

# FROM GREAT WRIT TO TUNING FORK: HOW HABEAS CORPUS WAS TAMED IN JAPAN

Colin P.A. Jones\*

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## I. INTRODUCTION: WHAT IS MISSING FROM THIS PICTURE?

On March 27, 2014, Iwao Hakamada was released from the Tokyo Detention Center’s death row.<sup>1</sup> In 1966, the former professional boxer had been arrested and prosecuted for the murder of a wealthy executive and his family, as well as the arson and robbery of their home.<sup>2</sup> Hakamada was convicted in 1968 and his

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\* Professor, Doshisha University Law School. The author would like to take the opportunity to acknowledge the guidance and encouragement of Professor Setsuo Miyazawa over the years, without which this article would probably never have been written.

<sup>1</sup> Justin McCurry, *Japanese Man Freed After 45 Years on Death Row as Court Orders Retrial*, GUARDIAN (Mar. 27, 2014), <http://www.theguardian.com/world/2014/mar/27/japanese-man-freed-death-row-retrial> [<https://perma.cc/3RP4-RM9Y>].

<sup>2</sup> *Id.*

conviction affirmed by Japan's Supreme Court in 1980.<sup>3</sup> He went on to become "the world's longest-serving death row inmate."<sup>4</sup> There was just one problem: he was almost certainly innocent.

Hakamada's conviction was based primarily on his own confession as well as a pair of bloodstained pants the police insisted were his despite not fitting.<sup>5</sup> His confessions were coerced, based on "23 straight days of daily 12-hour interrogations, punctuated by threats and beatings" during which he stated he "could do nothing but crouch down on the floor trying to keep from defecating."<sup>6</sup>

In court, he recanted and of the forty-five written confessions presented as evidence by the prosecution, the bench rejected forty-four of them as not having been given freely. Fortuitously (or perhaps, "inexplicably"), the single remaining confession was found not to have been coerced and formed the principal evidence underlying his conviction, even though one of the judges who convicted him secretly thought he was innocent and ultimately quit the bench over his failure to convince his two colleagues on the three-judge panel.<sup>7</sup>

Almost immediately after his conviction was confirmed by the Supreme Court, his lawyers moved for a new trial.<sup>8</sup> This was rejected thirteen years later.<sup>9</sup> An unsuccessful round of appeals followed, and the entire process was restarted anew by the filing of a second motion for a new trial in 2008. By 2010, an alliance of Diet members was formed to advocate on his behalf. Hakamada had been a *cause celebre*, symbolizing everything that was wrong with the Japanese criminal justice system.<sup>10</sup> According to the U.N. Committee on torture, his time on death row would have constituted a form of mental torture.<sup>11</sup>

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<sup>3</sup> *Id.*

<sup>4</sup> *Id.*

<sup>5</sup> Charles Lane, *On Death Row in Japan*, HOOVER INST. POL'Y REV. (Aug. 1, 2005), <http://www.hoover.org/research/death-row-japan> [<https://perma.cc/86A6-NU52>].

<sup>6</sup> *Id.*

<sup>7</sup> *Ex-judge Denied Visit to Inmate*, JAPAN TIMES (July 3, 2007), [http://www.japantimes.co.jp/news/2007/07/03/national/ex-judge-denied-visit-to-inmate/#.V0\\_OpWB-PIV](http://www.japantimes.co.jp/news/2007/07/03/national/ex-judge-denied-visit-to-inmate/#.V0_OpWB-PIV) [<https://perma.cc/T3EM-3YVK>].

<sup>8</sup> Lane, *supra* note 5.

<sup>9</sup> *Id.*

<sup>10</sup> Chisaki Watanabe, *On Death Row and a Cause Celebre*, JAPAN TIMES (May 9, 2008), <http://www.japantimes.co.jp/news/2008/05/09/national/on-death-row-and-a-cause-celebre/#.WQjYOvmzLJA> [<https://perma.cc/BXY9-Z7XQv>].

<sup>11</sup> U.N. Comm. Against Torture (CAT), *Conclusions and Recommendations of the Committee Against Torture: Japan*, U.N. Doc. CAT/C/JPN/CO/1 (Aug. 3, 2007),

Hakamada's is not an isolated incident. *Enzai* or wrongful convictions—some for high profile murder cases, others for lesser crimes like groping women on trains—are a staple feature in the Japanese media.<sup>12</sup> The titles of high profile wrongful conviction cases are probably more familiar to most Japanese law students than the names of the Supreme Court judges.

There are a number of reasons why *enzai* cases occur, but a key piece of the puzzle is the ability of police and prosecutors to detain suspects for prolonged periods with limited access to counsel *before* a charging decision is made. Other factors, such as limited access to exculpatory evidence by the defense, make trials very pro-prosecution (to say the least), resulting in a justice system that often seems to operate at odds with seemingly clear constitutional mandates regarding criminal procedure—mandates that on their face would seem very familiar to Americans.<sup>13</sup>

One thing that does *not* feature in accounts of *enzai*, however, is habeas corpus. Japan has had a habeas corpus statute since 1948,<sup>14</sup> one that is conspicuously absent from discourse about *enzai*, not only in the context of the all-too-common accounts of prolonged coercive detentions by police, but also subsequent efforts to obtain prompt judicial relief when it becomes readily apparent that an innocent person has been convicted. As already noted, it took the Shizuoka District Court thirteen years to rule on Hakamada's motion for a new trial.<sup>15</sup> Similarly, Toshikazu Sugaya, who served seventeen years in prison for the murder of a young child based on a coerced confession and DNA evidence, was not freed through habeas corpus immediately after more advanced DNA testing confirmed his

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<http://www.refworld.org/publisher,CAT,,JPN,46cee6ac2,0.html> [https://perma.cc/3TS9-TK93] [hereinafter UNCAT Japan Report].

<sup>12</sup> See, e.g., Kazuko Ito, *Wrongful Convictions and Recent Criminal Justice Reform in Japan*, U. CINCINNATI L. REV. 1245 (2012) (discussing recent criminal justice reform in Japan and media's role). See also *SOREDEMO BOKU WA YATTENAI [I JUST DIDN'T DO IT]* (Fuji TV 2006) (Japan). The Director Masayuki Suo's stark depiction of the prolonged detention and ultimate conviction of a young man erroneously accused of groping a woman on a train was based on an actual case. See Kenji Hirano, *Film on Accused Groppers Reflects Judiciary Flaws: Lawyers*, JAPAN TIMES (July 11, 2007), <http://www.japantimes.co.jp/news/2007/07/11/national/film-on-accused-groppers-reflects-judiciary-flaws-lawyers/#.V1qIGGB-PIU> [https://perma.cc/R5W7-K268] (discussing how the film *I Just Didn't Do It* reflects actual issues with the Japanese judiciary).

<sup>13</sup> Ito, *supra* note 12.

<sup>14</sup> Jin shin hogohō [Habeas Corpus Act], Law No. 199 of 1948 (Japan) [hereinafter Habeas Corpus Act].

<sup>15</sup> Lane, *supra* note 5.

innocence. He was freed pending a new trial after the prosecutors essentially acknowledged his likely innocence—a subtle, but important difference.<sup>16</sup> In that case, it also took the court over five years to reject his motion for a new trial.<sup>17</sup>

## II. HABEAS CORPUS AS A BELLWEATHER OF COMPARATIVE LAW AND CONSTITUTIONAL DECLINE

Habeas corpus provides an excellent example of the pitfalls of comparative law. After all, it would be factually correct to say that Japan has a habeas corpus statute, the Habeas Corpus Act, which will be discussed in greater detail in the pages that follow. It would also be correct to describe this statute as providing for prompt judicial relief from unlawful detentions in contravention of constitutional principles. However, both of these technically correct statements would be widely misleading as to how habeas corpus is actually used in Japan and how one would go about obtaining judicial relief for improper detentions in the country. As this article will show, habeas corpus does play a role in the Japanese legal system, albeit an obscure, largely unheroic one that is almost completely divorced from its original intent and the text used to formulate the remedy it purports to offer.

A case can also be made that the fate of habeas corpus is indicative of the direction taken by Japan's constitution as a whole. In the Anglo-American system, habeas corpus is a remedy of constitutional, indeed, proto-constitutional significance. It is the "Great Writ" of common law jurisprudence—"the most stringent curb the ever legislation imposed on tyranny."<sup>18</sup> As a form of relief from arbitrary detention, habeas corpus predates not only the U.S. Constitution (where it is one of the scant few "human rights" provisions contained in the original charter prior to the addition of the Bill of Rights), but also the 1679 Act of Parliament that codified it into a more modern form out of the common law primordial ooze. As this Article will show, in Japan it has become something very different.

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<sup>16</sup> Setsuko Kamiya, *High Court OKs Sugaya Retrial*, JAPAN TIMES (June 24, 2009), [http://www.japantimes.co.jp/news/2009/06/24/national/high-court-oks-sugaya-retrial/#.V1Am\\_GB-PIV](http://www.japantimes.co.jp/news/2009/06/24/national/high-court-oks-sugaya-retrial/#.V1Am_GB-PIV) [https://perma.cc/JA5K-Z5GG].

<sup>17</sup> *Id.*

<sup>18</sup> 2 THOMAS MACAULAY, THE HISTORY OF ENGLAND 3 (1848).

The Japanese constitution is a long, detailed document containing some of the Anglo-American constitutional ideals reflecting its unusual, partially American provenance. The direction it has taken since its promulgation in 1947, however, is an exceptionally complex thing to track, comprised of intertwining strands of academic theory, executive branch interpretation, and judicial precedents. As a result, whether its original ideals have been given life is a difficult question to answer in general terms, seven decades later. By contrast, habeas corpus represents a single constitutional ideal whose arc in post-war Japan can be readily tracked as a single strand, independent of the morass of constitutional jurisprudence.

Although the Japanese government has in recent years devoted significant resources to translating its laws into English, the *Jinshin Hogo Hō* (Habeas Corpus Act) of 1948 is not one of them. The text of the translation promulgated in the English language version of the *kanpō*, the official gazette, is attached to the end of this article for reference.<sup>19</sup>

### III. ORIGINS

Japan's previous constitution, the Constitution of the Empire of Japan—commonly referred to as the Meiji Constitution—provided that “[n]o Japanese subject shall be arrested, detained, tried or punished, unless according to law.”<sup>20</sup> This allowed for detentions in accordance with the law, and there were ample laws and regulations on which detentions could be founded. Writing in January 1946, U.S. Army lawyer Lieutenant Colonel Milo Rowell noted that:

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<sup>19</sup> Habeas Corpus Act, *supra* note 14. Japanese laws and regulations are promulgated in the Official Gazette, and until the end of the occupation in 1952, an English version of the Official Gazette was also produced. At the time of writing, access to these records was possible through the website of the Legal Information Institute of Nagoya University, at <http://jalii.law.nagoya-u.ac.jp/project/jagasette> [<https://perma.cc/7NZE-V9JE>].

The absence of a more recent, error-free translation in the modern database may reflect a view that law is simply not important. In reality, the Act would likely be relevant to non-Japanese people seeking legal information in English, since two common scenarios for their involvement in the Japanese legal system may be (a) detention in immigration facilities and (b) child custody disputes, where habeas corpus relief was long used as a mechanism for enforcing custody orders. See discussion *infra*.

<sup>20</sup> DAI NIHON TEIKOKU KENPŌ [MEIJI KENPŌ] [MEIJI CONSTITUTION], art. 23 (Japan).

All manner of abuses have been practiced by the police and procurators in the enforcement of general law, but primarily in the enforcement of the thought control law. It is not unusual for people to be incarcerated for months and years without charges being filed, during all of which time attempts are made to force confessions from the accused. It is strongly recommended that Constitutional guarantees be required which will prevent imprisonment without charges being filed.<sup>21</sup>

As we shall see, this American view of the situation in Japan is consistent with problems identified by Japanese participants in the Diet debates over the Act's adoption.

What accounts do exist of the introduction of habeas corpus during the American occupation attribute it to a petition by a Japanese lawyers' group, the *Zenkoku Bengoshi Hōkoku Kai*, to MacArthur's General Headquarters (GHQ) early in the American occupation.<sup>22</sup> In one of the standard accounts of occupation-era legal reforms, Alfred Oppler asserts that habeas corpus was a Japanese initiative, though one that the Americans were likely to view amenably:

This law [the Habeas Corpus Act] implemented the constitutional guarantee that no person shall be deprived of life or liberty, except according to procedure established by law. Here again, the Government Section [i.e., of the Allied occupation authorities] was careful not to put pressure on the Japanese to adopt something resembling the American writ. The Japanese themselves took the initiative, and after thorough preparation in which the judiciary, the

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<sup>21</sup> Memorandum from General Headquarters, Supreme Commander for The Allied Powers Government Section—Public Administration Branch on Comments on Constitutional Revision proposed by Private Group for Chief of Staff (Jan. 11, 1945) [hereinafter SCAP Memorandum], <http://www.ndl.go.jp/constitution/shiryō/03/060/060tx.html> [<https://perma.cc/SD5F-REUA>]. Note that although thought control laws are definitely a thing of the past, the prolonged detentions focused on procuring confessions are still at the core of problems with the criminal justice system identified by civil libertarians and criminal defense lawyers seven decades later.

<sup>22</sup> Yoshitoshi Mochinobu, *Nihonkokukentō Dai 18 Jō, 34 Jō no Seitei no Ikisatsu* [The Process of the Drafting Articles 18 and 34 of the Constitution of Japan], 48 KYUSHŪ KŌGYŌ DAIGAKU KENKYŪ HŌKOKU 95, 107 (2000).

executive branch, the legislature, and the bar had a hand, while my division was available for advice, a Habeas Corpus Act was finally introduced as a member bill into the Diet, and was enacted on July 30, 1948. General MacArthur was particularly delighted with this piece of legislation, since his father had introduced a Habeas Corpus Act in the Philippines.<sup>23</sup>

Other sources confirm this view. Before it disbanded, the National Patriotic Federation of Lawyers (*Zenkoku Bengoshi Hōkoku Kai*), a lawyers' association formed during wartime, petitioned GHQ and the Japanese government for a habeas corpus-like system of judicial relief for deprivations of freedom.<sup>24</sup> That said, the Americans were also cognizant of the need for “some proceeding which will compel the police to bring an arrested person publicly before a court and explain the reason for his imprisonment, *similar to a writ of habeas corpus*.”<sup>25</sup>

According to the History of the Non-Military Activities of the Occupation of Japan, the Habeas Corpus Act was enacted to give concrete meaning to article 34 of the new constitution.<sup>26</sup> The article mandates that:

No person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; *and upon demand of any person* such cause must be immediately shown in open court in his presence and the presence of his counsel.<sup>27</sup>

The English version of this provision is potentially misleading in a way that is relevant to habeas corpus.<sup>28</sup> First, the Japanese

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<sup>23</sup> ALFRED C. OPLER, *LEGAL REFORM IN OCCUPIED JAPAN* 149 (1976).

<sup>24</sup> Yoshitoshi, *supra* note 22, at 106–07.

<sup>25</sup> SCAP Memorandum, *supra* note 21 (emphasis added).

<sup>26</sup> The author has relied on the Japanese translation of these materials, contained in 14 NAYA HIROMI, *GHQ NIHON SENRYŌSHI: HŌSEI, SHIHŌSEIDO NO KAIKAKU* 69 (Takemae Eiji & Nakamura Takafusa eds., 1996).

<sup>27</sup> *NIHONKOKU KENPŌ [KENPŌ] [CONSTITUTION]*, art. 34 (Japan) [hereinafter *CONSTITUTION*] (author translation) (emphasis added).

<sup>28</sup> It is worth appreciating that the occupation authorities and their Japanese government interlocutors were working in parallel across languages and that the goal of the Japanese side

version has a full stop following “privilege of counsel.” In essence, it can potentially be read as articulating two separate constitutional protections: (1) the right to know the grounds for arrest and detention and privilege of counsel and (2) freedom from detention without adequate cause, such cause being subject to explanation in open court upon demand.

Second, the Japanese does not say “upon demand of any person,” but rather just “upon demand.” Thus, while the English version suggests that the constitution itself provides grounds for any person to petition a court for relief for a wrongfully detained person (people in such straits typically being unable to do so themselves),<sup>29</sup> the Japanese does not. In fact, the original GHQ draft of this provision limited demands to “the accused or his counsel,” which was subsequently revised to “upon demand of any person” in the English draft that was then submitted to the Japanese government, the so-called “MacArthur Draft.”<sup>30</sup> In any case, a clear statement that “any person” can petition on behalf of a wrongfully detained person was set forth in the Habeas Corpus Act.<sup>31</sup> As we shall see, though, the Supreme Court subsequently used its rule-making authority and decisions to render these words largely meaningless.

Note that some scholars have expressed the view that the Habeas Corpus Act was adopted to give life to the Article 18 protection against involuntary servitude, which in most instances would involve detention by non-state actors.<sup>32</sup> This appears to reflect a widespread initial confusion about the purpose of habeas corpus within the Japanese justice system as a whole and its relationship to Japan’s Code of Criminal Procedure, which itself underwent

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was not necessarily to prepare a scrupulously accurate translation of the English text being proffered by the Americans.

<sup>29</sup> The Japanese language does not require sentences to have a subject. A more accurate translation of the highlighted language would probably be “upon demand, such cause . . .” leaving open the possibility of being interpreted to allow demands from any person.

<sup>30</sup> See Yoshitoshi, *supra* note 22, at 107–10 (discussing the various iterations of what became article 34). Yoshitoshi also quotes other Japanese scholars expressing the view that the “any person” language in the English version is best read as referring to the detained and his counsel, rather than anyone in the world at large. *Id.* at 115. The various drafts of the constitution prior to the final can be accessed at the National Diet Library’s “Birth of the Constitution of Japan” website. *Part 1 Military Defeat and Efforts to Reform the Constitution*, NAT’L DIET LIBR., <http://www.ndl.go.jp/constitution/e/shiryo/01shiryo.html> [<https://perma.cc/HSX9-W633>].

<sup>31</sup> Habeas Corpus Act, *supra* note 14, art. 2(2).

<sup>32</sup> Yoshitoshi, *supra* note 22, at 97–105.



extensive restructuring under the American occupation to make it consistent with the constitution and provide for procedural protections, such as the privilege of counsel and the right of the accused to know the nature of the charges against him.<sup>33</sup> Certainly, the possibility of habeas corpus being used to remedy deprivations of freedom by non-state actors—employers, mental hospitals and even parents feuding over children—was anticipated as one possible use for habeas corpus, though as we shall see most of the debate focused on its more obvious constitutional dimensions in cases of wrongful detentions by state actors.<sup>34</sup>

#### IV. “LIKE LOOKING FOR FISH IN A TREE”—THE DIET DEBATES HABEAS CORPUS

The bill that became the Habeas Corpus Act was first presented for consideration to the Judicial Committee of the House of Councillors on February 20, 1948, with the corresponding committee of the House of Representatives commencing hearings on the same bill the following month. Over the next three months, a series of deliberations were held in both committees, which heard testimony from legal scholars, lawyers and other commentators. After some amendments by the House of Councilors, the bill was ultimately passed by both chambers and promulgated on July 30, 1948.

Although this Article can only touch on them briefly, the debates over the Habeas Corpus Act offer some fascinating insights into how at least a segment of the Japanese intelligentsia viewed the recent history of their nation’s legal system. A portion of the legislative history is unsurprisingly devoted to the principles behind this strange new law, as well as its history in the Anglo-American system.

Some of those who participated were skeptical. For example, on March 23, 1947, a speaker by the name of Ichirō Kobayashi offered the following explanation of the need for the Act, not only based on the limits of the previous constitutional system, but the

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<sup>33</sup> OPPLER, *supra* note 23, at 136–49.

<sup>34</sup> When first introduced to the Diet, the law was described as applying to all deprivations of liberty, whether in connection with criminal cases or not, and whether by state actors or private actors. SANGIIN SHIHŌ IINKAI KAIGIROKU DAI 4 GŌ [HOUSE OF COUNCILORS JUDICIAL COMMITTEE MEETING MINUTES NO. 4], at 1 (Feb. 20, 1948) (Japan).

possible limits of the new one as well. Those familiar with the state of the Japanese criminal justice seven decades later may find them oddly familiar.

As everyone knows, the freedom and personal liberties of the people enjoyed fine protection under the Meiji Constitution too. Constitutionally, Japanese subjects could not be arrested, detained, questioned or punished except in accordance with the law. Moreover, the laws guaranteed the freedoms of the people, the subjects, with all manner of provisions. So why are there so many accounts of human rights abuses? For example, there is voluntary going to the police station or accompanying an office there, which becomes “stay the night” then “stay tomorrow night,” resulting in a loss of freedom through the police.<sup>35</sup> Or using the Administrative Enforcement Act. Or the Police Punishment Regulation.<sup>36</sup> Or even though the suspect has an address, using “lack of address” as grounds for detention.<sup>37</sup> Or putting people in “protective” custody without reason.<sup>38</sup> These are the

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<sup>35</sup> *Nin'i dōkō* or “voluntary accompaniment” remains a common practice in Japan, one that can lead to coercive deprivations of freedom that lead in confessions before an arrest warrant is even detained. An example of how endemic the practice has become is illustrated by a June 25, 2012 news story about a man who “voluntarily” accompanied a constable to a police box after being accused of touching a woman’s thigh on a train. He then got up to use the bathroom but was able to “escape” through the unlocked back door of the police box. *Chikan Yōgi no Otoko, Nin'i Dōkō no Kōban Uraguchi kara Tōsō* [Man Charged with Molesting Voluntarily Turned Himself in, Then Escaped from Police Station Through Rear Entrance], YOMIURI SHIMBUN (June 25, 2012), <http://policestory.cocolog-nifty.com/blog/2012/06/post-720a.html> [<https://perma.cc/VU5R-TQ9T>]. This incident was reported as a comical example of police incompetence that allowed a “criminal” to escape, but of course “voluntary accompaniment” meant that the man should have been free to leave at any time anyways.

<sup>36</sup> The Police Punishment Regulations dated back to the pre-war era and empowered the police to both define a wide range of behaviors as minor crimes and try and mete out punishments for violations, providing a pretext to arrest people in a wide range of circumstances. The regulations were abolished under the occupation, but replaced by the Minor Offenses Act, which was considered at the same time as the Habeas Corpus Act, and informed some of the debate.

<sup>37</sup> Lack of an address remains grounds for a court to detain a suspect or deny bail. KEIJI SOSHŌ HŌ [KEISOHŌ] [C. CRIM. PRO.] 1948, art. 58, 60, 89.

<sup>38</sup> Under the Police Duties Execution Act, police officers are still able to use protective custody as grounds for detaining persons outside the scope of the arrest/detention regime provided for in the Code of Civil Procedure and the Constitution, such custody being

common tools of police and investigating authorities and everyone knows it. Just calling them human rights abuses doesn't accomplish anything. Why is that? Because even though the constitution guaranteed the freedoms of the people—the subject—there was a lack of means of enforcing that guarantee.<sup>39</sup>

On the merits of the Act, Kobayashi notes that

From now on, Ministers of State or anyone else who dares to hide behind the Emperor's sleeves in their illegal conduct will not be able to. They won't be able to say "I am detaining this person on the order of the Emperor, because it won't be an excuse under the Habeas Corpus Act. So you see, as should be abundantly clear from this point, an order under the Habeas Corpus Act will be binding on all high officials, all bureaucrats regardless of their rank. They must all obey it. Moreover, such an order may sometimes be made in opposition to someone who is extremely powerful at the time."<sup>40</sup>

A recurring theme in the Diet debates was whether Habeas Corpus proceedings were criminal or civil in nature. The entire Japanese Code of Criminal Procedure was being amended at the same time for reasons similar to those underlying the adoption of Habeas Corpus, in order to eliminate the type of abuses that had occurred in the past and making the criminal process consistent with the new constitution. Thus, a sense of confusion seems to prevail amongst many of the speakers about how habeas corpus will fit into the overall context of arrest and detention provided for in the new Code, a system

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justified because, "on the basis of unusual behavior and other surrounding circumstances, and moreover [the police officer] has reasonable grounds to believe that such person needs emergency aid and protection." Keisatsukan Shokumu Shikkō-hō [Police Duties Execution Act], Law No. 136 of 1948, art. 3 (Japan). To the author's knowledge, protective custody does not feature significantly in stories of abusive police practices leading to *enzai* cases, though those who experience it are likely to end up in the same police jail as someone who is arrested.

<sup>39</sup> SANGIIN SHIHŌ IINKAI KAIGIROKU DAI 5 GŌ [HOUSE OF COUNCILORS JUDICIAL COMMITTEE MEETING MINUTES NO. 5], at 9 (Mar. 23, 1948). Unless otherwise noted, all translations are by the author.

<sup>40</sup> *Id.* at 10.

that constitutionally requires a warrant except in cases of crimes in process.<sup>41</sup> One of the greatest obstacles to habeas corpus achieving any meaningful presence in the Japanese legal system may be attributable to the fact that the judiciary as a whole was (and is) complicit in many of the pre-trial deprivations of freedom that did (and do) take place through the issuance of detention warrants.<sup>42</sup> This was acknowledged by some of the participants in the Diet debates.<sup>43</sup>

Could it be expected that the same court that issued a detention warrant would seriously entertain a writ of habeas corpus by or on behalf of the detainee? Various commentators advocated having habeas corpus petitions be made directly to High Courts, perhaps even the Supreme Court. This latter suggestion was rejected due to the expense and inconvenience that would be involved in seeking a writ on behalf of someone detained in an isolated part of the country, such as Hokkaido.<sup>44</sup>

The uncertainty about whether it was a civil remedy or part of the criminal process also provided grounds for complaints about the

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<sup>41</sup> CONSTITUTION, *supra* note 27, art. 33.

<sup>42</sup> It is beyond the scope of this paper to get into the details of Japanese criminal procedure. However, it should be noted that Japan does not have a system of arraignment following arrest. What it has instead is a set of deadlines by which police or prosecutors must either release a suspect, bring charges, or apply to a judge for a warrant to detain the suspect for up to ten days. The warrant can be detained for an additional ten days. As a result, a suspect can be held for up to twenty-three days with limited access to counsel *before* a charging decision is made. Under this system, the suspect will be taken before a judge shortly before arrest, but the reason is not to confirm the charges against him, but to examine the prosecutor's reasons for seeking detention. Under article 60 of the Code of Civil Procedure, the common reasons for seeking detention are "flight risk" and "risk of evidence tampering," both of which are based on a presumption of guilt. KEIJI SOSHŌ HŌ [C. CRIM. PRO.] Law No. 131 of 1948, art. 60. Once the detention warrant is issued, the police and prosecutors have ample time to investigate the suspect under highly coercive conditions. Note that for detention purposes, even an acquittal by a trial court is not adequate to rebut the presumption of guilt, since appellate courts can and do order continued detention pending prosecutorial appeals! There is a procedure for seeking an explanation of the reasons for detention (C. CRIM. PRO., art. 82) but it is rarely used, possibly because there may be little merit for many petitioners to simply have the reason for a detention already authorized by the court explained in open court. That the procedure is intended to be a formality is suggested by practice rules that allow petitioners only ten minutes to voice opinions to the court. KEIJI SOSHŌ KISOKU [CRIM. TRIAL RULES], Sup. Ct. Rule No. 32 of 1948, art. 85-3(1).

<sup>43</sup> *See, e.g.*, HOUSE OF COUNCILORS JUDICIAL COMMITTEE MEETING MINUTES NO. 5, *supra* note 39, at 7, 8, 11 (describing some participants acknowledging the complicity of the judiciary in pre-trial deprivation of freedom).

<sup>44</sup> SANGIIN SHIHŌ INKAI KAIGIROKU DAI 16 GŌ [HOUSE OF COUNCILORS JUDICIAL COMMITTEE MEETING MINUTES NO. 16], at 10 (Apr. 26, 1947) (Japan). As a compromise, the Habeas Corpus Act allows for petitions to be filed at either the District or High Court.

law on the part who saw the “civil procedure”-like structuring of the process, with petitioner and detainer being treated equally; the petitioner being burdened with proving that the detention was “without legal procedure”<sup>45</sup> and detainees having a right of appeal. Would any detention that satisfied the requirements of the code of criminal procedure (i.e., with legal procedure) survive a petition, even if there were no “adequate grounds” as required by article 34 of the Constitution?<sup>46</sup>

In the context of other procedural protections, both those built into the criminal procedural regime and the ability to sue the state (or a private actor) in tort for wrongful deprivations of liberty, it was recognized that money alone was often not an adequate remedy and habeas corpus provided a potentially important source of relief for the actual deprivation of liberty.<sup>47</sup> Nonetheless, there was a certain amount of puzzlement as to how many cases involving detention by police or prosecutors pursuant to the Code of Criminal Procedure would result in actual relief. Participants in the debate were, of course, cognizant that habeas corpus would also offer a remedy for deprivations of liberty by non-state actors—workers being held in slave-like conditions, children, people being held in mental hospitals, and so forth. Yet the great majority of comment on the law was clearly focused on detentions by state actors, with numerous references to abuses that took place in the past.

Others expressed concern about the discretion to be granted to the Supreme Court to use its new constitutional rule-making authority to fill in the gaps in implementing the Act. In this context, the distrust of the judiciary and the procurators expressed by some of the commentators is illustrative. For example, in the following month, Waseda University Professor Muneo Nakamura noted to the same committee that while America had a unitary legal profession and a judiciary that was supported by the people:

Japan’s courts are divided between the outsider and insider legal professions, and judges in the courts do not have the backing of the people. They are a bureaucratic institution. This bureaucratic institution needs to be broken down. What is necessary—taking

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<sup>45</sup> Habeas Corpus Act, *supra* note 14, art. 2.

<sup>46</sup> CONSTITUTION, *supra* note 27, art. 34.

<sup>47</sup> SANGIIN SHIHŌ IINKAI KAIGIROKU DAI 16 GŌ, *supra* note 44, at 9.

for example the Habeas Corpus Act—even if you establish the Habeas Corpus Act, I must confess that I have suspicions about whether it will immediately start to function in a way that protects the people. That is to say, I believe that a system such as this is necessary, but the Habeas Corpus Act must be established on the assumption that the courts cannot be trusted.<sup>48</sup>

Later on, he complains,

I do not think the drafters of this bill have common sense. Perhaps it is unconscious, but it seems like it was drafted with the usual professional legal bureaucrat's idea of *limiting* the avenues for relief as much as possible. This is the tradition for the bureaucratic legal professions, to take the unusual situation, the so-called exceptional case, the unfair situation and use that as an excuse to limit everything. For example, if there is a lawyer who acts slightly inappropriately, they turn that into greater control over all lawyers . . . . They take occasional problems and turn them into generally-applicable restrictions, and these restrictions result in the courts having greater discretionary powers. I think that adding such provisions has been the way legislation relating to the judiciary has been drafted in Japan until now. I think this has also manifested itself in the Habeas Corpus Act. But this is a revolutionary new procedure, so it should be allowed to impose on the courts a bit. There may be a few petitions that seem unreasonable. Even if the door is slightly open to such things initially, causing some burden, isn't it necessary to think of the appropriate method for dealing with such people? But it seems like this bill has been drafted so that it will be rendered impotent.<sup>49</sup>

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<sup>48</sup> SHŪGIN SHIHŌ INKAI KAIGIROKU DAI 16 GŌ [HOUSE OF COUNCILORS JUDICIAL COMMITTEE MEETING MINUTES NO. 16], at 11–12 (April 26, 1948) (Japan).

<sup>49</sup> *Id.*

Perhaps the most scathing criticism of the judiciary and the ability to expect anything of it from habeas corpus came the following month from Hiroshi Masaki, a lawyer, who complained of the wide discretion being given to judges in evaluating evidence:

[T]oday, judges who during wartime were the tools of Tōjo and blithely followed the National Mobilization Act and proudly and triumphantly crushed the anti-war sentiment of the people, wiping out all anti-war activities of the people; these same people who are still around . . . expecting such a judiciary to administer human rights under the new constitution is like looking for fish in a tree . . . .

Even though under the old constitution the concept of judicial discretion rejected all outside freedoms, judges have been given the freedom to consider evidence even if it involves ignoring logic. If such freedom is again given to judges it will mean the loss of the people's freedom, so in response to their freedom to evaluate evidence, we need a provision that says that they must follow logic and respect reason. Otherwise there will be a huge gap through which the rats can escape, and something fine like [the habeas corpus law} will end up being an empty treasure . . . .[I]f we stop allowing judges to convict based solely on confessions, we would have to assume that that judges have the ability to be strictly scientific and rational. If judges lack the ability to judge scientifically and their logic is fuzzy, it will be like giving calculus problems to elementary school students . . . .When judges encounter even slightly difficult situations they just say "the evidence is inadequate" or "there is no evidence." Even if it is thousands of pages, a court can look at the entire trial record and say there is no evidence. But it's not that

there is no evidence, it's that they lack the ability to make judgments.<sup>50</sup>

Concerns about whether the judiciary could actually make habeas corpus work the way it was intended were also expressed through a suggestion that appeals from rejected petitions should be heard by a panel that includes lawyers, not just professional judges, an interesting idea that of course went nowhere.<sup>51</sup> A concern that did prove prescient was that habeas corpus would end up focused on formalities rather than substance, meaning that if a detention ordered was validly issued even though the grounds for doing so were unwarranted (e.g., the police asserting a suspect to be a flight risk when he really isn't), the remedy would not be available.<sup>52</sup>

On the other side, a recurring theme was concern that the remedy would be abused,<sup>53</sup> a concern that is clearly reflected in the structure of the Act (including the authority given to courts in articles 7 and 11 to dismiss a petition if it lacks substantiation or the court determines it to be groundless based on the petition alone<sup>54</sup>) and, as we shall see, the Supreme Court's implementing regulations. While some of these concerns seem directed at judicial economy and harmonizing the new habeas corpus regime with the criminal trial process, a different concern about possible abuses was expressed in the context of the law's apparent empowering of any person to petition for relief on behalf of another detained person. For example, would this mean that a prostitute who had freely entered indentured servitude could be released from her debt by a husband or parent petitioning for habeas corpus relief against her own desires? This concern was expressed by more than one commentator, and another finally pointed out that such business arrangements would now likely be void.<sup>55</sup>

Ultimately the Act was promulgated on July 30, 1947. Like the Japanese Constitution, the Habeas Corpus Act has never been

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<sup>50</sup> *Id.* at 16.

<sup>51</sup> *Id.* at 12–13.

<sup>52</sup> SHŪGIIN SHIHŌ IINKAI KAIGIROKU DAI 30 GŌ [HOUSE OF REPRESENTATIVES JUDICIAL COMMITTEE MEETING MINUTES NO. 30], at 6 (Jun. 12, 1948) (Japan).

<sup>53</sup> SHŪGIIN SHIHŌ IINKAI KAIGIROKU DAI 46 GŌ [2D HOUSE OF REPRESENTATIVES JUDICIAL COMMITTEE MEETING MINUTES NO. 46], at 8 (Jun. 30, 1948) (Japan).

<sup>54</sup> Habeas Corpus Act, *supra* note 19, art. 7, 11.

<sup>55</sup> SHŪGIIN SHIHŌ IINKAI KAIGIROKU DAI 31 GŌ [2D HOUSE OF REPRESENTATIVES JUDICIAL COMMITTEE MEETING MINUTES NO. 31], at 1, 3 (Jun. 14, 1948) (Japan).



amended in its seven decades of existence. Instead, drastic amendments were wrought to the Act by the Supreme Court through its rule making powers and precedents, amendments that effectively divorced the law from its original purpose as a remedy for human rights violations.<sup>56</sup>

## V. THE SUPREME COURT TAKES CHARGE

At the same time the Act took effect, the newly-established Supreme Court used its rule-making powers under the new Constitution to establish detailed regulations for the handling of habeas corpus cases.<sup>57</sup> For convenience, these are referred to in this article as the Rules. These, too, were promulgated in English but are not available through the Japanese government's Japanese Laws in Translation database. Accordingly, relevant extracts of the English as promulgated have been included as Appendix 2.

The Rules show not a "conservative" Supreme Court being unduly conservative solicitous of the Diet, as has become the widely accepted characterization of the court today.<sup>58</sup> Rather, they show an institution using its rule-making authority to ostensibly fill in the details of a statute designed to implement "the principles of the Japanese Constitution which guarantees the fundamental human rights" while substantively rewriting it in a manner that makes it less effective for doing so.<sup>59</sup> While the Diet debates showed concern that the text of the Habeas Corpus Act alone contained the seeds of an implementation regime that courts could use to render it meaningless, the Rules effectively ensured richly fertilized in which they could grow.

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<sup>56</sup> In recent years, a common conservative talking point on the need for constitutional amendment has involved simplistic comparisons to the number of times other "peer nations" (the United States, France, Germany, etc.) have amended their constitutions since the Japanese Constitution was promulgated, the logic apparently being that it is somehow "abnormal" that Japan's charter has remained unchanged over this same period. The possibility that the constitution—like the Habeas Corpus Act does not actually mean as much as positive law as its text suggests is rarely contemplated.

<sup>57</sup> Jinshinhogo Kisoku [Habeas Corpus Rules], Sup. Ct. Rule No. 22 of 1948 [hereinafter Rules]. Article 76 of the Constitution newly created the Supreme Court at the top of a judiciary vested with "the whole judicial power." CONSTITUTION, *supra* note 27, art. 76. Article 77 vests in the Supreme Court "rule-making power under which it determines the rules of procedure and of practice." CONSTITUTION, *supra* note 27, art. 77.

<sup>58</sup> See, e.g., David Law, *The Anatomy of a Conservative Court: Judicial Review in Japan*, 87 TEX. L. REV. 1545 (2009).

<sup>59</sup> Habeas Corpus Act, *supra* note 14, art. 1; Rules, *supra* note 57, art. 1.

What proved to be two of the most substantive changes were wrought through article 4 of the Rules. First, article 4 effectively excised the “rapid” and “easy” relief promised by article 1 of the Habeas Corpus Act.<sup>60</sup> This was accomplished by empowering courts to reject petitioners if there are “any other adequate means whereby relief may be obtained” unless “it is evident that relief cannot be obtained within reasonable time.” Needless to say, “adequate” does not necessarily require “ease,” and a “reasonable time” suggests something far less urgent than “rapid;” distinctions that have been borne out by practice.

More significantly still, article 4 of the Rules addressed the fear of habeas corpus abuse by allowing courts to reject petitions where the unlawfulness of their deprivation was not “conspicuous.”<sup>61</sup> In other words, a deprivation of freedom that was merely of suspect legality, or only “slightly” unlawful would not be amenable to relief. This subtle change proved to be of huge importance because it meant courts could and did prevent the use of habeas corpus to challenge the substantive legality (or constitutionality) of various forms of detention. As we shall see, the “conspicuously unlawful” threshold soon became a significant barrier to most petitioners seeking relief from wrongful detention, even when it technically was wrongful. No “fruit-of-the-poison-tree”-like doctrine would develop in habeas corpus as a means of chastening police or other detaining authorities for sloppiness. In fact, as this Article will attempt to show, the application of the “conspicuously unlawful” threshold would result in the procedures mandated by the Habeas Corpus Act, and thus the Act itself, becoming for the most part substantively meaningless.

The Rules were also used to “solve” the problem created by the inclusion in article 2(2) of the Habeas Corpus Act allowing “any person” to file a petition on behalf of the detainee.<sup>62</sup> This was accomplished by the adoption of the rather fanciful assumption that persons deprived of their physical freedom are still able to exercise and express free will: article 5 of the Rules outright prohibits applications “made against the freely expressed intention of the prisoner.”<sup>63</sup> A similar assumption about the free will of the unlawful underlies the addition in article 35 of the Rules of an option for

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<sup>60</sup> Rules, *supra* note 57, art. 4; Habeas Corpus Act, *supra* note 14, art. 1.

<sup>61</sup> Rules, *supra* note 57, art. 4.

<sup>62</sup> Habeas Corpus Act, *supra* note 14, art. 2(2).

<sup>63</sup> Rules, *supra* note 57, art. 5.

petitioners to withdraw their petitions prior to the court rendering judgment (even over the objection of the detaining party).<sup>64</sup>

A more subtle change was the expansion of actions a court could take with respect to qualifying petitions. Articles 10 and 16(3) of the Habeas Corpus Act gave a court hearing a petition to order the release of a prisoner either provisionally or, if the petition had grounds, permanently.<sup>65</sup> That was, after all, the basic concept underlying the whole statute. However, article 2 expanded the range of relief a court could order “other dispositions which the court considers suitable on behalf of the prisoner.”<sup>66</sup> In other words, courts could find a detention conspicuously unlawful but still refrain from setting them “free,” a flexibility which proved useful when using habeas corpus to address “detentions” of infant children by parents in domestic disputes.

The Rules also enabled the courts to transform habeas corpus in Japan from a process focused on the actual hearing and oral testimony, as most common law practitioners would expect, to the document-focused proceedings which prevail in Japan. Article 8 of the Rules requires petitioners to include more information and substantiation than is required in the law itself, and article 9 empowers courts to reject petitions which fail to satisfy these requirements.<sup>67</sup> Essentially, the Rules placed the burden of proving that their detentions were conspicuously unlawful squarely on petitioners, essentially establishing an evidentiary presumption in favor of deprivations of liberty.

And while the Habeas Corpus Act envisioned a civil trial-like exchange of pleadings by detaining party and detainee, the Rules similarly expand on what a detaining party must include in the answer, including the oddly permissive “reasons why the detainee may not be brought to court.”<sup>68</sup> In the event a hearing is held, the Rules also

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<sup>64</sup> Rules, *supra* note 57, art. 35. At least one lawyer involved in operating committee discussions about the rules suggested that this rule represented a change of law that would result in petitioners withdrawing petitions under coercion. SUPREME COURT SECRETARIAT, TŌKYŌ CHIHŌ SAIBANSHŌ SHUSAI JINSHINHOHŌ UN’YŌ KYŌGI KAIGI SOKKIROKU [TRANSCRIPT OF MINUTES OF HABEAS CORPUS ACT OPERATING COMMITTEE MEETING], at 63 (Oct. 19, 1948) (Japan) [hereinafter OPERATING COMMITTEE MINUTES]. “The law didn’t just forget to provide for this.” *Id.* at 64.

<sup>65</sup> Habeas Corpus Act, *supra* note 14, art. 10, 16(3).

<sup>66</sup> Habeas Corpus Act, *supra* note 14, art. 2.

<sup>67</sup> Rules, *supra* note 57, art. 8, 9.

<sup>68</sup> Rules, *supra* note 57, art. 27.

have the detaining party explain the substance of his answer first, *before* the petitioner explains the petition.<sup>69</sup>

Finally, article 46 of the Rules removes any doubt as to the type of procedure habeas corpus was, by declaring that gap-filling would be in accordance with the Code of Civil Procedure.<sup>70</sup> This proved useful in rejecting appeals from the court's interpretation and application of the habeas corpus regime.

## VI. THE STAKEHOLDERS MEET

On October 19, 1948, shortly after the dust of the law- and rule-making processes had settled, under the auspices of the Tokyo District Court and the Civil Division of the Supreme Court, an extraordinary gathering of representatives of the bar, Ministry of Justice, the police, correctional facilities, prosecutors, and about two dozen judges (but, interestingly, not a single law professor) met to discuss what habeas corpus would actually mean in practice. The minutes of these meetings show the starting position of the people who would actually give life (or pseudo-life, at least) to the words of the Habeas Corpus Act and the Rules.

The introductory remarks of the chief judge of the Tokyo District Court are worth quoting at length as they may be indicative of the attitude of the mainstream judiciary about not only habeas corpus itself, but perhaps the constitution as well:

This law was enacted based on the premise that in order to establish democracy, personal freedom must be guaranteed as a fundamental right. In that light, I believe it is necessary for us to realize that in administering this law the courts are given a very heavy responsibility. I feel it is truly ironic that courts have been given this heavy responsibility of protecting personal liberty. Since before this we have performed our duties taking due consideration for personal freedom, apparently some people go to the extent of criticizing the courts as the true villain in trampling on human rights. I believe such criticism is unfair, but I also feel it is ironic that now courts are supposed to be

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<sup>69</sup> Rules, *supra* note 57, art. 29.

<sup>70</sup> Rules, *supra* note 57, art. 46.

the heroes in protecting personal liberty. I used to think that in the past free courts had done their jobs in respecting personal freedom, but recently I feel that this view was perhaps a bit naïve.<sup>71</sup>

He also offers fascinating insights into the perception gap between American occupation authorities and their Japanese counterparts regarding the significance of habeas corpus.

The newspapers reported that General MacArthur regarded the passage of this law as an extraordinary accomplishment of the Diet. Yet the papers at the time merely repeated the announcement as it was made. There was not a single article newspaper article reporting on the passage of this law. At the time I just happened to be at GHQ meeting with some of them, and I was asked what sort of coverage the passage of the Habeas Corpus Act was getting in the press, and when I told them that the papers weren't reporting anything their expressions showed surprise. Seeing this, I realized that Anglo-Saxons are deeply interested in habeas corpus, which made me feel that our own believe that personal freedom was already fully protected was highly naïve. We must change our prior attitudes in implementing the law.

Previously the political and legal system and other factors made it so that the primary responsibility of the courts was to keep the peace and, during the war, keeping the peace became the only responsibility of the courts, so that even if we did think about protecting personal liberty there it difficult to do anything about it.<sup>72</sup>

Other judges who had participated in the process of analyzing the Act and preparing the Rules gave their own explanations of what they were all about.<sup>73</sup> Topics covered included the history of habeas

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<sup>71</sup> OPERATING COMMITTEE MINUTES, *supra* note 64, at 9–10.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.* at 13–37.

corpus in the West, the background to the passage of the Act in Japan, the details of specific articles, and the corresponding provisions of the Rules and some of the other criminal and civil remedies available under Japanese law for wrongful detention (such as a prosecution for wrongful imprisonment, a tort claim or claim under the State Redress Act for damages) and their deficiencies.<sup>74</sup> Some time is spent on the technicalities of the court notionally taking custody of the body of the unlawfully detained while the proceedings are pending (even though this meant delegating administration of the custody to the party being accused of wrongful detention) and the effect this had on a detention warrant (suspending its effect until the habeas corpus proceeding was resolved, even though in practice this meant delegating administration of the custody to the authority being accused of wrongful detention).<sup>75</sup> The explanation also demonstrated an awareness that the remedy might be used to free children or mental patients, though such situations were also clearly considered to be sideshows to the main event of dealing with detentions by public authorities.<sup>76</sup>

The floor was then turned over to other participants. There was a general agreement on the need to spread awareness of this remedy since, in the words of one judge, the unlawful detentions that had been “regrettably” common under the old constitution would not go away overnight.<sup>77</sup> Another judge remarked that it be important that the new law not end up as “just a decoration”—and proceeded to suggest that perhaps the police and prosecutors, the people who “have direct contact with the people” may not be fully attentive of changes in law and thus not aware of when they might be inadvertently (*ukkari*) be violating it or even using “protective custody” (*hogo*) as a pretext to detain suspects as part of a criminal investigation.<sup>78</sup>

In response, the only prosecutors present asked whether even lawful (*tadashiki*) prolonged detentions might be subject under article 4 of the Rules.<sup>79</sup> One of the judges (a section head from the Civil Affairs Division of the Supreme Court Secretariat) indicated that given the speedy trial requirement of article 37 of the Constitution,

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<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 35.

<sup>77</sup> *Id.* at 38.

<sup>78</sup> *Id.* at 40.

<sup>79</sup> *Id.*

such detentions could indeed be unlawful for purposes of meeting the article 4 threshold.<sup>80</sup> In response, the prosecutor explained that part of the problem was it took so long to get the relevant court documents from the courts.<sup>81</sup> In response, one of the lawyers politely pointed out that it wasn't just a matter of paperwork, but of courts failing to keep track of the detentions they supposedly controlled, giving an example of a suspect who sat in jail for forty-five days because the court forgot to summon him to the trial where he was given a suspended sentence in absentia.<sup>82</sup>

One of the two representatives of the police then spent some time explaining how unlawful detentions by the police no longer happened, and why they were not to blame for it happening in the past:

Today there are no criminal investigations based on unlawful restraints. And I think it was not something where the police were doing things this way, it was the momentum of the times.<sup>83</sup>

The other police representative steered the conversation to the subject of prostitution and how the police were making a concentrated effort to stamp out the indentured servitude version of the practice that had prevailed in the past, noting however that there were instances of this resulting in debts being shaken off.<sup>84</sup>

A significant portion of the discussion of the Operating Committee focused on nitty gritty procedural issues. The discussions of the Rules show the judiciary to be both well-intentioned, but also clearly viewing the habeas corpus proceedings as being focused on documents rather than oral hearings. The lawyers present pushed back on this, at one point asking about the possibility of oral rather than written petitions, and asking why the laws and the Rules appear to allow the court to make a preliminary decision based on the pleadings once it received the answer from the respondent (i.e., the detaining party).<sup>85</sup> Why not summon both petitioner and respondent

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<sup>80</sup> *Id.*

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

<sup>82</sup> *Id.* at 46.

<sup>83</sup> *Id.* at 43.

<sup>84</sup> *Id.* at 47.

<sup>85</sup> *Id.* at 55, 57.

to court and force them both to make their case in open court—wasn't that how it worked in the Anglo-Saxon system?

The lawyers also rejected concerns about abuse, noting that since the system anticipated that petitioners would have counsel appointed in all but exceptional cases, and the Rules were designed to make this even more likely.<sup>86</sup> Yet couldn't frivolous petitions be controlled through the system for disciplining attorneys?<sup>87</sup>

The minutes reveal a fairly typical Japanese meeting: the judicial hosts gave an opening greeting, set forth the agenda, and the participants proceeded to comment on each item in turn before ending on schedule. This did not prevent the expression of some vociferous dissent by the lawyers present. Before moving on to the next chapter of Japan's habeas corpus story, it is worth taking note of some of these remarks, since they accurately foreshadow the fate that habeas corpus would suffer under the regime the Diet and the judiciary had established:

Those of us in government positions and out must be through in how we deal with this. If we do not, it will become a mess, just like the jury system. In England the jury is used in high regard, with proper preparatory procedures. But in Japan preparatory procedures were bad. So we need to make sure that the intent of [H]abeas [C]orpus [A]ct are clearly appreciated without any misunderstanding.<sup>88</sup>

and

If from the start there is a very strict method of review based primarily on the fear that this system will be abused, this law will never come to life. The method of review must be considered, but if there is a little abuse it may not be a bad thing. If the petitioner's petition makes sense, then the detaining party should be investigated in the presence of the petitioner. If you pay attention to the parties, there shouldn't be problems and the law will come to life. But if the

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<sup>86</sup> *Id.* at 63–65.

<sup>87</sup> *Id.* at 65.

<sup>88</sup> *Id.*



courts act on the basis that their primary concern is to avoid abuse, then the door will be closed from the outset.<sup>89</sup>

Finally, it is worth noting that in the context of discussing who has custody over petitioner while his or her petition is pending and the way they should be treated, the practice of using police jails to hold pre-trial detainees—thereby leaving them under constant police control and supervision, an environment readily open to abuse and coercion of confessions—also comes up.<sup>90</sup> The *daiyō kangoku* system remains a feature of the criminal justice system in Japan today and continues to be identified as part of a pre-trial detention regime that can be abused by the police to coerce confessions.<sup>91</sup>

## VII. HABEAS CORPUS IN ACTION: FURTHER TRIMMING

From October 1948 until the end of the U.S. occupation (April 28, 1952), the Supreme Court's online precedent database shows ten decisions about or at least mentioning habeas corpus. Interestingly, all were issued during the first half of this period, between 1948 and 1950.

The decisions show a Supreme Court that seems to take any opportunity to limit the utility of habeas corpus as a remedy. For example, although article 21 allows appeals of lower court rulings to be appealed to the Supreme Court (within three days!)<sup>92</sup>, in a December 2, 1950 opinion, the second petty bench noted that, since article 46 of the Rules made the Code of Civil Procedure applicable where not incompatible with the purpose of the Habeas Corpus Act, under article 419-2 of the Code of Civil Procedure in effect at the time, appeals from civil judgments would only be accepted by the Supreme Court in cases involving constitutional violations.<sup>93</sup> This meant that even if a lower court finding that a detention was not

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<sup>89</sup> *Id.*

<sup>90</sup> *Id.* at 75–76.

<sup>91</sup> *See, e.g.*, SILVIA CROYDON, *THE POLITICS OF POLICE DETENTION IN JAPAN: CONSENSUS OF CONVENIENCE* (2016) (discussing the use of the *daiyō kangoku* system for police detention).

<sup>92</sup> Habeas Corpus Act, *supra* note 14, art. 21.

<sup>93</sup> Saikō Saibansho [Sup. Ct.] Dec. 2, 1950, Sho 25 (ku) no. 124, 3 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 1159. The current Code of Civil Procedure was enacted in 1996.

“conspicuously” unlawful (the threshold set by article 4 of the Rules<sup>94</sup>) was demonstrably wrong, appeals to the Supreme Court could be rejected on the grounds that they asserted a misinterpretation of the law rather than a constitutional violation.

In a similar vein, a December 17, 1949 decision by the Second Petty Bench rejected an argument from a petitioner arguing that the Rules unfairly closed the door to most habeas corpus petitions.<sup>95</sup> Specifically mentioned were article 6 of the Rules requiring petitioners to prove that special circumstances prevented them from being represented by counsel (as generally required by article 3 of the Habeas Corpus Act), the information and substantiation requirements imposed on petitioners through article 7 of the Rules, and the article 8 requirement that courts reject defective petitions.<sup>96</sup> Here, too, the Supreme Court characterized this as being an argument that courts should conduct their own information gathering.<sup>97</sup> It was thus *not* a constitutional claim for purposes of article 419-2 of the Code of Civil Procedure and rejected accordingly.<sup>98</sup>

On the constitutional front, a December 24, 1949 Third Petty Bench decision found that a person whose initial arrest, detention, and conviction at initial trial was unlawful, did not qualify as a petitioner under article 2 of the Habeas Corpus Act, if the unlawful arrest and detention did not have any impact on the trial at the appeal level, which would have resulted in the conviction being confirmed.<sup>99</sup> “Even if the proceedings that resulted in the detainee’s detention included some unlawfulness, does not mean that, as argued, the court’s judgment violates the constitution and is thus void.”<sup>100</sup> So, problematic arrests or detentions can be remedied on appeal, rendering them constitutional, thereby forestalling use of habeas corpus to challenge even *constitutional* procedural defects in a trial process leading to a loss of freedom.

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<sup>94</sup> Rules, *supra* note 57, art. 4.

<sup>95</sup> Saikō Saibansho [Sup. Ct.] Dec. 17, 1949, Sho 24 (ku) no. 58, 2 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 839.

<sup>96</sup> Rules, *supra* note 57, art. 6, 7, 8; Habeas Corpus Act, *supra* note 19, art. 3.

<sup>97</sup> *Id.*

<sup>98</sup> *Id.*

<sup>99</sup> Saikō Saibansho [Sup. Ct.] Dec. 24, 1949, Sho 24 (ku) no. 71, 2 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 867.

<sup>100</sup> *Id.*

The most interesting constitutional challenge during this period relates to Cabinet Order 201.<sup>101</sup> This was the infamous order issued in 1948 at the instigation of GHQ banning public sector workers from striking, in spite of the guarantee contained in article 28 of the Constitution of workers' rights to organize, collectively bargain, and engage in joint action.<sup>102</sup> Workers imprisoned for violating this Cabinet Order brought habeas corpus petitions that were rejected on the grounds that petitioners were asserting their innocence, rather than because it was "obvious and conspicuous that the restrain[t] or a judgment order or other disposition relating to the restraint has been made without jurisdiction or authority or has been remarkably conflicted with formalities or proceedings prescribed in laws, orders or rules," the threshold established by Article 4 of the Rules. In an October 29, 1948 ruling, the Second Petty Bench used questionable logic to declare that, despite the petitioners having made constitutional arguments in their petition to the lower court, the lower court didn't even mention the constitutional element.<sup>103</sup> In their appeal to the Supreme Court, the petitioners were simply critical of the grounds on which the lower court applied the standard set forth in article 4 of the Rules, but failed to make a constitutional argument.<sup>104</sup> The Court did note that the petitioners had asked for a ruling on the constitutionality of Cabinet Order 201, but that argument has nothing to do with the ruling of the lower court on the habeas corpus petition—appeal denied.<sup>105</sup>

Granted, as is the case in which the Supreme Court seems unduly solicitous of government conduct during the occupation period (and possibly thereafter as well), a rhetorical question—what else could the court really do?—may offer the most ready explanation. The political impossibility of challenging the validity of Cabinet Order 201 would have been obvious. Yet, as we shall see, the habeas corpus decisions in this period set the tone for much of what comes in habeas corpus jurisprudence (and, the author believes, constitutional jurisprudence in general).

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<sup>101</sup> Naikaku Sōridaijin Ate Rengō Saikōshireikan Shokan ni Motozuku Rinji Sochi ni kansuru Seirei Dai 201 Gō [Cabinet Order in Connection with Provisional Measures based on Letter from SCAP to Prime Minister], July 22, 1948, No. 201 of 1948.

<sup>102</sup> CONSTITUTION, *supra* note 20, art. 28.

<sup>103</sup> Saikō Saibansho [Sup. Ct.] Oct. 29, 1948, Sho 23 (o) no. 88, 2 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 391.

<sup>104</sup> *Id.*

<sup>105</sup> *Id.*

During this period, the court also issues its first judgment in a type of case that, despite an absence of any clear constitutional dimension of the type envisioned in article 1 of the Act, would become the staple of habeas corpus litigation for several decades to follow—child custody disputes. In a January 18, 1949 judgment which, at three pages, is the longest of all of the court’s habeas corpus decisions during this period, the Second Petty Bench denied an appeal from a rejection of a habeas corpus petition by a father seeking the return of his two young children, allegedly spirited away by his estranged wife.<sup>106</sup>

Despite allegations that the mother used violent means to take the children, the Supreme Court noted that, even were that the case, it didn’t change the fact that it was best for the two children—both infants—to be with their mother, at least until the parents or a court decided what should happen to them after divorce.<sup>107</sup> What is interesting about this case is that the dense procedural thicket thrown up in other appeals involving detentions by police seems to vanish. The lower court got into the substantive legality of “detention” of the children by one parent as opposed to the other, and denied the petition on those grounds, rather than using procedural rationales to avoid substance as in the other cases reviewed.

### VIII. THE WAR CRIMES CASES

Perhaps the most significant habeas corpus decisions in terms of its possible significance as any sort of remedy for constitutional violations came shortly after the end of the American occupation in the form of petitions filed by two groups of inmates in Sugamo Prison. Both groups had been incarcerated as the result of convictions at war crimes tribunals in Japan and elsewhere in Asia. One group consisted of Japanese nationals and based their petitions on the grounds that their deprivations of freedom resulted from procedures that were inconsistent with the Japanese Constitution—a surprisingly reasonable argument.

The other groups were comprised of former Japanese subjects of Korean and Taiwanese heritage who lost their Japanese nationality when the Treaty of San Francisco went into force on April 28, 1952.

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<sup>106</sup> Saikō Saibansho [Sup. Ct.] Jan. 18, 1949, Sho 23 (o) no. 130, 3 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 10 (Japan).

<sup>107</sup> *Id.*

Article 11 of the treaty declares that “Japan accepts the judgments of the International Military Tribunal for the Far East and of other Allied War Crimes Courts both within and outside Japan, and will carry out the sentences imposed thereby upon Japanese nationals imprisoned in Japan.”<sup>108</sup> The argument of this group of former Japanese nationals imprisoned in Japan was essentially that, no longer being Japanese nationals, there were no longer grounds for continuing to detain them.

The latter case was decided first in July of 1952 and is referred to as the Non-Japanese Case.<sup>109</sup> The former was decided in April of 1954 and is referred to as the Japanese Case.<sup>110</sup>

Unlike the cases discussed previously, both cases were decided by all fifteen of the court’s judges sitting en banc as a Grand Bench. The cases are thus of particular significance, which is unsurprising, perhaps given that they represented an opportunity for the court to rule on the validity of the “victor’s justice” meted out during the occupation era.

And yet, in both cases, the court did little more than ratify the results of the war crimes tribunals and the Japanese government’s commitment under the peace treaty to stand by them. In the Non-Japanese Case, the court essentially accepted the Japanese government’s interpretation—that for purposes of article 11 of the peace treaty, the petitioners were still Japanese.<sup>111</sup> For good measure, one of the judges issued a concurring opinion opining that courts should refrain from interpreting treaties differently from the executive branch understanding.<sup>112</sup>

In the Japanese Case, the petitioners argued that article 11 of the peace treaty and its implementing legislation violated the constitution (and indeed, those convicted in Japan would have been done so through procedures outside the scope of the constitution when it was in force).<sup>113</sup> The court basically ignored this argument, noting that the treaty and related legislation required the enforcement

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<sup>108</sup> Treaty of Peace with Japan art. 11, Sept. 8, 1951, 136 U.N.T.S. 46, 56 (entered into force Apr. 28, 1952).

<sup>109</sup> Saikō Saibansho [Sup. Ct.] July 30, 1952, Sho 27 (ma) no. 79, 6 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 699 (Japan) [hereinafter Non-Japanese Case].

<sup>110</sup> Saikō Saibansho [Sup. Ct.] Apr. 26, 1954, Sho 28 (ku) no. 58, 8 SAIKŌ SAIBANSHO MINJI HANREISHŪ [MINSHŪ] 848 (Japan) [hereinafter Japanese Case].

<sup>111</sup> Non-Japanese Case, *supra* note 109.

<sup>112</sup> *Id.*

<sup>113</sup> Japanese Case, *supra* note 110.

of the sentences, therefore the imprisonment of the petitioners was not “conspicuously” unlawful and thus did not satisfy the threshold requirement of article 4 of the Rules. This being the case, there was no need to rule on the constitutional claim, since the rejection of the original petition was justified.<sup>114</sup>

This rhetorical effort to make the elephant in the room disappear was too much for the judges on the court. One, Tsuyoshi Mano, a former lawyer who supposedly entered the profession after having been inspired by reading about president Lincoln freeing the slaves, wrote a scathing concurrence:

While I agree with the conclusion of the majority opinion, by not making any judgment on the appellant’s claim of constitutional violations in its reasoning and just vaguely rejecting the appeal, I believe that there is a serious mistake in its legal reasoning.<sup>115</sup>

He then devotes several paragraphs to excoriating his colleagues for failing to conduct basic reasoning and avoiding clarity as to the constitutionality of the petitioners’ detention.<sup>116</sup> It either was constitutional or it wasn’t, and their use of article 4 of the Rules a shield to deflect the constitutional issue was unacceptable. He concludes by asserting his own view that the treaty and implementing regulation were constitutional, and therefore the detention was not problematic either.<sup>117</sup>

Another objection in the form of a concurrence was issued by Hachiro Fujita, a career judge. His objection was similar to that of Mano’s, that if detention under a law or treaty might be unconstitutional, it was inappropriate to reject a habeas corpus petition simply on the grounds that it was not *conspicuously* unconstitutional, as the logic of article 4 of the Rules required.<sup>118</sup> He suggested an alternative approach to arriving at the required conclusion, that essentially the obligations under the peace treaty

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> *Id.* Notably, he declined to explain how he arrived at his own conclusions as to constitutionality.

<sup>118</sup> *Id.*

constituted part of Japan's acceptance of the Potsdam Declaration and that they existed outside the constitution.<sup>119</sup> To him, this constituted preferable grounds for rejecting the appellants' claims.

In the long run, perhaps the most significant thing about the Japanese Case is that it became the source of key language that is cited in subsequent cases, language that appears to have further limited the scope of habeas corpus relief, despite appearing to merely reiterate language from the Act and the Rules, specifically:

Only a person physically restrained otherwise than by due process under law may petition for relief under the Habeas Corpus Act, if it is conspicuous that the restraint has been conducted or the judicial decision or disposition on restraint has been made without authority or in gross violation of the method or procedure specified by laws and regulations.<sup>120</sup>

This language is followed by the following explanatory phrase:

Grounds for petitions have been limited in this way, to cases in which violations of authority, method or procedure are conspicuous, because the Habeas Corpus Act is a special method of relief for the people establishing the prompt and easy restoration of liberty when wrongfully deprived, in accordance with the spirit of the constitution and its guarantee of fundamental human rights.<sup>121</sup>

The notion that limiting grounds for petitions seeking relief for deprivations of liberty is somehow consistent with the constitution that guarantees liberty is almost Orwellian. For our purposes, however, the more noteworthy part of this language is the reaffirmation of the concepts introduced in the Rules, that only

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<sup>119</sup> *Id.*

<sup>120</sup> *Id.* Article 4 of the Rules limits the grounds for a petition to the "conspicuous" threshold as previously discussed. Rules, *supra* note 57, art. 4. The language of this opinion adds a further limitation on who may file an appeal, despite the "any person" language contained in article 2 of the Habeas Corpus Act (and at least the English version of Article 34 of the Constitution). CONSTITUTION, *supra* note 20, art. 34; Habeas Corpus Act, *supra* note 14, art. 2.

<sup>121</sup> Japanese Case, *supra* note 110.

deprivations of liberty that were conspicuously in violation of “authority” (*kengen*), method (*hōshiki*) or procedure (*tetuzuki*) would qualify for relief. In other words, any detentions under imprimatur of law or legal process would likely ever get a petitioner as far as a hearing before a court in a habeas corpus case.

### IX. HABEAS CORPUS BECOMES A FAMILY AFFAIR (MOSTLY)

The Grand Bench revisited habeas corpus again in a 1958 decision (referred to below as the “1958 Decision”), in which it reiterated a formula similar to that quoted above, and then added the following gloss:

In other words, the person who requests relief under the Habeas Corpus Act should face the following requirements: the restraint has been conducted or the judicial decision, etc. on restraint has been made without authority or in gross violation of the method or procedure specified by laws and regulations; and these facts are conspicuous.”<sup>122</sup>

The 1958 Decision was an appeal from a rejection of a habeas corpus petition in what would now be called a “child abduction” situation. The facts summarized below (kindly supplied from the trial court record by one of the concurring judges) suggest the type of dramatic, gripping drama that only family law cases can offer.

Appellant was an American who cohabited with a *geisha* (G) in a de facto marriage that continued from 1952 until her death in 1956. G had two children out of wedlock: one, the “detainee” subject to the action (A), and a sibling (B). G brought both children with her to live with Appellant, but B (the eldest son) was soon taken by the G’s parents (his grandparents) and lived with them. A, however continued to live with G and Appellant, and called Appellant “father.”<sup>123</sup>

Around the time of G’s death, one of the grandparents brought a successful action in family court to be named A’s guardian, and

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<sup>122</sup> Saikō Saibansho [Sup. Ct.] May 28, 1958, Sho 32 (o) no. 227, SAIKŌ SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, 1226.

<sup>123</sup> *Id.* at 1237–1238.



then brought various other actions seeking the return of the child, including their own habeas corpus petition. Apparently tiring of waiting for the wheels of justice to turn, in the January of 1957 they took matters into their own hands, waited for A to finish kindergarten, and bundled the child into a car.<sup>124</sup>

Appellant filed a petition for habeas corpus relief seeking the return of the child. It was rejected, leading to an appeal to the Supreme Court. The majority opinion used the discretion it created for itself in article 42 of the Rules to dismiss appeals from lower court decisions on habeas corpus petitions without a hearing if it was apparent from the pleadings that the appeal had no merit. The majority cited with approval the trial court's finding that Appellant had failed to provide any substantiation, and went so far as to note that even if the grandparents' abduction of the child may have been imprudent, that alone did not mean their control over the child was without authority or involved conspicuous unlawfulness.<sup>125</sup> Here, we see how article 4 of the Rules has the possibly unintended effect of putting courts in the position of essentially *ratifying* potentially (but not conspicuously) unlawful behavior.

For a number of reasons, the 1958 Decision can perhaps be seen as a turning point, the juncture at which the apex of the Japanese judiciary decided to allow the Habeas Corpus Act to sink into relative obscurity, never achieving its potential as the constitutional remedy that was clearly intended for it. First, the case reflects the normalization of the use of habeas corpus principally in disputes over children. This was of course one of the "private detention[s]" anticipated at the legislative and implementation stage debates over the Act but never as anything more than a side show. In the 1958 Decision, the majority opinion still felt the need to address the underlying purpose of the Act by at least noting rhetorically (in the pointlessly contorted phraseology that often characterizes court opinions from this time) that: "it cannot be said that there are no grounds for doubting whether problems such as these should be handled as Habeas Corpus cases."<sup>126</sup> The 1958 Decision helped remove any remaining doubts.

Second, the majority opinion makes a point of confirming that the habeas corpus system was not like a criminal or civil trial

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<sup>124</sup> *Id.* at 1238.

<sup>125</sup> *Id.* at 1228.

<sup>126</sup> *Id.* at 1228.

involving a detailed inquiry into factual or legal problems, but was intended to offer a special type of “emergency” judicial relief.<sup>127</sup> It does so using its own Rule 4 provision allowing courts to reject petitions if other remedies are available to challenge the detention.<sup>128</sup> The 1958 Decision confirms that habeas corpus would rarely serve as a vehicle for serious inquiry into the facts or law behind a detention alleged to be unlawful, at least in any meaningful constitutional sense. For the law or facts to be unclear would mean the detention was not “conspicuously” unlawful.

Third, the decision shows a court still highly conflicted about habeas corpus, with several judges clearly concerned about the direction the court was taking it. While all of the court’s fifteen judges agreed that the appeal should be rejected, five issued supplemental opinions and one issued what was in substance a dissent.

Judge Mano makes another appearance, explaining in one paragraph (that refers to earlier opinions) that a court should consider a habeas corpus petition regardless of whether the unlawfulness of the alleged detention is conspicuous.<sup>129</sup> Judge Fujita, also still on the court, objected to any interpretation of the conspicuousness requirement of article 4 of the Rules that would create an additional threshold to the relief promised by article 2 of the statute.<sup>130</sup> Judge Junzō Kobayashi similarly asserted that the “conspicuous” language in the Rules was merely intended to clarify the meaning of the statute and shouldn’t be intended foreclosing relief except in cases where the unlawfulness of a detention was obvious without the need for any investigations of fact or law.<sup>131</sup> “Such an interpretation would significantly narrow the situations in which the Habeas Corpus Act applied, and would threaten to delegate the law to a largely decorative existence.”<sup>132</sup>

Judge Ken’ichi Okuno similarly noted that if, as the majority seemed to be suggesting, article 4 of the Rules and its conspicuousness threshold meant habeas corpus would only apply in cases where the grounds for it were so obvious that there was no need to engage in fact-finding or resolve any uncertainty of law, then this

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<sup>127</sup> *Id.* at 1226–1227.

<sup>128</sup> *Id.* at 1227.

<sup>129</sup> *Id.* at 1228.

<sup>130</sup> *Id.* at 1229–1230.

<sup>131</sup> *Id.* at 1230–1231.

<sup>132</sup> *Id.*

would have the effect of restricting and changing the language of article 2 of the Habeas Corpus Act. That would mean the Rules exceeded the scope of the rule-making authority delegated to the court by article 23 of the Habeas Corpus Act and thus be unlawful.<sup>133</sup>

Judge Daisuke Kawamura similarly objected to the *significant* threshold, declaring that rejecting petitions without examining them on this basis would result in many people being denied relief for wrongful detention. A former lawyer, he goes so far as to pose the question: “Would this not contravene the personal liberty guaranteed by the Constitution of Japan and the spirit of Article 1 of the Act?”<sup>134</sup>

Judge Kobayashi also objected to the majority’s casual dismissal of the brazen behavior of the grandparents, declining to consider it as a component of a potentially “unlawful” detention because it happened in the past.<sup>135</sup> What sort of a precedent did that set? Finally, he also pointed out a basic logical fallacy of both the trial court ruling and the majority’s endorsement of it: that on the one hand it involved a conclusion that there were “no disputes between the parties as to the principal facts of the case” but saw the Appellant’s petition dismissed because it “lacked any substantiation.”<sup>136</sup> In doing so, he was unknowingly acknowledging what would become an identifiable pattern of result-oriented jurisprudence that, in the views of the author, came to manifest itself in habeas corpus cases and other proceedings in disputes over children.<sup>137</sup>

As Judge Masuo Shimoizaka similarly pointed out that although the judgment of the lower court treats the abduction as a thing of the past—no longer an “unlawful” detention—and finds the child to be in the loving care of the grandparents, the court was able

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<sup>133</sup> *Id.* Article 41 of the Constitution provides that the Diet is the “sole” law making apparatus of the state. CONSTITUTION, *supra* note 20, art. 41. However, article 77 clearly vests in the Supreme Court the power to pass, *inter alia*, rules of procedure and practice. CONSTITUTION, *supra* note 20, art. 77. There are various theories as to which should prevail in the event that a law passed by the Diet conflicts with a Supreme Court rule. *See, e.g.*, ASHIBE NOBUYOSHI & TAKAHASHI KAZUYUKI, *KENPŌ [CONSTITUTION]* 352–253 (6th ed. 2015).

<sup>134</sup> *Id.*

<sup>135</sup> Saikō Saibansho [Sup. Ct.] May 28, 1958, Sho 32 (o) no. 227, SAIKŌ SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, 1231.

<sup>136</sup> *Id.* at 1232.

<sup>137</sup> *See, generally*, Colin P.A. Jones, *In the Best Interests of the Court—What North American Lawyers Need to Know About Child Custody and Visitation in Japan*, 8 *ASIA PAC. L. & P. J.* 167 (2007).

to hold all proceedings necessary to arrive at this conclusion a mere twenty days after the abduction took place. He found it hard to agree that the situation represented an acceptable “restoration of liberty” or that the child actually felt safe and free from detention. In his view, the child was still suffering from a deprivation of liberty. Although the lower court should be commended for acting quickly, it failed to consider what was really important in this sort of case: what was best for the child going forward. He thought the appeal should be rejected but the case remanded for further proceedings.<sup>138</sup>

### X. HABEAS CORPUS FROM THEN UNTIL NOW

The cases discussed so far in this Article reveal what happened to habeas corpus at an early stage in its history. From the outset, the Supreme Court—with some dissenting voices—declined to use the Habeas Corpus Act as the constitutional remedy it was intended to be. Today, few identify it as a procedure that has anything to do with human rights. This author has not seen any Japanese books on the subject of human rights law in which habeas corpus is even mentioned in the index.<sup>139</sup>

It has not lived up to its potential. In a retrospective piece on the Habeas Corpus Act forty years after its enactment, Professor Masayoshi Ohtani writes:

[It] must be pointed out that as far as is apparent from the case reporters, there are plenty of instances that should appear but do not. A list of these would include (1) arrest for a different charge (*bekken taihō*) and

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<sup>138</sup> Saikō Saibansho [Sup. Ct.] May 28, 1958, Sho 32 (o) no. 227, SAIKŌ SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, 1240.

<sup>139</sup> The same holds true in constitutional law, with the Habeas Corpus Act receiving no mention. By way of example, Professor Ashibe’s text on the constitutional law is one of the most widely accepted introductory texts. See discussion at *supra* note 133. On the subject of habeas corpus, its index contains no references to Japan’s Habeas Corpus Act, and on the subject of writs of habeas corpus, it merely redirects readers to *heibiasu korupasū*, i.e. a discussion of the remedy in the Anglo-American constitutional system.

detention,<sup>140</sup> (2) emergency arrest,<sup>141</sup> (3) investigations and forced confessions in substitute prisons, (4) restrictions on bail, (5) prolonged detention (6) limits on the defense (including the right to request and appointing counsel), (7) improper sentencing based on recognition of other crimes, and (8) improper administrative actions. Illegal deprivations of freedom such as these were originally supposed to be the principal subject of the habeas corpus system, and in the Anglo-American system these are the principal area in which it operates. However in Japan it can be said that it is not functioning at all, despite a growing need . . . . In conclusion, one has to say that there is nothing meaningful to see in terms of the system functioning in the area it was originally supposed to.<sup>142</sup>

Towards the end of his review of the various contexts in which habeas corpus relief has been sought in Japan—mostly unsuccessfully—he notes that from the outset it was anticipated that habeas corpus might be used for achieving the handover of children.

However, it turned out that the number of petitioners was vastly greater than anticipated. On this point, it could be seen as an appositional phenomenon when compared to the unexpectedly low number of instances involving criminal procedures and other detentions by authorities. Viewed from the original aims of the system, this is clearly an exceptional

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<sup>140</sup> Those who have spent long enough watching Japanese news may have noticed that it seems very rare for anyone to be arrested for murder. The more common charge is to be arrested for *unlawfully disposing of a dead body*, the existence of a dead body presumably providing adequate probable cause. Once in custody, the suspect is then encouraged to confess and then formally arrested for murder, already in police custody.

<sup>141</sup> Despite the Constitution permitting arrests only pursuant to an arrest or if the crime is committed in the presence of the arresting officer or other person, article 210 of the Code of Criminal Procedure allows police to make an “emergency arrest” (*kinkyū taiho*) of a suspect who has likely committed a serious offense, without either a warrant or the crime being committed in the presence of the arresting officer. C. Crim. Pro., *supra* note 37, art. 210.

<sup>142</sup> Ōtani Masayoshi, *Jinshinogohō no 40 Nen [40 Years of the Habeas Corpus Act]*, 60:5 HŌRITSU RONSŌ 207, 228 (1988).

situation. Notwithstanding the criticism of some observers of the extent of such use, it appears to have some special feature that is necessary to satisfy a social need.<sup>143</sup>

He closes by noting a highly problematic jurisprudence in what had come to be a widely used remedy within the sphere of family law.

The use of habeas corpus in family cases had already been evident a decade earlier, when Professor Takashi Ohmiya devoted a sixty-page article in a suitably obscure law review to the subject of the use of habeas corpus to achieve the handover (*hikiwatashi*) of infant children.<sup>144</sup> He had ample material to work with; his article analyzes over fifty cases from all levels of the judiciary, and he starts his analysis noting that in such cases “the best interests and welfare of the child must be the most important consideration.”<sup>145</sup>

Professor Ohmiya describes habeas corpus as functioning as a “provisional disposition” for deciding where a child should live until permanent custody arrangements are sorted out by the courts.<sup>146</sup> Available for his analysis is an extensive body of jurisprudence involving considerations such as violent takings and “maternal deprivation” that developed around these cases.<sup>147</sup> The original purpose of the law is barely mentioned, and one would struggle to find a constitutional linkage between this jurisdiction and the constitutional ideals mentioned in article 1 of the Habeas Corpus Act.<sup>148</sup>

## XI. THE COURT STEPS IN AGAIN

Although Professor Ohtani saw habeas corpus as addressing a social need in family cases, a few years after he published his

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<sup>143</sup> *Id.* at 236.

<sup>144</sup> Takashi Ohmiya, *Kodomo no Hikiwatashi Seikyū to Jinshinogohō (1)* [*Demands to Hand Over Children and the Habeas Corpus Act (1)*], 14 HOKKAIDŌ KOMAZAWA DAIGAKU KENKYŪ KİYŌ 41 (1979).

<sup>145</sup> *Id.*

<sup>146</sup> *Id.*

<sup>147</sup> *Id.*

<sup>148</sup> This comment is not intended as a criticism of Professor Ohmiya. To the author’s knowledge, the Japanese Supreme Court has never issued a decision clearly identifying a constitutionally-significant dimension to the parent-child relationship.

retrospective, the Supreme Court issued a decision indicating that perhaps the remedy was being sought and granted too frequently. On October 19, 1993 the Third Petty Bench pushed habeas corpus into the background even in the limited universe of family law. This decision is referred to as the “1993 Decision.”<sup>149</sup>

The case involved an appeal from a lower court opinion ordering the return of two children to their mother from their father, her estranged husband, and his parents. Determining that the home environment and standard of living offered by both parents were not markedly different, the lower court had relied on what was at the time a standard judicial practice of preferring mothers to fathers in cases involving young infants and ordered the return.<sup>150</sup>

The Third Petty Bench upheld the father’s appeal, quashing the lower court decision and remanding for further proceedings.<sup>151</sup> The court addressed what even today remains a basic legal conundrum arising in cases involving the children of estranged yet still legally married parents; under article 818 of the Japanese Civil Code, parental authority (including what would now be called “physical custody” or “care and control”) is exercised jointly by both parents during marriage.<sup>152</sup> While courts can make a provisional determination of physical custody prior to divorce,<sup>153</sup> parental authority may only be vested in one parent (and only one parent, joint parental authority out of marriage not being provided for) upon divorce.<sup>154</sup> Accordingly, before a court makes any dispositions on where and by whom the children should be raised, both parents are arguably within their rights making those decisions, even if they conflict. This being the case, it was particularly miraculous that courts over the preceding decades had been successful in finding instances of *conspicuous* unlawfulness in “detentions” of these types while persistently failing to do so in cases involving state actors. The Court addressed this conundrum by declaring:

When the husband and the wife jointly exercise  
parental authority over their infant child, the custody

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<sup>149</sup> Saikō Saibansho [Sup. Ct.] Oct. 19, 1993, Hei 5 (o) no. 609, SAIKŌ SAIBANSHO SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, 5099.

<sup>150</sup> *Id.* at 5102.

<sup>151</sup> *Id.* at 5099.

<sup>152</sup> MINPŌ [CIV. C.] 1896, art. 818, no. 89 [hereinafter CIV. C.].

<sup>153</sup> *Id.* art. 766.

<sup>154</sup> *Id.* art. 819.

of the child by either the husband or the wife should be deemed to be legal under parental authority unless there are special circumstances. Therefore, in order to prove that the custody or restraint by either the husband or the wife is conspicuously illegal as referred to in Article 4 of the Habeas Corpus Rules, such custody must be evidently more detrimental to the child's welfare.<sup>155</sup>

In short, the Court decided that the “conspicuously illegal” threshold it created for itself in the Rules and had used to avoid using habeas corpus for its original purpose should henceforth be used to filter most of the “exceptional” child abduction cases out as well. To be fair, the Court was also pointing out another basic flaw (from the Court's perspective) of using habeas corpus relief in child custody disputes: Japan has an entire system of courts devoted to dealing with such cases, one that has specialized resources and personnel lacking at the District Courts which receive habeas corpus petitions. As declared by the Court:

A dispute over custody of an infant child between the child's parents or the husband and the wife who have joint parental authority but live separately, as in this case, is basically subject to the exclusive jurisdiction of family courts, and the system for adjudication of domestic relations as well as the human and material resources of family courts exist particularly for the purpose of investigating and adjudicating such dispute. In cases where there is no danger to the infant child nor is there any urgent problem concerning the custody or rearing of the child, as in the present case, it is impossible to find any reason to request relief under the Habeas Corpus Act.<sup>156</sup>

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<sup>155</sup> See *Judgment Concerning the Conspicuous Illegality of the Restraint Required in Cases where Either the Husband or the Wife Requests the Other Party to Deliver Their Infant Child under the Habeas Corpus Act*, SUP. CT. JAPAN (1993), [http://www.courts.go.jp/app/hanrei\\_en/detail?id=1429](http://www.courts.go.jp/app/hanrei_en/detail?id=1429) [<https://perma.cc/3SEA-83WW>] (presenting an English translation of the judgment).

<sup>156</sup> *Id.*



Thereafter, habeas corpus relief became more unusual even in these cases. This is illustrated by a study conducted by the Ninth Civil Division of the Tokyo District Court and published in a 2007 issue of *Hanrei Jihō*, one of Japan's most prestigious law journals.<sup>157</sup> This study is referred to in this Court as the "Tokyo District Court Study" and its review of habeas corpus petitions filed in the Tokyo District Court from 2004 through 2006 revealed forty-three petitions, approximately 70% of which were over the handover of a child.<sup>158</sup> This represented an increase over a prior study of the court for cases in the year 1990 and 1991, in which sixty cases were of this type.<sup>159</sup>

Of all of the petitions reviewed in the 2007 study, only one was granted. Five were resolved through settlements between the parties (*wakai*), and fourteen saw the petitions withdrawn.<sup>160</sup>

Recall that the withdrawal of petitions was a procedural option not provided for in the law nor added in the Rules. A lawyer in the 1948 Operating Committee had presciently objected to allowing withdrawal of petitions because it could encourage coercion to do so by the detaining party.<sup>161</sup> Yet the District Court Study indicates the court unofficially "recommending" petitions be withdrawn in cases involving children has become an accepted practice.<sup>162</sup>

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<sup>157</sup> *Tōkyō Chisai ni okeru Saikin no Jinshin Hogo Seikyū Jiken no Shori Jōkyō* [*The Disposition of Recent Habeas Corpus Petitions in the Tokyo District Court*], 1961 HANREI JIHŌ [HANJI] 3 (2007) [hereinafter Tokyo District Court Study].

<sup>158</sup> *Id.* The other types of claim included: (1) several petitions from a detainee claiming his imprisonment was based on forged documents (all rejected on procedural grounds); (2) a petition from chess champion Bobby Fischer who was detained in Narita at the instigation of U.S. authorities for the (in retrospect bizarre) offense of having played a chess match in Yugoslavia in 1992 (withdrawn after he was granted asylum and citizenship in Iceland); (3) several petition from prison inmate seeking a transfer to a hospital prison due to a health conditions (rejected on substantive grounds); (4) several petitions from prison inmates making various complaints about the warden, including one complaining specifically about the food (all rejected on procedural or substantive grounds); (5) two petitions filed by prisoners immediately after their convictions were confirmed by the Supreme Court, both asserting their innocence (one rejected on procedural grounds, the other on substantive); and (6) one petition filed by brothers fighting over "possession" of an elderly mother (withdrawn).

<sup>159</sup> *Tōkyō Chisai ni okeru Saikin no Jinshin Hogo Seikyū Jiken no Shori Jōkyō* [*The Disposition of Recent Habeas Corpus Petitions in the Tokyo District Court*], 1431 HANREI JIHŌ [HANJI] 14 (1992).

<sup>160</sup> Tokyo District Court Study, *supra* note 157, at 30.

<sup>161</sup> OPERATING COMMITTEE MINUTES, *supra* note 64, at 63.

<sup>162</sup> Tokyo District Court Study, *supra* note 157, at 10. On the subject of withdrawing petitions, an interesting example of the process of entropy that beset habeas corpus can be seen in a 1956 case involving a successful petition resulting in a patient being ordered

The Tokyo District Court Study also shows courts to have recast the “absence of other remedies” requirement added by article 4 of the Rules into a requirement of *hojūsei*, a term that could be translated “supplementariness,” further relegating habeas corpus to the realm of an obscure remedy that is rarely, if ever, available and acting as a concept that serves as additional grounds for rejecting a petition. As noted in the study:

At the very least, in cases between parents both vested with parental authority, the general rule made clear from precedent is that family court proceedings starting with preservative dispositions under the Domestic Relations Act. If a habeas corpus petition is filed without going through these procedures, there is a high probability that it will be dismissed for lacking complementariness or that it will not satisfy the requirement that the conspicuous illegality be readily apparent . . . [i]f a petitioner has not first gone through family court proceedings, our court lets them know and as a result, *the majority of cases are withdrawn* before any substantive examination takes place.<sup>163</sup>

Of course, the rationale of the courts in resolving these cases is hard to refute. Why parents (and their counsel) seek habeas corpus relief in cases involving children despite the availability of court proceedings should probably be explained. First, family court procedures take time; there is a requirement that all disputes of this type first go through court-sponsored conciliation, which may span for months and during which the left-behind-parent may have little or no contact with his or her child; many parents are understandably impatient in such situations; and those who are forewarned of the inefficacy of family courts (particularly fathers who may—rightly or wrongly—perceive a bias against them in favor of mothers) may be inclined to seek relief under a statute that at least purports to offer

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released from a mental hospital by the trial court. The Supreme Court overturned this decision and remanded it to the trial court for further proceedings. The trial court rejected efforts by the (now free) petitioner to withdraw his petition and ordered him back into the custody of the mental hospital. See Yamamoto Kōzō, *Hanrei Jinshinhogohō [The Cases on the Habeas Corpus Act]*, 62 DOSHISHA HŌGAKU, Oct. 1960, at 57, 60 (defining petition withdrawals).

<sup>163</sup> Tokyo District Court Study, *supra* note 157, at 12 (emphasis added).

“fast” and “easy” relief.<sup>164</sup> Second, although family courts can order the handover of a child as a provisional remedy, there are few sanctions for not complying with family court orders or even agreements made by the other party.<sup>165</sup> Only the Habeas Corpus Act offers the threat of criminal sanctions for non-compliance, or for failing to “produce the body” by bringing the detained party to court.<sup>166</sup> Though, even with respect to habeas corpus, the Study indicates that there are no (other) mechanisms for enforcing a judgment granting a petition.<sup>167</sup> Moreover, for the criminal sanctions to matter, police or prosecutors must care enough to enforce them; the author is aware of only one case in which even the possibility of criminal charges was triggered for non-compliance in a habeas corpus case, though it does not appear to have been reported anywhere.

In any case, the Tokyo District Court Study reveals a procedural regime that functions in a way that ensures a hearing almost never happens in any case. Only two of the cases surveyed (2.6% of the total) resulted in writs of habeas corpus being granted and thus hearings.<sup>168</sup> Thus, in actual trials in which the detaining party “produces the body” of the detained party to the court and is required to explain the reasons for the detention in front of the prisoner, the original purpose of habeas corpus has been effectively excised from the act. In fact, the Tokyo District Court Study betrays what comes across as grumbling about hearings when they do occur: the requirement that a judgment be issued the same day as the hearing is inflexible, the court must make a yes-or-no decision about who the custodian of the children is, and the parties submit pleadings full of subjective, conflicting evidence.<sup>169</sup> In short, all the things that were intended to be *features* in habeas corpus as originally conceived are perceived as bugs in the remedy as it has been shaped by the court. Not only that, but the lawyers who represent the detained (the children) are described as poorly suited to the task of representing

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<sup>164</sup> Habeas Corpus Act, *supra* note 14, art. 1.

<sup>165</sup> Jones, *supra* note 137, at 245–257. Note, however, that the procedural regime for enforcing handovers has changed since the time this article was written, though the basic problem with enforceability has not.

<sup>166</sup> Habeas Corpus Act, *supra* note 14, art. 18.

<sup>167</sup> Tokyo District Court Study, *supra* note 157, at 10.

<sup>168</sup> *Id.* at 4.

<sup>169</sup> *Id.* at 10.

them compared to the lawyers and expert investigators of family courts.<sup>170</sup>

## XII. THE SHADOW OF HABEAS CORPUS TODAY

As is hopefully clear, habeas corpus in Japan has become almost completely meaningless—at best it is a tuning fork used to make other proceedings work a bit more harmoniously. Not only has it become meaningless when compared to its original purpose, but it is largely meaningless even within the context of the limited purpose it has been allowed to serve in recent years.

Let us revisit article 1 of the Habeas Corpus Act, which I have tried to render into a more grammatical, less quirky English translation than the one promulgated in 1948:

The purpose of this law is for the Japanese people to have their personal freedom quickly and easily restored through the courts when actually and wrongfully deprived of it, in accordance with the Constitution of Japan and its guarantee of fundamental human rights.<sup>171</sup>

As already described in length, court practice and article 4 of the Rules have ensured that habeas corpus is neither quick nor easy, or even available most of the time. More fundamentally, however, to the author's knowledge no one has ever indicated the “fundamental human rights”<sup>172</sup> implicated in the child custody cases that became the mainstay of habeas corpus jurisprudence. While the Supreme Court in its 1993 Decision rightly pointed out the difficulty of finding conspicuous illegality in cases involving disputes among parents both having parental authority, it failed to identify what constitutional rights would be violated even in situations when this threshold was met.<sup>173</sup> Remember, habeas corpus was intended to give life to article

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<sup>170</sup> *Id.*

<sup>171</sup> Habeas Corpus Act, *supra* note 14, art. 1 (author translation).

<sup>172</sup> *Id.*

<sup>173</sup> Interestingly, habeas corpus could have but never actually did play a meaningful role in countering the criticism levelled against the role of Japanese judiciary in Japan becoming viewed internationally as a haven for international parental child abduction prior to its ratification of the Hague Convention on the Civil Aspects of International Child Abduction in 2014. Although prior to this there were countless instances of foreign parents seeking the

34 and possibly a few other provisions of the constitution, none of which are implicated in child custody cases.

To the author's knowledge, no court or commentator has dealt with the very basic question: does a child—an infant in many of these cases—even *have* “personal freedom,” and, even if they do, is it being “deprived” by living with dad, going to kindergarten, and seeing grandma?<sup>174</sup> This is not to trivialize the problems involved in these cases or the potentially negative impact they may have on children, an impact well worth judicial attention. The fact remains, however, that there is a basic failure to identify any constitutional dimension to these cases, just as Japan's Supreme Court has failed to identify any constitutionally-protected dimension in the parent-child relationship generally.<sup>175</sup>

It might be possible to argue that Article 1 of the Habeas Corpus Act is merely hortatory and that even if the remedy the act establishes has ended up being an obscure and supplementary one, it is at least a remedy. This is perhaps true, but it is worth pointing out that even in this context, it is largely meaningless for another key reason, a reason related directly to how the Supreme Court has chosen to shape it over the years: in the rare instance when a habeas corpus

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return of children abducted to Japan from foreign countries (including numerous instances where this was done in violation of foreign law and/or court orders) by a Japanese parent, both through habeas corpus and other remedies available in the family court system, virtually no children were ever returned. *See generally*, Jones, *supra* note 137. Interestingly, habeas corpus petitioners failed in these cases despite a 2003 Supreme Court decision upholding the arrest and conviction under an obscure anti-human trafficking provision of the Penal Code of a foreign father trying to *leave* Japan, in part due to the *greater degree of illegality* of removing children across borders. *See* Colin P.A. Jones, *No More Excuses: Why Recent Penal Code Amendments Should (But Probably Won't) Stop International Parental Child Abduction to Japan*, 6 WHITTIER J. CHILD & FAM. ADVOC. 351 (2007) (discussing the effect of amendments of the penal code on parental child abduction in Japan).

<sup>174</sup> Habeas Corpus Act, *supra* note 14, art. 1. The closest the court came to dealing with this issue involved a rather fanciful application of logic. In a July 4, 1968 decision of the First Petty Bench declared that it was clearly established by prior precedent (including the 1958 Decision) that “exercising custody over an infant lacking capacity to form intent naturally involves restricting the personal freedom of the infant, but that does not prevent such restrictions from being deemed “detention” under the Habeas Corpus Act or the rules thereunder.” In other words, because the exercise of custody naturally involves the restriction of the freedom of children, such custody can be exercised in a “conspicuously unlawful” manner for habeas corpus purposes.

<sup>175</sup> It is also worth noting that in cases involving children courts have somehow managed to avoid getting tied up in the restrictions it sought to impose on “real” detainees, the ones intended to minimize instances when petitioners were filed by someone *other than the detainee*, as described *infra*, and possibly over the objections of the detainee.

petition actually does result in a hearing, the hearing itself will almost certainly be a meaningless formality.

This is because with “conspicuous” illegality established by the Rules and precedent as the threshold a petitioner must satisfy for a petition to be accepted by a court, acceptance by the court means it will have already made up its mind as to how to decide based on the pleadings.

In child custody cases, this should be entirely unsurprising since, as indicated by the Tokyo District Court’s description of its own practice, petitioners would first be required to exhaust their options at family court.<sup>176</sup> A habeas corpus petition being accepted would mean that the petitioner already has a custody decree or other orders from a family court (in proceedings that were unlikely to have been either quick or easy). Lacking the specialized expertise and resources of a family court, which (hopefully) will have already devoted significant time and resources to understanding the situation of the children at issue and what should be done for them, how could a District Court do anything other than ratifying a decision already made elsewhere?

As noted by the Tokyo District Court Study, cases involving children mostly involve violations of family court decrees (i.e., by the “detaining” parent).<sup>177</sup> A decade’s worth of informal discussions by this author with lawyers and former judges involved in child custody matters confirm the view that habeas corpus hearings are not a place where judges make decisions based on oral arguments; they are often a meaningless formality leading to a preordained conclusion.<sup>178</sup>

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<sup>176</sup> Tokyo District Court Study, *supra* note 157, at 10.

<sup>177</sup> Tokyo District Court Study, *supra* note 157, at 6.

<sup>178</sup> The author would venture that another key feature of habeas corpus has also been rendered largely meaningless—the requirement that the detained party have counsel appointed, at state expense, if necessary. While many parents might welcome the appointment of independent counsel for a child abducted by the other parent, it seems unlikely that a lawyer appointed to represent the child would be in a position to advocate for anything different from what the family court has already decided is in his or her best interests.

The role of habeas corpus even in child custody cases may be shunted further into the background in connection with the implementation by Japan of the Hague Convention on the Civil Aspects of International Child Abduction, which went into effect in Japan on April 1, 2014. Japan’s implementing legislation and related rules provide for an entire procedural regime by which Japan’s courts would review petitions for return of children under the treaty, though it was unsure how (and if enforcement would work). *See, e.g.*, Colin P.A. Jones, *Towards an “Asian” Child Abduction Treaty? Some Observations on Singapore and Japan Joining the Hague Convention* (Asian Law Institute Working Paper Series No.

The meaninglessness of habeas corpus hearings when they do happen is suggested by an interesting tort case brought against the presiding judge of the Himeji Branch of the Kobe District Court over a 2001 habeas corpus case that involved no less than four hearings.<sup>179</sup> The father “detaining” the two children failed to bring them to the first hearing (because they were in Texas for medical reasons, he explained later), but he did bring them to the next hearing.<sup>180</sup> Before the hearing, he reluctantly surrendered the children to court personnel, and they did not participate in the proceedings.<sup>181</sup> The court then heard from the petitioning mother, counsel for the detained children, and the father before issuing a “provisional” disposition ordering the children handed over to the mother.<sup>182</sup> This transfer was accomplished by the simple expedient of ensuring she left the courtroom first and then physically preventing the father from leaving until she was gone with the children.<sup>183</sup> Unsurprisingly, the two subsequent hearings upheld the “provisional” ruling and the tort claim against the presiding judge (and the state) was unsuccessful. There may be little to commend the father in his actions in this case, but it is a case that illustrates the generally meaningless nature of habeas corpus proceedings.<sup>184</sup>

Thus, what Anglo-American lawyers would likely regard as the most important and meaningful aspect of habeas corpus

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031, 2013) (discussing effect of the Hague Convention on Japan). Three years since taking effect, cases in which return orders by Japanese courts have proven unenforceable have started to receive attention, but in no instance that the author is aware of has habeas corpus been suggested on the Japanese side as a final remedy (and the only one with possible penal sanctions for non-compliance). See Simon Scott, *Three Years After Japan Signed Hague, Parents Who Abduct Still Win*, JAPAN TIMES (May 1, 2017): [http://www.japantimes.co.jp/community/2017/05/01/issues/three-years-japan-signed-hague-parents-abduct-still-win/#.WQ\\_JfTdUvIU](http://www.japantimes.co.jp/community/2017/05/01/issues/three-years-japan-signed-hague-parents-abduct-still-win/#.WQ_JfTdUvIU) [https://perma.cc/NG9L-XS8P].

<sup>179</sup> Kōbe Chihō Saibansho [Kōbe Dist. Ct.] Apr. 15, 2002, Hei 13 (gyō u) no. 20, SAIKŌ SAIBANSHO SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, [http://www.courts.go.jp/app/hanrei\\_jp/detail4?id=7221](http://www.courts.go.jp/app/hanrei_jp/detail4?id=7221) [https://perma.cc/3ZPK-PT42].

<sup>180</sup> *Id.*

<sup>181</sup> Note that the parties intended to play a leading role in habeas corpus as it was originally designed—the detained persons—do not even appear in the courtroom in this type of case! Note that they should, in the case of infants, but this serves as further illustration of how far habeas corpus has come from its textual origins and legislative intent.

<sup>182</sup> Kōbe Chihō Saibansho [Kōbe Dist. Ct.] Apr. 15, 2002, Hei 13 (gyō u) no. 20, SAIKŌ SAIBANSHO SAIBANSHO SAIBANREI JŌHŌ [SAIBANREI JŌHŌ] 1, [http://www.courts.go.jp/app/hanrei\\_jp/detail4?id=7221](http://www.courts.go.jp/app/hanrei_jp/detail4?id=7221) [https://perma.cc/3ZPK-PT42].

<sup>183</sup> *Id.*

<sup>184</sup> Recent informal discussions between the author and lawyers handling habeas corpus cases seem to confirm that the results of hearings are preordained.

proceedings, the hearing at which a detaining party and his prisoner confront each other and argue over the constitutional or other legal principles involved, has been effectively excised from habeas corpus in Japan through Supreme Court rules and judicial practice. This has resulted in the Habeas Corpus Act becoming not a tool of the Japanese people for enforcing the constitution, as was unequivocally the original intent, but a tool by which courts at least double-check, but almost always ratify decisions regarding child custody or detention made elsewhere. Japan's judiciary prevented habeas corpus from being abused by destroying it.

Perhaps there is some value to even the small role habeas corpus has retained. But the fact that many of the practices used by police and prosecutors to coerce suspects into confessing that were cited at the time of the Habeas Corpus Act's adoption—prolonged, coercive detentions, limited bail, and so forth—remain an integral and frequently-criticized feature of the Japanese criminal justice system today would not seem to say very much about the state of the constitutional protections in this sphere.

### XIII. CONCLUDING REMARKS

In fairness, habeas corpus—and perhaps constitutions—may be overrated and idealized by Anglo-American jurists. As has been pointed out by Professor Paul Halliday, the history of the development of habeas corpus in the West may have been as much about the establishment of the superiority of Royal Courts compared to other courts and authorities, first in England then later throughout the British Empire.<sup>185</sup> In this light, habeas corpus was as much a tool for helping to establish a judicial hierarchy. It has arguably played the same role in the United States, where it was first canonized through its protection in the U.S. Constitution and subsequently enabled federal courts to establish their superiority over state courts by providing a means for the former to review the constitutionality of proceedings leading to the latter resulting in deprivations of freedom.

As suggested by Professor Halliday in his concluding remarks, the key to the success of habeas corpus—where it actually was successful—was “a powerful court.”<sup>186</sup> Even within the British

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<sup>185</sup> See generally, PAUL D. HALLIDAY, *HABEAS CORPUS FROM ENGLAND TO EMPIRE* (2010) (providing a historical and empirical analysis of the writ of habeas corpus).

<sup>186</sup> *Id.* at 301.



Empire, however, where powerful courts were lacking, “habeas corpus operated as only a shadow of its theoretical self.”<sup>187</sup>

It is widely acknowledged that, with some exceptions, Japan lacks powerful courts and Japanese people have low expectations of the judiciary.<sup>188</sup> Those courts it does have are part of a national bureaucracy with a hierarchy that is both defined by law and subject to a much more detailed, unwritten stratigraphy that is unofficial but well-known by insiders.<sup>189</sup> Moreover, despite constitutional separation of powers, on a working level the judiciary maintains relations with executive branch agencies, particularly the Ministry of Justice (which is run by prosecutors).<sup>190</sup> A remedy like habeas corpus, which could set individual courts at odds with each other outside of the framework of the established hierarchy or upset institutionalized working-level relationships with other government institutions, is a remedy the judiciary probably doesn’t need—even if the people of Japan might.

As noted at the outset, the author believes that what happened to habeas corpus in Japan is likely symptomatic of what has happened to other ideals reflected in the constitution. This includes the ideals that the Habeas Corpus Act was supposed to realize. What happened to habeas corpus may be an extreme example, but at the same time one that is particularly easy to distinguish and track, given the discrete, specific nature of the remedy, the constitutional principal to which it relates, and its readily verifiable fate down a dirt road of judicial desuetude.

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<sup>187</sup> *Id.*

<sup>188</sup> *See, e.g.*, SHIGENORI MATSUI, *THE CONSTITUTION OF JAPAN: A CONTEXTUAL ANALYSIS* 150 (2011) (“Since most of the public had not expected the courts to play much active role in solving legal disputes in general, it is natural that they had not expected the courts to enforce the Constitution more vigorously.”); CARL GOODMAN, *THE RULE OF LAW IN JAPAN: A COMPARATIVE ANALYSIS* 262 (2003) (noting the weak enforcement powers and other limitations of Japanese courts).

<sup>189</sup> *See, e.g.*, SEGI HIROSHI, *NIPPON NO SAIBAN [JAPANESE TRIALS]* (2015).

<sup>190</sup> This can be confirmed by reviewing any edition of the *Seikan Yōran*, a quarterly directory of national government institutions and the politicians and bureaucrats who serve in them, published by Seikan Yōransha (<http://www.seisakujihou.co.jp>). This directory shows that any given time most of the bureau chiefs and other leadership positions in the Ministry of Justice are filled by prosecutors. It also shows that some positions in the MOJ and other executive branch institutions (such as the Cabinet Legislation Bureau) are filled by people who have previously been working in the judiciary.

#### XIV. APPENDIX 1: HABEAS CORPUS ACT<sup>191</sup>

**Article 1.** In accordance with the principle [sic] of the Japanese Constitution which guarantees the fundamental human rights, this Law aims at the rapid and easy recovery by the judicial court of the freedom of the person which is illegally restrained.

**Article 2.** A person whose freedom of action is restrained without the proper legal procedure may apply for its recover in accordance with the provisions of this law.

Any person may present the preceding application on behalf of the person who is held under such restraint.

**Article 3.** The application mentioned in the preceding Article shall be made by attorney on behalf of the restrained person. However, in cases where there exist extraordinary circumstances, it can be made by the applicant himself.

**Article 4.** The application provided for in Article 2 may be presented in writing orally to the High Court or District Court which has the [sic] jurisdiction over the district where the restrained, the restrainer or the application [sic: applicant] resides.

**Article 5.** Such application in writing shall contain the following items specifically, and it shall be offered with necessary materials for presumptive proof:

1. Name of the restrained;
2. Purpose of the request;
3. Fact of the detention;
4. Restrainer known;
5. Place of detention known.

**Article 6.** The Law Court must make decision without delay on the request under Article 2.

**Article 7.** The Court may, in cases where the application lacks requisite vindications or necessary presumptive proof dismiss it by a decision.

**Article 8.** Upon receipt of the application provided for in Article 2, the Court may, by request of the applicant or through its authority transfer the case to another Court considered to have competent jurisdiction.

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<sup>191</sup> Habeas Corpus Act, *supra* note 14. This English version is presented as it appears in the English version of the Official Gazette, including errors in grammar and spelling together with quirky expressions.

**Article 9.** The Court may, except [sic; in] the cases prescribed in the preceding two Articles, immediately make the necessary inquiry, in order to prepare for investigations at the time of trial, into the reason for the restraint and other matters by conducting a hearing on the statement made by the restrained, the applicant and their attorneys and other interested parties.

The Court may cause the members of the collegiate court to make the preliminary inquiry mentioned in the preceding paragraph.

**Article 10.** In case of necessity, the Court may release in order to release the restrained person temporarily by its decision, either under each that the restrained shall present himself at any time when summoned or on the conditions deemed proper, or may otherwise take appropriate steps prior to conducting the trial provided for in Article 16.

In the case where the restrained person under the preceding Article shall not present himself, he may be arrested.

**Article 11.** The Court may dismiss the application (for such releases) without any proceeding for trial, when it has become evident through the preliminary inquiry that there exists no ground justifying the said application.

When the court makes the decision under the preceding paragraph, it shall rescind the disposal carried out before under Article 10 and, causing the restrained person to present himself, hand him to the restrainer.

**Article 12.** Except in case of Article 7 or Paragraph 1 of the preceding Article, the Court shall designate a certain date and place and summon for trial the applicant or his attorney, the restrained person and the restrainer.

While issuing a habeas corpus warrant to the restrainer to cause the person so restrained to appear at the designated date and place provided for in the preceding paragraph, the Court shall direct him to submit a written answer concerning the date, place of and the reason for such restraint, by the day of the trial mentioned in the preceding paragraph.

In the warrant mentioned in the preceding paragraph, the fact that if the restrainer does not obey the said warrant, he may be placed under arrest or taken into custody until he obeys the order and shall be liable to a fine not exceeding \500 for each day's delay shall be explicitly stated.

There shall be a period of three days between the forwarding of the said warrant and the day of trial. However, the trial shall be held within one week from the date under which the request under Article 2 was made. This period may be shortened or prolonged, as the case may be.

**Article 13.** The order mentioned in the preceding Article shall be notified to the Court which has issued the warrant concerning the restraint and to the Procurator.

The Judges of the Court and the Procurator mentioned in the preceding paragraph may present themselves on the day of trial.

**Article 14.** The investigations on the day of the trial shall be conducted at an open court attended by the restrained person, the restrainer, the applicant and his attorney.

When there is no such attorney, the Court shall select one from among the qualified lawyers.

The attorneys under the preceding paragraph may request for travelling expenses, daily allowances, hotel expenses and compensation.

**Article 15.** On the day of the trial, the Court, upon hearing the statement of the applicant and the reply of the restrainer, shall conduct investigations on materials for presumptive proof.

The restrainer shall clarify the reasons for detentions.

**Article 16.** If the Court, upon investigations [sic], finds such application groundless, it shall dismiss it by decision and hand over to the restrainer the person so detained.

In the case of the preceding paragraph, the provisions of Article 11, Paragraph 2 shall apply.

In cases where the application is based on sufficient ground, the court shall forthwith release the person under restraint.

**Article 17.** In the trial provided for in Article 7, Article 11, Paragraph 1, and in the preceding Article, the Court may saddle [sic] the restrainer or the applicant with the entire costs spent in the procedure, or a part thereof.

**Article 18.** In cases where the restrainer refuses to obey the order mentioned in Article 12, Paragraph 2, the Court may arrest him or keep him in custody until he obeys the order, and impose on him a fine not exceeding \500 per each day's delay.

**Article 19.** The restrainer, if notified by the person under restraint that the requests the benefit of an attorney on his behalf, shall

immediately notify the request to the attorney whom he may nominate.

**Article 20.** The Court which has received the application provided for in Article 2, or the Court to which such application has been forwarded shall immediately notify the Supreme Court of the case and report to it on the progress and results of the steps taken in connection therewith.

**Article 21.** In regard to the decision made by the lower Court, an appeal may be made to the Supreme Court within 3 days.

**Article 22.** The Supreme Court, if it finds such steps necessary, may cause the Lower Court to transfer the pending case, irrespective of the stage of its proceedings and may directly review it.

The Supreme Court, under the circumstances mentioned in the preceding paragraph, may nullify or alter the decision or verdict pronounced by the lower court.

**Article 23.** The Supreme Court may decide on necessary rules governing such application, examination, trial and other matters.

**Article 24.** Judgments which were passed according to other laws and are unfavourable to the restrained shall be invalid [sic] to the extent they conflict with the judgment under this Law.

**Article 25.** Those who have been relieved by this Law shall not be restrained on the same ground without the judgment of the Court.

**Article 26.** Anyone who undertakes to remove or hide the restrained or contrives his escape, or who commits an act which may nullify the relief prescribed by this Law, or who deliberately makes incorrect entries in the written answer mentioned in Article 12, Paragraph 2, shall be liable to penal servitude of less than 2 years or a fine not exceeding ¥ 50,000.

### **Supplementary Provisions**

This Law shall come into force after the lapse of 60 days from the date of its promulgation.

**XV. APPENDIX 2: HABEAS CORPUS RULES (EXTRACTS)<sup>192</sup>**

(Purport of this Rule)

**Article 1.** The application for relief and the succeeding proceedings thereto made under the Habeas Corpus Act . . . shall be governed by this Rule, as well as the provisions of the Law.

(Content of the relief)

**Article 2.** The relief under the Law shall be realized by a ruling rendered in accordance with provisions of paragraph 2 of Article 12 of the Law by the court . . . commanding the person restraining another person to produce the body of the prisoner at a certain time and place and submit a written reply by the day of the trial, in order to do, submit to and receive the release *or other dispositions which the court considers suitable in [sic] behalf of the prisoner . . . .*

(Definition of the restraint and the person restraining another)

(Requisites of the application)

**Article 4.** The application mentioned in Article 2 of the Law may be made *only if it is obvious and conspicuous that the restraint or a judgment order or other disposition relating to the restraint has been made without jurisdiction or authority or has been remarkably conflicted with formalities or proceedings prescribed in laws, orders or rules. But, in cases where there exists any other adequate means whereby relief may be obtained, the abovementioned application may not be made unless it is evident that relief cannot be obtained within reasonable time [sic].*

**Article 5.** The application mentioned in Article 2 of the Law *cannot be made against the freely expressed intention of the prisoner.*

(Dismissal of application by a ruling)

**Article 21.** The court may, by a ruling, dismiss an application in the following cases:

1. Where an application is illegal and its defects are such that it cannot be repaired;

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<sup>192</sup> Jinshinhogo Kisoku [Habeas Corpus Rules], Sup. Ct. Rule No. 22 of 1948 (emphasis added).

2. *Where an applicant [sic] is made against the freely expressed intention of the prisoner;*

3. Where a person restraining another or his residence is uncertain;

4. Where the prisoner has died;

5. Where the prisoner had recovered freedom of his action;

6. Where it is evident that there exists no ground justifying the application.

It is not necessary that a ruling under the preceding is notified to a person restraining another, except that he has been examined in the preliminary inquiry.

(Nature of proceedings of the application)

**Article 46.** The proceedings of the application for relief under the Law shall be governed, unless contrary to its nature, by the provisions governing civil procedure, as well as those of the Law and this Rule.