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Dr Shiro Armstrong
Director, Australia-Japan Research Centre
Australian National University, Canberra

Dear Dr Armstrong and AJRC researchers

Re: Submission for the AJRC Reimagining the Australia-Japan Relationship Project

I am a Final Year Bachelor of Laws student at the University of Sydney and I have just completed the Japanese Law unit coordinated and taught by Professor Luke Nottage.

For our final essay for Japanese Law, I chose to compare Japan and Australia's criminal justice systems and selected China's, additionally, as a third point of comparison. From that base, the topic required us to formulate recommendations for how relevant legal bodies in Japan and Australia could effectively learn from each other and collaborate better in law reform as part of "reimagining the Australia-Japan relationship" bilaterally.

Upon feedback and recommendation from Professor Nottage, I attach my final essay below as a submission for this AJRC Reimagining the Japan Relationship Project for your perusal and information.

The essay firstly compares the pretrial practices, jury systems and the existence of wrongful convictions in each country's criminal justice systems. Then it explores the treatment of foreigners in Japan and Australia respectively. The essay also examines the extradition relationship between Japan and Australia through an exploration of the Australia and China extradition treaty initiative as a manifestation of the Australia-Japan bilateral relationship. Finally, it details some recommendations for reform by drawing upon the conclusions formed through the above analyses.

I hope this is useful for your research and the project. Please feel free to contact me if you have any further questions.

Finally, I would especially like to thank Professor Nottage for his mentorship, guidance and instruction throughout the Japanese Law unit and for bringing this opportunity to my attention. I very much enjoyed taking his unit and would highly recommend it to future students.

Kind regards

Joy Zhang

Topic 3 – Comparing Japan, Australia and China's Criminal Justice Systems

I INTRODUCTION

To 'reimagine the Japan-Australia relationship', I will compare some key features of both countries' criminal justice systems. I have also selected China's criminal justice system as a third point of comparison due to China's dominance as the largest economy and country by population in the Asia-Pacific region with significant international influence.[1] This essay will also examine the treatment of foreigners in Australia and Japan's criminal justice systems with emphasis on extradition as an example of the manifestation of the bilateral relationship. In doing so, this essay aims to draw some conclusions about the criminal justice systems of these countries from which recommendations for Japan and Australia to learn from each other and collaborate better bilaterally can emanate.

II COMPARING CRIMINAL JUSTICE SYSTEMS

The three key features of Japan's criminal justice system I will focus on comparing are: its pre-trial practices, its *saiban-in* lay-judge system during trial and the existence of wrongful convictions post-trial. In doing so, I will explore how these features have contributed towards Japan's notorious 99% conviction rate.[2]

A *Pre-Trial Practices*

Police interrogation and detention of suspects in Japan is regulated by the Code of Criminal Procedure.[3] According to the Code, at the time of arrest, if the police officer believes that detention is needed, he/she must refer the suspect to the public prosecutor who must decide whether to release the suspect, initiate prosecution or detain him further.[4] If detained, the total detention period cannot

[1] APEC, 'Member Economies', *About APEC* (Web Page, 2020) <https://www.apec.org/About-Us/About-APEC/Member-Economies>.
[2] Kazuko Ito, 'Wrongful Convictions and Recent Criminal Justice Reform in Japan' (2013) 80(4) *University of Cincinnati Law Review* 1245, 1248.
[3] Taeko Wachi et al, 'Police interviewing styles and confessions in Japan' (2014) 20(7) *Psychology, Crime & Law* 673, 674.
[4] [Code of Criminal Procedure] (Japan) art 205.

exceed 23 days from arrest to initiation of prosecution, although police can re-arrest the suspect on another charge to prolong the detention period.[5]

Within the 23 days of detention, suspects face interrogation in a confined, locked room without access to a defence lawyer. Japanese law gives defendants the right to remain silent, but should they do so, interrogation may continue regardless.[6] Recent reforms require electronic recording of interrogations in a limited range of cases but Johnson suggests that "the problem of the overborne will" has not been eliminated despite these reforms.[7] Hence, many commentators suggest that police misconduct such as "verbal violence, intimidation, psychological pressure, coercion and deceit" and even torture occurs under these conditions which has led to many coerced and false confessions.[8]

Confessing ultimately releases a suspect from prolonged detention and endless interrogation. Despite this, commentators suggest this is a form of "hostage justice" where the only escape is to "confess, no matter whether true or false". An example of the prevalence of confessions (many of which were likely to have been coerced) was in a 2011 study where the National Police Agency (NPA) found that out of 397 suspects, 340 (85.6%) confessed to their crimes.[9] Despite the Japanese Constitution and Code of Criminal Procedure prescribing that confessions made under such circumstances cannot be admitted as evidence, in practice, such evidence is often admitted and relied upon excessively in Japanese courts as proof of guilt.

Under common law in Australia, police have the power to arrest a person without a warrant on 'reasonable suspicion' of the commission of certain offences.[10] After arrest, investigation including questioning and detention of the arrested person is allowed. For example, the *LEPRA Act* (NSW) states that persons may be detained after arrest for the purposes of questioning and investigation for a maximum of four hours which may be extended to eight hours after grant of a detention warrant. The

[5] Wachi et al (n 3) 675; [Code of Criminal Procedure] (Japan) art 60.
[6] Bruce E Aronson and David T Johnson, 'Comparative Reflections on the Carlos Ghosn Case and Japanese Criminal Justice' (2020) 18(24) *The Asia-Pacific Journal* 1, 17-18.
[7] Ibid.
[8] Ito (n 2) 1250.
[9] Wachi et al (n 3) 675.
[10] Mark Findlay, Stephen Odgers and Stanley Yeo, *Australian Criminal Justice* (Oxford University Press ANZ, 5th ed, 2014) 47.

detained person has the right to communicate with relatives or a lawyer and to have that person present during interrogation. Additionally, that arrested person must be released or brought before an authorised officer (such as a magistrate) as soon as possible.[11]

There are certain safeguards for detained persons facing police interrogation in Australia. For example, the *Crimes Act* (Cth) provides that a person who is under arrest must be treated with humanity and respect for human dignity and must not be subjected to cruel, degrading or inhuman punishment.[12] Additionally, for example, in NSW, there has been widespread audio/visual recording of police interviews since 1991 and in 1995 it became law that admissions were not admissible in indictable offences unless recorded.[13] The confession rate in NSW is low as research published in 2007 demonstrated that in only half of two random samples of recorded interviews, suspects either confessed or made partial admissions with 25% denying liability throughout.[14] A police officer must also caution a suspect that they have a 'right to silence' which cannot be used as evidence of an admission against the person if they exercise it.[15]

By contrast, in China, similarly to Japan, "confession is king"[16]. This means that not only are police interrogation practices designed to deliver confessions from suspects, but also, confessions are most often made. For example, McConville found across all sites and courts in China, 92% of suspects made full confessions, 5% partial confessions and only 3% denied involvement.[17] Although prohibited by the Chinese Criminal Procedure Law (CPL), China has been heavily criticised for its widespread use of torture to obtain these confessions. Interrogations are neither recorded nor moderated with the presence of a defence lawyer as a suspect has no right to a defender before the case is transferred to the procuratorate.

[11] Ian Dobinson, 'The guilty plea: an Australian/Chinese comparison' in Michael McConville and Eva Pils (eds), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing, 2013) 187, 190.
[12] See also *Crimes Act 1914* (Cth) ss 23C, 23D.
[13] *Criminal Procedure Act 1986* (NSW) s 281.
[14] Dobinson (n 11) 193.
[15] Findlay, Odgers and Yeo (n 10) 62.
[16] Dobinson (n 11) 192.
[17] He Jiahong and He Ran, 'Wrongful convictions and tortured confessions: empirical studies in mainland China' in Michael McConville and Eva Pils (eds), *Comparative Perspectives on Criminal Justice in China* (Edward Elgar Publishing, 2013) 73, 74.

Hou, in her 2003 thesis, noted that pre-arrest custody of up to 37 days was possible under the CPL.[18] Then the law allows post-arrest detention of up to four months prior to the matter being referred to the procuratorate for prosecution.[19] The majority of suspects (approximately 74%) in McConville et al.'s study were held in custody for two to five months before the case was transferred to the procuratorate.[20] The suspects have a 'duty to confess faithfully' and to 'refuse to answer any questions that are irrelevant to the case'. However, this has been interpreted as rejecting a 'right to silence'.[21]

Therefore, we can infer from the above comparisons of the pre-trial practices occurring in all three countries that Australian practices afford the most protection to suspects, including the shortest period of detention with rights to lawyers and recording of interrogations. China appears on the other extreme where the protection of suspects' rights is clearly secondary to the state's interest in preventing crime and bringing offenders to justice.[22] Finally, Japan's procedures lie somewhere in between the other two countries', adopting some of the more draconian methods of interrogation and length of detention but with some recording and right to silence. Arguably, the current practices in Japan and China are more likely to lead to more wrongful convictions contributing to the 99% conviction rates in both countries, as explored further below.

B *Jury Systems*

Trials by the *saiban-in* system in Japan started in May 2009.[23] The *saiban-ins* are randomly selected citizens who deal with fact-finding, application of laws and sentencing with professional judges. Generally, a team of three judges and six citizens make up the panel with their vote being of equal weight. A majority vote is required to decide a case with at least one professional judge and one *saiban-in* in agreement needed. The system applies to crimes with severe punishments including by

[18] Xiaoyan Hou, 'The Criminal Pre-trial Process of the People's Republic of China – The Protection of Suspects' Rights' (Master of Philosophy Thesis, City University of Hong Kong, 2003) 72; [Criminal Procedure Law] (China) art 65.
[19] [Criminal Procedure Law] (China) arts 124, 126.
[20] Michael McConville et al, *Criminal Justice in China: An Empirical Inquiry* (Edward Elgar Publishing, 2011) 51.
[21] Dobinson (n 11) 193-4.
[22] Hou (n 18) 79.
[23] Masahiro Fujita, *Japanese Society and Lay Participation in Criminal Justice* (Springer Science+Business Media Singapore, 2018) 1.

death penalty and indefinite imprisonment such as murder, burglary with bodily harm and arson.[24] Citizens who can vote in elections aged 20 or over are eligible to partake in the *saiban-in* system with some criteria for disqualification and ineligibility. *Saiban-ins* can ask the defendants and victims questions in the trials in the inquisitorial tradition and only appear in first instance trials.

The system was introduced as a means of establishing more popular participation in the justice system.[25] However, Ito has argued that unlike the jury system in common law countries, the *Saiban-in* system can be dominated by the strong opinions of the professional judges which therefore may overly influence the citizens' decisions.[26] Also, unlike in Australia where unanimity is generally required, Japanese professional judges have a potential veto in every case.[27] Additionally, when the trial body reaches a final decision, only the professional judges write a judgment statement.[28]

Despite these criticisms, in a survey published by the Supreme Court of Japan, after completing their duty as *saiban-in*, 59.9% of ex-*saiban-ins* evaluated it as an outstanding experience and 36.8% answered it was a good experience.[29] Likely reasons for this positive feedback include: the "easy-to-talk atmosphere" and their feeling of having substantial discussions in the deliberations. This suggests that the introduction of the *saiban-in* system has made a constructive impact on the public's perception of Japan's criminal justice.

Australia adopts the common law jury system of 12 jurors who silently observe proceedings for indictable offences such as murder and manslaughter. Each juror's function is to hear evidence, apply the law as directed by the judge and decide if a person is guilty or not guilty of a crime.[30] Generally a unanimous vote is required for a verdict and then sentencing, if guilt is found, is determined by the judge. Jurors are selected from the adult population by random ballot with several qualifications and

[24] Fujita (n 23) 9-10.
[25] Fujita (n 23) 13.
[26] Ito (n 2) 1259-1260.
[27] Kenny Yang, 'Trust The People Or Business As Usual? An Examination Of Lay Participation In The Japanese Criminal Justice System' (2017) 42(2) *University of Western Australia Law Review* 69, 84.
[28] Fujita (n 23) 18; Yang (n 27) 85.
[29] Fujita (n 23) 81, 83-84.
[30] NSW Office of the Sheriff, 'Juror: Observe, Listen, Decide' (Pamphlet, September 2014) 4 <https://courts.nsw.gov.au/documents/factsheets/j000320_juror_rewarding%20responsibilty_20pp_dl_aw_lores.pdf>.

exemptions as well. The purpose of the jury is to allow for direct participation of citizens in judgments and to introduce community values into criminal law. The presence of a jury also encourages the trial to be conducted in a way comprehensible to the public and seen to be fair.[31]

Similarly to the *saiban-in*, there is a possibility that one or a few obstinate or corrupt jurors who are determined to vote against the majority of the jurors have a veto power to prevent a verdict from occurring. This could result in significant delay and costs required to dismiss the jury and order a retrial. However, the voices of the dissenting minority could represent a minority group in the community and therefore it may be of benefit to the majority to listen to this dissenting voice and try to convince them in favour of the majority's opinion. There are special circumstances where a large majority (usually 10 or 11) of jurors' opinion will suffice for conviction or acquittal to insure against such an occurrence.

In UNSW's Jury Study, a survey of 78 jurors in criminal trials in NSW, some jurors expressed frustration with the process, referring to conflict in the jury room and some to the emotional pressures of hearing and dealing with situations revealed by the evidence.[32] One juror observed that it was a 'huge responsibility to get it right' and another expressed he felt 'very uncomfortable being confined to the jury room … for the seven straight hours of our deliberation days'.[33] On the other hand, another survey conducted by O'Brien et al. concluded that increased involvement in the jury process enhanced perceptions of the criminal justice system among the surveyed jurors, and predicted overall confidence in the criminal justice system.[34]

Chinese law states that lay assessors are to constitute no less than one-third of the members of collegial panels on which they sit.[35] They are to be chosen from among the members of a pool of self-nominated candidates and those proposed by the work unit or organisation and confirmed by the local

[31] Findlay, Odgers and Yeo (n 10) 160.
[32] Jill Hunter, *UNSW Jury Study: Juror's Notions of Justice – An Empirical Study of Juror Motivations to Investigate and Obedience to Judicial Directions* (Faculty of Law UNSW, 2013) 16.
[33] Ibid.
[34] Kate O'Brien et al, 'Factors affecting juror satisfaction and confidence in New South Wales, Victoria and South Australia' (2008) 354 *Trends & Issues in Crime and Criminal Justice* 1.
[35] National People's Congress Directive (China) ('Directive') art 3.

People's Congress.[36] In reality, the assessors are often selected because of their connections with the courts and judges. Also, although the Directive stipulates that the assessors shall be randomly allocated to cases[37], actual participation in court hearings is concentrated in a tiny proportion of assessors as the court and the judges tend to use those assessors who were both available and cooperative for the sake of administrative convenience.

The Directive also stipulates that 'people's assessors are to have the same rights as judges' and cases on which assessors sit are to be decided by the majority vote. Whether these principles are upheld in practice is debatable. In Xin He's study, he found that, in most situations, the lay assessors would often only be responsible for signing the so-called "deliberation" minutes prepared by the court clerks, not knowing the decisions on them.[38] He also found that few assessors raised questions during the hearing process which may have been because the lay assessors were denied access to the dossier in advance containing that facts and circumstances of the cases.[39] The judges would also make little effort to help them understand the cases. On the other hand, an interview with Duan Lian, an assessor profiled in a China Today article, claimed she was permitted to ask questions of witnesses and was included in discussions with the presiding judge during adjournments and the conclusion of cases.[40] Arguably, though, her experience was in the minority as other assessors interviewed suggested that they felt they were no more than 'a decorative object with no real role to play' in cases.[41]

The above comparison reveals that Japan's jury system, despite its criticisms, is more similar to the Australian democratic jury system than China's. The *saiban-in* who took part in trials seemed most satisfied with their overall experience. This may be due to their feeling fulfilled in being permitted to perform their civic duty without being under the same kinds of pressures that Australian jurors experience to reach a majority verdict and 'get it right'. Although judges have a veto power over the

[36] Directive art 7.
[37] Directive art 14.
[38] Xin He, 'Double Whammy: Lay Assessors as Lackeys in Chinese Courts' (2016) 50(3) *Law & Society Review* 733, 746.
[39] He (n 38) 741.
[40] Stephen Landsman and Jing Zhang, 'A Tale of Two Juries: Lay Participation Comes to Japanese and Chinese Courts' (2008) 25(2) *UCLA Pacific Basin Law Journal* 179, 208.
[41] Ibid.

saiban-in's decision, arguably this phenomenon is not unique to Japan since Australian jurors with a minority view can also block verdicts. Both systems though are in stark contrast to the Chinese lay assessor system which deviates vastly from its legal underpinnings and arguably plays merely a 'decorative' role.

C *Wrongful Convictions*

A wrongful conviction is where a person is convicted of an offence they did not commit or the crime they are convicted of did not occur.[42] One argument is that Japan produces relatively few wrongful convictions since Japanese prosecutors have a cautious charging policy only of suspects they consider likely to be convicted, thereby contributing to the high conviction rate. For example, one recent effort to count the number of wrongfully convicted people in Japan identified 162 cases of confirmed or strongly suspected wrongful conviction between 1910 and 2010, more than half of which involved homicide.[43] However, Johnson suggests that this represents only a fraction of the total number of wrongful convictions since the study did not include less serious crimes and many cases were probably undiscovered.[44] Therefore, this has led prominent defence lawyers such as Takano Takashi to believe that the actual number of wrongful convictions could be as high as 1500 each year, which are mostly unofficially recognised.[45]

Several reasons for this potentially high wrongful conviction rate have been suggested. One, as mentioned above, may be the high false confession rate which may occur under a suspect's extreme pressure or coercion (or even torture) by investigators and the lack of compulsory recording of interrogations. Another reason may be the prosecutor's lack of duty to disclose all material (including exculpatory) evidence to the defence and the defence's limited right to discovery.[46] Several famous wrongful conviction cases such as *Matsukawa*, *Oume* and *Matsuyama* cases showed that disclosure of

[42] Rachel Dioso-Villa, 'A Repository Of Wrongful Convictions In Australia: First Steps Toward Estimating Prevalence And Causal Contributing Factors' (2015) 17 *Flinders Law Journal* 163, 166.
[43] David T Johnson, *The Culture of Capital Punishment in Japan* (Palgrave Advances in Criminology and Criminal Justice in Asia, 2020) 67.
[44] Ibid 68.
[45] Ibid 70.
[46] Ito (n 2) 1251.

evidence possessed by the prosecutor was a key element in the reversal of wrongful convictions and findings of innocence.[47] Finally, Johnson suggests that a culture of denial exists in Japan which contributes towards the numbers of wrongful convictions.[48] He argues that police, prosecutors and judges need to acknowledge their own mistakes and the media and other agents need to conduct rigorous investigations to hold these actors accountable. Otherwise, this culture of denial shields these actors from accepting responsibility for wrongful convictions.

For Australia, Dioso-Villa estimates there were approximately 71 wrongful convictions from 1922 to 2015, one-quarter of which received a sentence of life imprisonment or death.[49] However, her sample is limited by the fact that no jurisdiction in Australia systematically records wrongful convictions and the difficulty in establishing that certain cases irrefutably demonstrate innocence.[50] Taking into account Australia's smaller population compared to Japan's, this wrongful conviction rate still seems lower than Japan's. The most common and likely causes of wrongful conviction identified, among others, were: police misconduct or overzealousness such as verbal and physical acts of coercion or fabrication of evidence (55% of total cases), erroneous judicial instructions to jury (32%), forensic error (31%), incompetent defence representation (23%), false witness testimony (17%), prosecutorial misconduct (17%) and false confessions (17%).[51]

In China, there are no official statistics on numbers of wrongful convictions. However, Zhong and Dai's study found 141 cases involving 206 defendants who were exonerated by a court alone from 1980 to 2019. This figure did not include those who were factually innocent but not yet exonerated by a court. Of these exonerations, four cases involved 'rising of the dead' (i.e. the allegedly deceased victim was really alive), several cases involved 'identification of the true perpetrator' and three-fourths of the defendants were cleared due to 'unclear criminal facts and insufficient evidence'. The study identified several contributing and political factors for these wrongful convictions including: police torture and forced/false confession (86.5% of cases), unprofessional crime scene investigation,

[47] Ito (n 2) 1252.
[48] Johnson (n 43) 75.
[49] Dioso-Villa (n 42) 163.
[50] Dioso-Villa (n 42) 165, 180.
[51] Dioso-Villa (n 42) 182.

police manipulation of evidence, mistaken eyewitness testimony, forensic error, judicial misconduct and political intervention by leaders or policy.

Although all three countries' criminal justice system share the unfortunate phenomenon of producing wrongful convictions, arguably the consequences in Australia are now less severe than in Japan and China where the irreversible death penalty is still administered. The factor of false or forced confessions in all three countries has contributed to these wrongful convictions in several cases however is likely to be more of an issue in China and Japan than Australia where interrogations are now recorded and prosecutors bear a duty to disclose all material evidence to the defence[52]. In Japan, cultural factors of shame and denial likely inflate the wrongful conviction statistic. In China, policies such as the 'Strike-Hard campaign' where the criminal justice system was required to 'severely and swiftly punish serious offenders' also likely led to many wrongful convictions due to prioritising the resolution of offences swiftly over justly and fairly.[53]

III FOREIGNERS AND EXTRADITION

One way that these countries' domestic criminal justice systems may impact upon the bilateral relationship between Japan and Australia is if, for example, an Australian citizen is arrested and charged in Japan for committing a crime as a foreigner in Japan, or vice versa. Additionally, the legal possibility of extradition could result in an Australian citizen, for example, being sent back to Australia to be tried for a crime they committed in Japan, or vice versa. From these scenarios, it is likely that both Australian suspects in Japan and Japanese suspects in Australia will experience barriers such as linguistic challenges, and potential discrimination and bias when facing the criminal justice systems of those countries.

A *Treatment of Foreigners*

[52] See, eg, *Legal Profession Uniform Law Australian Solicitors' Conduct Rules 2015* r 29.5.
[53] Lena Y Zhong and Mengliang Dai, 'The Politics of Wrongful Convictions in China' (2019) 28(116) *Journal of Contemporary China* 260, 272-273.

Anderson and Johnson argued that a real problem with Japan's criminal justice system is bias and discrimination against foreign suspects.[54] Generally, non-Japanese suspects face several barriers to justice including a lack of knowledge of Japan's criminal procedures, and a low level of comprehension of the Japanese language.[55] Although foreign suspects will often be provided with an interpreter in police interrogations, for example, the interpreter is informed to assist the officers to facilitate communication between the officers and suspects and is appointed by the police (and often he/she is a police officer).[56] Therefore, neutrality in interpretation cannot be assumed.

There have also been reports of how Japanese police target and racially profile foreigners under anticrime and antiterrorism campaigns. For example, reportedly, the NPA has manufactured the illusion of a "foreign crime wave" depicting non-Japanese as a threat to Japan's public safety even though, statistically, foreign crime numbers are miniscule.[57] There have also been reports on how Japanese courts discriminate against foreigners in sentencing. For example, Japanese national Hiroshi Nozaki in 2000 was caught flushing a Filipino woman's body parts down a public toilet but was only charged with "abandoning a corpse" and received 3.5 years in gaol. By contrast, Nigerian Osayuwamen Idubor, convicted on appeal in 2008 of sexually assaulting a Japanese woman was sentenced to two years plus time served during trial. Idubor asserted that his confession was forced and that police destroyed crucial evidence, however he was convicted and sentenced almost identically to Nozaki. Arguably these examples could be demonstrative of a culture of xenophobia in Japan against non-Japanese which may have an impact upon Australians who commit crimes in Japan.

In Australia, the provision of interpreters for police also present unique challenges. These range from the police's reluctance to use interpreters, especially in relatively minor offences, a lack of training in

[54] Kent Anderson and David Johnson, 'Japan's New Criminal Trials: Origins, Operations and Implications' in Andrew Harding and Penelope Nicholson (eds) *New Courts in Asia* (Routledge, 2011) 372, 373.
[55] Mamoru Tsuda, 'Human Rights Problems of Foreigners in Japan's Criminal Justice System' (1997) 25(1/2) *Migrationworld* 22.
[56] Jakub E Marszalenko, 'Three stages of Interpreting in Japan's criminal process' (2014) 1(1) Language and Law / Linguagem e Direito 174, 178
[57] Debito Arudou, 'Police 'foreign crime wave' falsehoods fuel racism', *The Japan Times* (online, 8 July 2013) <https://www.japantimes.co.jp/community/2013/07/08/issues/police-foreign-crime-wave-falsehoods-fuel-racism/>.

identifying need for interpreters' skills or an inherent bias for favouring accounts from fluent English speakers as opposed to non-English speakers.[58] There is also evidence to suggest that racial profiling and targeting exist in Australia's criminal justice policies which may disadvantage foreigners such as visiting Japanese citizens. In the Love case, a Papua New Guinean citizen who identified as a Kamilaroi person faced deportation having been sentenced to 12 months imprisonment at the age of 39.[59] Despite the High Court declaring that Aboriginal Australians who are born overseas and are not citizens of Australia are not within the reach of the 'aliens' power in the Constitution and cannot be deported, the case exposed Love to six weeks in immigration detention and highlighted the continued raced notion of Australian citizenship held by administrative decision-makers and the unequal treatment experienced by ethnic minorities, especially the Indigenous.[60] Additionally, the Australian Deportation project which studied 271 Administrative Appeals Tribunal decisions came to the conclusion that a disproportionate number of cancellations of visas on character grounds were held by New Zealanders, especially Maori, and Vietnamese nationals.[61] Hence, these illustrations suggest that the police and administrative officers' subjective evaluations of "foreignness" and "citizenship" affect decisions involving non-White individuals which could bias them against such people who enter the system.

B *Extradition*

Extradition is a process by which one country apprehends and sends a person to another country for the purposes of criminal prosecution or to serve a prison sentence.[62] Under the *Extradition Act 1988* (Cth), Japan is declared an "extradition country" and Japan and Australia share an extradition agreement short of an extradition treaty.[63]. However, to date, I could not locate any cases or

[58] Wakefield et al, 'Perceptions and profiles of interviews with interpreters: A police survey' (2014) 0(0) *Australian & New Zealand Journal of Criminology* 1, 2-3.
[59] *Love v Commonwealth of Australia* [2020] HCA 3 [10].
[60] Louise Boon-Kuo, ''Race', Crimmigration and the Deportation of Aboriginal Non-citizens' in Peter Billings (ed) *Crimmigration in Australia* (Springer Nature Singapore Pte Ltd, 2019) 39, 40.
[61] Ibid 44-45.
[62] Australian Government, 'Extradition', *Attorney-General's Department* (Web Page, 31 May 2021) <https://www.ag.gov.au/international-relations/international-crime-cooperation-arrangements/extradition>.
[63] Shannon Cuthbertson, 'Extradition Treaties: The Vagaries of Their Status under Australia Law' (2019) 93(2) *Australian Law Journal* 111, 113.

commentary regarding use of this procedure between Australia and Japan. Instead, there has been negotiation for an extradition treaty between Australia and China. I will analyse this relationship to draw some general conclusions about the Australia-Japan extradition relationship.

China sought to ratify the Treaty on Extradition between Australia and the People's Republic of China signed in 2007, but Australia abandoned its only attempt to ratify it in March 2017, due to domestic political pressure and strident criticism of its terms. The first key criticism which prevented ratification of the Treaty was the assertion that China lacks the mechanisms to comply with mandatory human rights obligations in the *Extradition Act* due to the secrecy and lack of transparency of China's judicial system combined with allegations of mistreatment of detainees. An example of this mistreatment is the use of torture to elicit forced confessions from suspects as explored above.[64]

A second key criticism was regarding the systematic unfairness which exists in Chinese criminal trials.[65] For example, Chinese judges rely overwhelmingly on the written testimony of witnesses drafted by public security officials such as the police who very rarely appear in court. Their evidence is not cross-examined or challenged by contradictory evidence from contrary witness statements nor clarified by questions from the bench and often decisions will be made solely based on these untested statements. Although the Chinese Criminal Procedure Law makes provision for witnesses' appearance, attendance rates are very low. This is mostly due to the far less authority and independence that the judiciary have in China compared to in Australia (as Chinese judges are controlled by the Executive). Hence, similarly to Japan, there is a perennially high 99% conviction rate in China.

Finally, Australia has a policy stance against imposing the death penalty as provided for in the *Extradition Act*. However, although officially a state secret, estimates suggest that China imposes the most death penalties per year out of any other country in the world.[66] Although Article 3(f) of the Treaty provided that extradition would be refused if the person may be sentenced to death by the

[64] Nigel Stobbs, 'The Law And Policy Context Of Extradition From Australia To The People's Republic Of China' (2017) 7(1) *Victoria University Law and Justice Journal* 32, 38.
[65] Ibid 44-45.
[66] Amnesty International, *Death Sentences and Executions 2019* (Amnesty International Global Report, 2020) 4.

requesting party unless the requesting party undertakes not to impose the death penalty or not carry it out if it is imposed, there remains doubt among critics regarding whether such an undertaking would be honoured by China if it were to be given.[67]

Hence, if extradition between Japan and Australia were to be invoked, it is likely to bear some resemblance to the failed extradition treaty between China and Australia. Both China and Japan have a 99% conviction rate and impose the death penalty (although Japan does to a much lesser degree). Therefore, Australia would insist upon an undertaking from Japan to forego imposition of the death penalty upon extradited individuals. The human rights violations occurring in Japan, however, are likely to be less severe than those in China which is probably why Australia and Japan have, at least nominally, an extradition agreement between them. However, claims of Japanese "hostage justice" bear some resemblance to the pre-trial interrogation procedures in China which may be cause for concern for Australia in future extradition claims. This would require the discretion of the Attorney-General to determine whether extradition should be allowed in such cases.

IV RECOMMENDATIONS AND CONCLUSION

It is difficult to make general recommendations to improve the Japan-Australia relationship due to the many differences between the two criminal justice systems. The Japanese system is more heavily focused on punishing criminals and protecting the public whereas the Australian system favours individual freedom and 'innocence before being proven guilty'. However, after comparing both systems to that of China's, it appears that they are more alike than the authoritarian, socialist system.

In the pre-trial stage of criminal justice, Japan should consider following in Australia's direction by mandating recording of all interrogations, allowing access to a defence lawyer more frequently and relying less on the suspect's confession and more on corroborating evidence. This would reduce the perception of Japan's system as "hostage justice" and more readily provide the Australian Attorney-General with reason to favour an extradition request if it arises from Japan. Australia could potentially

[67] Stephen Tully, 'Facing the Death Penalty Under a China-Australia Extradition Treaty' (2016) 22 *Law Society Journal* 90, 91.

learn from Japan, following its introduction of the *saiban-in*, by more readily allowing a majority vote of 10 or 11 jurors as opposed to a requirement of unanimity where appropriate. This may reduce the pressure required of jurors in Australia to 'get it right' so that they can more readily enjoy the jury process. Wrongful convictions are an unfortunate by-product of every legal system. Hence, both Australia and Japan can collaborate either by evolving their culture or improving their evidence-gathering and judicial procedures to eliminate the risk of them occurring. Finally, foreign visitors in both countries are likely to suffer from inherent biases and challenges when faced with the Japanese or Australian legal system. In recognising these structural difficulties, Australia and Japan can collaborate to enhance consular, diplomatic and linguistic services to diminish these barriers to justice for its citizens.

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