, when England codified the privilege against self-incrimination.²⁵³ The Criminal Evidence Act required that a defendant “shall not be called as a witness” against himself.²⁵⁴

A coerced confession is inadmissible. A confession may not be admitted unless it is proved beyond a reasonable doubt that the confession was not obtained by “oppression of the person who made it.”²⁵⁵ A confession is inadmissible if it was obtained under circumstances that would render the confession “unreliable.”²⁵⁶ Even if a confession is excluded, the “fruits” of that confession, the “facts discovered as a result of the confession,” need not be suppressed.²⁵⁷ However, the prosecutor may not indicate that the resulting evidence was arrived at based on a suppressed confession.²⁵⁸

A criminal defendant may choose to remain silent during police questioning, investigation, and at trial. However, since the passage of the Criminal Justice and Public Order Act of 1994 [CJPOA],²⁵⁹ the defendant’s silence at these crucial stages may have negative consequences at trial.²⁶⁰

Section 35 of the CJPOA applies to defendants over the age of fourteen years who have no physical or mental impediment that makes it “undesirable” for the defendant to “give

²⁵¹ Langbein, *supra* note 241, at 101.

²⁵² GLENDON, *supra* note 188, at 275.

²⁵³ Henry E. Smith, *The Modern Privilege: Its Nineteenth-Century Origins*, in *The Privilege Against Self-Incrimination* 145, 179 (R. H. Helmholz, et al. eds., 1997).

²⁵⁴ *Id.*

²⁵⁵ PACE §76(2).

²⁵⁶ PACE §76(2).

²⁵⁷ PACE §76(4)(a).

²⁵⁸ PACE §76(5).

²⁵⁹ Criminal Justice and Public Order Act 1994, §35(1) (1994), *available at* http://www.opsi.gov.uk/Acts/acts1994/ukpga_19940033_en_5#pt3-pb3.

²⁶⁰ See ANDREW ASHWORTH, *THE CRIMINAL PROCESS* 96-100 (2nd ed., 1998).

evidence” at trial.²⁶¹ Section 35 states that the court or jury may “draw such inferences as appear proper from [the defendant’s] ... failure to give evidence or his refusal, without good cause, to answer any question” at trial as long as the accused was aware that he had the opportunity to give such evidence.²⁶² Section 35 does not “render the accused compellable to give evidence on his own behalf, and he shall accordingly not be guilty of contempt of court by reason of a failure to do so.”²⁶³

At trial, Section 34 allows that the court or jury may take note of defendant’s failure to speak during investigative questioning. Two periods of questioning are relevant: questioning that takes place when defendant is charged with a crime; and questioning before suspect is charged with a crime but after having been informed of the suspect’s rights.²⁶⁴ At the judge or jury’s discretion, the fact finder “may draw such inferences ... as appear proper” from defendant’s failure to mention a particular fact upon which he relied for his defense at trial.²⁶⁵ The fact finder may consider defendant’s failure to mention a “fact which in the circumstances existing at the time the accused could reasonably have been expected to mention when so questioned, charged or informed.”²⁶⁶ In any proceeding in which defendant moves for dismissal of charges, the failure to speak of relevant facts may also be taken into account.²⁶⁷

In a similar manner, CJPOA Section 36 permits the defendant’s failure to account for objects, substances, or marks, on the defendant’s person or effects at time of arrest to be held against the defendant.²⁶⁸ This provision applies to objects in defendant’s possession, in vicinity

²⁶¹ Criminal Justice and Public Order Act 1994, §35(1) (1994), *available at* http://www.opsi.gov.uk/Acts/acts1994/ukpga_19940033_en_5#pt3-pb3.

²⁶² *Id.* at §35(2).

²⁶³ *Id.* at §35(4).

²⁶⁴ *Id.* at §34(1).

²⁶⁵ *Id.* at §34(2).

²⁶⁶ *Id.* at §34(1).

²⁶⁷ *Id.* at §34(2).

²⁶⁸ *Id.* at §36(1).

of defendant at time of arrest, marks upon defendant's clothing, footwear or any objects held by defendant.²⁶⁹ The provision applies only if the arresting constable informed the defendant "in ordinary language" that he believes that the mark, object, or substance is related to the defendant's participation in the crime, and the defendant refuses or fails to answer the constable's questions about the object in question.²⁷⁰ CJPOA Section 37 allows similar inferences to be made from a defendant's failure to account for his presence at a crime.²⁷¹ The provision applies when defendant is arrested at the crime scene "at or about the time the offence for which he was arrested is alleged to have been committed."²⁷²

Although Sections 34-37 of CJPOA allow negative inferences to be drawn from defendant's silence, these inferences can be considered only in conjunction with other, more concrete evidence. The prosecutor may not bring a case, and a defendant may not be convicted, solely on the negative inference drawn from failure to speak.²⁷³ Likewise, a judge may not base a decision not to dismiss charges *solely* based on an inference drawn under these sections.²⁷⁴

The Royal Commission on Criminal Procedure recommended against undermining the defendant's right against self-incrimination and vehemently opposed the passage of CJPOA Sections 34-38.²⁷⁵ The Commission wasn't completely adverse to drawing inferences from the defendant's silence during police questioning so long as the defendant "had received full notice of the prosecution case and had declined to comment on it."²⁷⁶ The Commission did not want to allow the inference to be made, however, when the defendant was "unlikely to know what evidence the police" had against him partly because the suspect may have been "intimid[ated]" by being

²⁶⁹ *Id.* at §36(1).

²⁷⁰ *Id.* at §36(1), §36(4).

²⁷¹ *Id.* at §37(1).

²⁷² *Id.* at §37(1).

²⁷³ *Id.* at §38(3).

²⁷⁴ *Id.* at §38(4).

²⁷⁵ See ASHWORTH, *supra* note 260, at 96-100.

²⁷⁶ *Id.* at 97.

questioned at the police station.²⁷⁷ On the other side of the debate, police and prosecutors argued that the defendant's right to silence worked to "ambush' the prosecution by withholding the nature of their defence until trial ... thereby reducing the prosecution's opportunity to ... rebut it."²⁷⁸ Prosecutors and police further argued that "professional criminals" took advantage of the right to silence to "avoid conviction."²⁷⁹ Police argued that suspects and defendants did not feel intimidated during pre-trial questioning because widespread "legal aid" and "duty solicitor schemes" ensured that suspects had legal counsel to assist them during questioning and would not be overrun by coercive police interrogation methods.²⁸⁰ Having no constitutional duty to protect the right of silence, Parliament passed the CJPOA in spite of the Commission's objections. The move was billed as a victory for "law and order."²⁸¹

Right to Counsel

The use of defense counsel in common law dates to the *Leges Henrici Primi*, or laws of Henry I, written in the early twelfth century.²⁸² These laws allowed an accused to have a friend or relative speak for the accused.²⁸³ Not until the "second half of the thirteenth century," did criminal accused persons begin to use "professional" legal representatives.²⁸⁴ During medieval times, a capital crime defendant was prohibited by law from using a defense attorney.²⁸⁵ Over time, this prohibition was tempered. In the "later" Middle Ages, an attorney could "argu[e] questions of law" at trial, although counsel were seldom used.²⁸⁶ In the eighteenth century,

²⁷⁷ *Id.*

²⁷⁸ *Id.* at 98.

²⁷⁹ *Id.* at 99.

²⁸⁰ *See id.*

²⁸¹ *Id.* at 101.

²⁸² DAVID J. A. CAIRNS, *ADVOCACY AND THE MAKING OF THE ADVERSARIAL CRIMINAL TRIAL* 25 (1988).

²⁸³ *Id.* at 26.

²⁸⁴ *Id.*

²⁸⁵ *Id.* at 3.

²⁸⁶ *Id.*

counselors' role expanded to include the ability to "examine and cross-examine" witnesses.²⁸⁷

Only during the eighteenth century did defendants begin regularly using defense counsel, first in cases of murder trials, and eventually in lesser offenses.²⁸⁸ The Prisoners' Counsel Act of 1836 abolished the old limitations, allowing full use of defense counsel to include making arguments to the jury in "felony trials," evening the playing field between defendant and state because the prosecutor had always been allowed to argue to the jury.²⁸⁹

In debating the Prisoner's Counsel Act, opponents argued against allowing defense attorneys to argue to the jury because it would "only enable counsel to distort the truth with sophisticated and emotive arguments."²⁹⁰ Proponents pointed to the need for fair proceedings given the harsh penalties at stake. At the time, the death penalty was imposed for all "serious offences, and for many minor and obsolete crimes."²⁹¹ The passage of the Prisoner's Counsel Act put the defense counsel on full parity with the prosecutor and led to the development of a full-fledged adversarial trial system within the next twenty years.²⁹²

In modern procedural law, the Police and Criminal Evidence Act 1984 [PACE] allows "[a] person arrested and held in custody ... to consult a solicitor²⁹³ privately at any time" upon request.²⁹⁴ Upon request, the arrestee must be given access to a solicitor "as soon as is practicable," not to exceed a delay of 36 hours.²⁹⁵ However, if the arrestee is arrested for a

²⁸⁷ *Id.*

²⁸⁸ *See id.*

²⁸⁹ *Id.* Counsel had never been prohibited from making arguments to the jury in misdemeanor trials. *Id.*

²⁹⁰ *Id.* at 4.

²⁹¹ *Id.*

²⁹² *See id.* at 4, 163.

²⁹³ "Solicitor" and "barrister" both refer to lawyers. A criminal accused will first have a solicitor, who will then hire a barrister to represent the client at trial. ELLIOT & QUINN, *supra* note 193, at 161.

²⁹⁴ Police and Criminal Procedure Act 1984 §58(1), available at <http://www.statutelaw.gov.uk/legResults.aspx?LegType=All+Legislation&searchEnacted=0&textentMatchOnly=0&confersPower=0&blanketAmendment=0&sortAlpha=0&PageNumber=0&NavFrom=0&activeTextDocId=1871554>. The right to counsel upon arrest does not apply to terror suspects. PACE §58(12).

²⁹⁵ PACE §58(4), §58(5).

“serious ... offense,” an police superintendent ... can authorize delay up to 36 hours²⁹⁶ if immediate grant of the request would result in: harm to related evidence; “physical injury to other persons;” alerting other suspects who have yet to be arrested; or hindering recovery of property that is fruit of the subject crimes.²⁹⁷

PACE Code C provides specific implementation guidance to police. Police must notify an arrestee of the right to counsel, indicating that the solicitor’s services are “free” and “independent.”²⁹⁸ The police station “charging area” must have a poster informing arrestees of their right to counsel.²⁹⁹ Police are forbidden from “dissuading a detainee from obtaining legal advice.”³⁰⁰ If a detainee waives the right to speak to a solicitor, the police officer must ask for and, if the detainee provides a reason, note the reason on the detainee’s paperwork.³⁰¹ The Legal Aid Act of 1988 also provides for a “duty solicitor scheme[]” by which a duty solicitor is available via a “national telephone network.”³⁰²

Although a detainee is entitled to legal advice free of cost, regardless of income, the same is not true for legal representation at trial. The Access to Justice Act 1999 established the Legal Services Commission to provide state-funded legal services in both civil and criminal matters.³⁰³ The Commission’s Criminal Defence Service (CDS) provides defense attorneys for indigent defendants.³⁰⁴ The CDS provides a trial attorney subject to a “merits test” but not a means test.³⁰⁵ An attorney will be provided regardless of defendant’s financial situation if the “merits test” is met. Magistrates decide whether a defendant meets the “merits test” for

²⁹⁶ PACE §58(6).

²⁹⁷ PACE §58(8).

²⁹⁸ PACE Code C 6.1, available at [http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_\(final\).pdf?view=Binary](http://police.homeoffice.gov.uk/publications/operational-policing/2008_PACE_Code_C_(final).pdf?view=Binary).

²⁹⁹ PACE Code C 6.3.

³⁰⁰ PACE Code C 6.4.

³⁰¹ PACE Code C 6.5.

³⁰² GARY SLAPPER & DAVID KELLY, *THE ENGLISH LEGAL SYSTEM* 329 (4th ed., 1999).

³⁰³ ELLIOTT & QUINN, *supra* note 193, at 291-92.

³⁰⁴ *Id.* at 295.

³⁰⁵ *Id.* at 298.

representation.³⁰⁶ An attorney will be appointed if it is “in the interests of justice,” based on these factors: severity of the case with possibility for prison sentence or defendant losing their job; substantial questions of law are involved; defendant is unable to “follow the proceedings and explain their case” due to language or mental difficulties.³⁰⁷ This system leaves indigent defendants whose cases fail the merits test without legal representation at trial. As the trial process is adversarial,³⁰⁸ the indigent defendant with a “merit”-less case is at a significant disadvantage. However, rich defendants do not necessarily enjoy a free ride. In Crown Court cases, after conclusion of the case, the judge may require a defendant to repay “some or all” of the defense costs depending on the defendant’s financial position.³⁰⁹

COMPARATIVE ANALYSIS

The three systems analyzed have vastly different approaches to the issues of right to counsel and somewhat varying approaches to the right against self-incrimination. As *Shari’ah* law is derived from a religious text, it is not geared toward being a legal code. Thus, criminal procedure under pure *Shari’ah* law is skeletal, sketching out broad principles, but not minute details. *Shari’ah* serves the community as a whole while maintaining the rights of the individual. It seeks efficient justice but knows that if justice is not meted out in the *Shari’ah* courts, God will mete out the ultimate justice. Thus, the defendant has a right to remain silent and a compelled confession may not be admitted. Beyond these broad rights, little explication is made. Also, because the judge has a duty to God to conduct the trial according to *Shari’ah* law, the judge can be trusted to act as an advocate for the defendant in lieu of a lawyer. Lawyers are not used for the prosecution and rarely used for the defense. This is unsurprising given the purpose of *Shari’ah*

³⁰⁶ *Id.* at 296.

³⁰⁷ *Id.* at 296-97.

³⁰⁸ *Id.* at 361.

³⁰⁹ *Id.* at 298.

law to find the truth according to *Shari'ah*. The defendant need not fear malicious prosecution because the judge and police, as devout Muslims, could not commit such a sin.

The Japanese legal system is very different from *Shari'ah* law. Whereas *Shari'ah* law is tied inextricably to the past, revealed teachings, the Japanese legal system was largely born in 1947. After World War II, Japan was required to, and took advantage of the opportunity, to remake itself for the modern world. Japan's legal system is heavily influenced by American common law because Allied Forces occupied Japan in the immediate post-war period when the Constitution was being formed. As such, Japan has a modern constitution that guarantees specific legal rights. Japan's constitution is clear. It is more code-like than older constitutions, such as the United States Constitution. Being able to draw upon the experiences of the American occupiers, Japan incorporated aspects of American criminal procedure, for example, rights similar to the *Miranda* rights, directly into the constitution. The Japanese constitution therefore grants powerful rights to the criminal defendant. The constitution undeniably guarantees a right against self-incrimination and the mandatory exclusion of any coerced or involuntary confession. Additionally, the constitution guarantees the right of a criminal accused to legal counsel. Statutory law extends this right to a suspect. An accused, but not a suspect, may have counsel appointed for him if he cannot so afford the lawyer.

Britain does not have a written constitution. Thus, the rights that would otherwise be inalienable are actually changeable in English law. The right against self-incrimination evolved in a circle. Whereas first the Star Chamber relied on forced confessions, England then came to recognize an absolute right against self-incrimination, both at trial and in pre-trial questioning. Faced with a perceived problem with law and order, England legislated away some of the protection of the right against self-incrimination. Although the defendant has an absolute right to remain silent during questioning and at trial, in certain instances, the defendant's silence can

be used as evidence of guilt. Although a defendant has the absolute right to legal counsel at trial, some indigent defendants may be left without appointed counsel if their case does not pass a “merits test.” However, all persons have the right to consult a lawyer during police detention, free of charge.

The Japanese and English legal systems are left free to innovate and modify the law in a way that the *Shari’ah* law system does not allow. To the extent that the “door is closed” to *ijtihad*, no innovation is possible in *Shari’ah* law. Even considering that the “door” remains open to *ijtihad*, the *mujtahid* are left to deduce new ideas from the same finite amount of law in the *Qur’an* and the *Sunnah*. The *mujtahid* may be able to creatively interpret the *Qur’an* or *Sunnah* to apply to modern problems, but there is only so much law that can be deduced from the limited amounts of *legal* passages in the *Qur’an* or *Sunnah*. Thus, in a country that relies solely on *Shari’ah* law as the supreme law of the land, such as Saudi Arabia, there can be little or no innovation in the law. The law cannot be given greater specificity and thus cannot call for more complicated proceedings than already exist. In most nations using *Shari’ah* law, the *Shari’ah* principles are supplemented by legislative enactments, allowing greater specificity and modernization.

The English legal system, featuring an unwritten but not a written constitution, is relatively freer to scale back on criminal procedure rights. The Japanese constitution guarantees broad rights as a minimum, and legislation guarantees additional rights. The legislatively granted rights may be changed and rescinded, but the constitutional rights must be honored unless the constitution is amended.

CONCLUSION

It would be entirely too easy for a Western-educated comparatist to dismiss *Shari’ah* law as outmoded. Indeed, there is great controversy surrounding the human rights implications of

the punishments for *hudud* crimes. If the *Shari'ah* courts faithfully adhere to the spirit of *Shari'ah* law, there can be no greater guarantee of just treatment than the confidence that your judge has a *religious* duty to handle your case fairly. The relative rarity of using defense counsel may be indicative of defendants' confidence in the judges' fairness. Another positive aspect of *Shari'ah* law is the simplicity and expediency of the proceedings. So long as the benevolent, God-fearing judge obeys his duty to fairly try cases, the *Shari'ah* system is well fitted to modern times, despite being rooted in an ancient text. If, however, the judge is not fair, then the defendant is left to the mercy of the court and subject to harsh justice with very little process.

It is surprising that England has diminished the defendant's right against self-incrimination. It is also notable that England requires some indigent defendants—whose cases do not meet the merits test to justify appointed counsel—to defend themselves against a prosecutor without having had any legal training. Although the *Shari'ah* defendant will likely choose not to have a lawyer, or if they so desire one but cannot afford one, they will be not be entitled to appointed lawyer, the *Shari'ah* defendant does not face a prosecution by a trained lawyer.

The Japanese legal system is notable for its opportunity to re-invent itself in the twentieth century. It is also notable for having maintained some aspects of indigenous Japanese law, while absorbing some of the best features of Western legal systems.

Although the three legal systems evolved from drastically different beginnings, subject to drastically different conditions along the way, they all allow for an absolute right against self-incrimination and an absolute right to be defended by counsel. The systems have simply chosen to qualify the right in different ways. All systems are equally valid and have proven to be successful in their respective countries.