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# THE LAW OF CRIMINAL PROCEDURE IN CONTEMPORARY JAPAN

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## CHAPTER ONE INVESTIGATION

### 1.01. Introduction

The law of criminal procedure in Japan is a mixture of Continental law, Common Law, and Anglo-American constitutional law, and, as the reader will discover, the Japanese application of these imported concepts and principles is unique.

In any country the initial stage of a criminal case is one of the most important. Governmental action and suspect behavior at this stage will have a direct relationship to the final outcome of a given case. The interaction between the government, the suspect, and defense counsel will be shown through the cases presented. By examining the cases the reader will understand how the Japanese authorities execute their tasks.

To accomplish their work the authorities, especially the prosecutors, are given a great deal of discretion. For example, the prosecutor has the power to investigate and interrogate concerning any criminal matter. They also have control and influence over the police<sup>1</sup>. The exercise of this power in Japan is usually done with a high degree of professionalism and concern for the rights of the individual, however it has sometimes been abused as we shall see from the following factual situations.

The use of confessions in Japan is still considered to be the best and most efficient way of obtaining a conviction<sup>2</sup>. When a suspect is interrogated by the police or prosecutors, the purpose of the interrogation is to extract a confession<sup>3</sup>. In order to obtain a confession a suspect is isolated from family, friends, and legal counsel for a lengthy period time, usually twenty-three days. During this time the suspect is subjected to techniques generally considered barbaric by other developed countries.

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1. "...judicial police officials must comply with the suggestions and instructions of the public prosecutor...."

Dando, Shigemitsu, Japanese Law of Criminal Procedure, p. 96—7. (Translation by B. J. George)

Also, the use of this discretion can be seen in the statistics of acquittals. In 1984, a defendant in Japan had only a .14% chance of being acquitted. In that year there were 80,465 individuals indicted, and only 111 of them were acquitted. Jiyu to Seigi (Freedom and Justice) 1987, No. 2 Vol. 38 at page 49.

To accomplish the investigation and interrogation the authorities can utilize one of two possible courses of action, voluntary measures and compulsory measures. Voluntary measures are those steps taken by either the police or prosecutor which do not require a warrant or judicial order. These include the act of requesting someone to come down to the station for questioning, or the stopping of a vehicle on a road or highway in order to question the driver or passengers.

Once the authorities have sufficient evidence of criminal activity they may go to the court and obtain search warrants and/or arrest warrants. They may also make an arrest a flagrant offender and conduct a search incident thereto without a warrant. These are known as “compulsory measures” and will be covered in the second half of this chapter.

## Part I

### 1.02. Voluntary Measures and the Use of Force.

Under Article 198 of the Code of Criminal Procedure the authorities may

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2. Karel van Wolferen, *The Enigma of Japanese Power*, (Macmillan, London, 1989) at page 233 :

“Until the occupation authorities tried to change Japanese practice, confessions — often extracted by tricks or what amounted to torture — were the basis of nearly all prosecution successes. Since the end of the occupation, convictions based on confessions have again predominated, accounting for 65 to 75 per cent of the total. . . . this contravenes the constitution, which stipulates that no person shall be convicted or punished if the only proof against him is his own confession (article 38). Many accused, moreover, have already retracted confessions subsequently used as circumstantial evidence. The attitude of the judge is very important in this context. The rare judge will balk at the ways of the prosecutor. On 16 December 1987, for example, Tokyo district court judge Sorimachi Hiroshi found a suspect not guilty of burglary and attempted rape and openly criticised the relentless efforts of the prosecutors to extract a confession. My own interviews with judges and lawyers indicate that the fraction of one per cent of cases that the prosecutors lose are those in which the few liberal-minded judges have been reluctant to accept retracted confessions as evidence.”

3. *Id.* at page 188—9

“... Thus a major task for the police is to make a suspect confess. In this context the legal rights of the individual are as good as irrelevant.

request anyone to appear at the police station for questioning<sup>4</sup>. It is routine practice for a statement to be prepared of what the individual said. To verify its authenticity, the declarant signs the statement and places his personal seal on it<sup>5</sup>.

The authorities can use physical force to persuade a suspect to comply with a request to cooperate. The distinction between a voluntary and compulsory measure does not concern the use of physical force. In one case the trial judge misinterpreted the distinction and held that the police could not physically restrain an individual when invoking voluntary measures. The man was driving an automobile in an erratic manner at 4 a.m. and was stopped by the police<sup>6</sup>. They asked him for his license and requested him to submit to a breathe analyzer examination because his eyes and face were red and he reeked of alcohol. At the police station he was interrogated concerning his whereabouts and activities prior to being stopped. No arrest had been made. The man gave the police his license but continued to refuse the examination.

The defendant had called his mother to come to the station, and while they

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#### 4. Code of Criminal Procedure :

Article 198. A public prosecutor, a secretary of the public prosecutor's office or a policeman may, when it is necessary for conducting an investigation of an offense, call upon the suspect to appear and examine him : provided that the suspect may, except in such cases as arrest or detainment, refuse to appear, or leave at any time after appearance.

2. At the examination as mentioned in the preceding paragraph, the suspect shall beforehand be notified that he shall not be required to make statement contrary to his will.
3. The statement of the suspect may be recorded in a protocol.
4. The protocol as mentioned in the preceding paragraph shall be perused by or read to the suspect for his verification, and when the suspect has made a motion for any addition or deletion, or alteration; his statement with regard thereto shall be entered in the protocol.
5. The suspect may, when he has affirmed that the contents of the protocol are correct, be asked to sign and make seal thereon : provided, that this shall not apply if refused to do so.
5. In Japan a personal stamp with the individuals last name engraved thereon is used in the same way a signature is used in the United States.
6. (Japan v. Takahashi) Supreme Court Judgment, March 16, 1976, 30 Keishu 187, 809 Hanrei Jiho 29. note : the case name is not used in Japan and instead the court and the date are given. In this article the names of the cases will be provided when they are available.

were waiting for her to arrive, the defendant asked the attending officer for a match to light his cigarette. When the officer refused to give him one the defendant quickly stood up and headed toward the exit, stating that he would get the matches himself. The officer thought that he was trying to escape and grabbed the defendant's left wrist with both hands. The defendant struggled to get free and the officer was hit in the face and a shoulder patch was torn from his uniform. The defendant was then arrested and charged with obstructing an officer in the performance of official duties<sup>7</sup>.

The trial court decided that the police officer overreacted to the situation and the defendant was acquitted. The court reasoned that since the defendant had not been arrested, that is to say, that the police had not utilized compulsory measures of investigation, they had no right to physically restrain the defendant. According to the trial court the use of force by the police is prohibited until they have taken the trouble to exercise compulsory measures.

On appeal both the High Court and the Supreme Court decided the issue in favor of the government. The High Court held that the degree of restraint the defendant encounter when the officer grabbed his wrist was not significant. The Supreme Court held that it was proper for the police to physically restrain the defendant, even without making an arrest. The defendant was suspected of drunk driving and the act of restraining him was considered to be proper police procedure under the circumstances. The defendant was convicted and given a four month sentence.

This case is used in Japan to demonstrate that the use of physical force is not restricted to instances in which compulsory measures are invoked and it can be utilized prior to an official arrest. The Supreme Court stated that compulsory measures refer to certain restraints and limitations the authorities can place on the person, dwelling, or property of an individual, and not to the specific use of force.

### 1.03. The Length of Questioning Prior to Arrest.

It is a well known fact that in Japan criminal suspects are subjected to very lengthy interrogation. This interrogation can occur before or after the

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#### 7. Article 95(1) of the Penal Code :

A person who uses violence or threats against a public servant in the performance of his duties, shall be punished with penal servitude or imprisonment for not more than three years.

suspect has been arrested. In most cases the police ask the suspect to voluntarily come to the station for questioning. The suspect has the right to refuse, but as we will see in the following cases, the exercise of that right is rare.

The police prefer to conduct an investigation on a voluntary basis without having to resort to arrests and warrants. The main motive behind this practice concerns time. There is no provision in the Code of Criminal Procedure which limits the length of time the police can question someone who has voluntarily agreed to be questioned. On the other hand, if an arrest is made the police have only two days to question the person. After two days they must either send the suspect to the prosecutor or release the person<sup>8</sup>. Thereafter, the prosecutor has only a day in which to examine the suspect without obtaining a warrant authorizing further detention<sup>9</sup>.

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8. Article 203 of the Code of Criminal Procedure :

A police official shall, upon the arrest of a suspect, with or without a warrant, inform him of the gist of facts constituting the offense and the right to appoint a counsel, and shall give an opportunity for the explanation thereof ; and shall forthwith release him in case he believes that it is not necessary to retain him ; and shall, in case he believes that it is necessary to retain him, take such procedure as to send him to a public prosecutor within forty eight hours from the time of arrest, together with the documents and evidence.

2. In the case of the preceding paragraph, the suspect shall be asked whether or not he has a counsel, and if he has, he shall not be informed of the right to appoint a counsel.

3. In case the procedure for sending is not taken within the limitation of time as mentioned in paragraph 1, the suspect shall be immediately be released.

9. Id. Article 205 :

A public prosecutor shall, in case he has received the suspect sent in accordance with the provisions of Article 203, give him an opportunity for explanation, and shall, when it is considered that it is not necessary to retain him, immediately release him and shall, when it is considered that it is necessary to retain him, request a judge to commit him within twenty four hours from the time the suspect was received.

2. The limitation on time as mentioned in the preceding paragraph may not exceed seventy two hours as from the time when the suspect was arrested.

3. In case the public prosecution was instituted within the limitation on time as mentioned in the preceding two paragraphs, the request for commitment shall not be made.

4. The request for commitment or the institution of public prosecution is not made within the limitation on time as mentioned in paragraphs 1 and 2, the suspect shall be released immediately.

In a 1979 case, a suspect was stopped by the police while driving to work one morning<sup>10</sup>. The police told him that they wanted to question him about a certain matter, and he agreed to come to the station. He rode in the police car and an officer drove his car. At the station the police questioned the man all day taking breaks only for meals and when the suspect needed to use the toilet. When he went to the toilet he was always under observation by a policeman.

Late that evening the police obtained an arrest warrant and executed it just after midnight. The next day the police transferred the case to the prosecutor. The prosecutor applied for a warrant of detention. The district court judge who heard the matter denied it because the length of pre-arrest interrogation had been too long. Even though the suspect was theoretically at the police station voluntarily, the facts indicated that the police used compulsion and intimidation in order have the suspect remain at the station. The police never asked him if he wanted to leave or contact someone. They also knew that he would be late getting home for dinner.

This case indicates that there are some judges in Japan who feel that the practice of lengthy pre-arrest interrogation is wrong. If the police want to do more than just ask a few questions a proper arrest should be made so that a thorough interrogation can be conducted. The prosecutors generally oppose this idea and feel that it is in the best interest of the suspect not to be formally arrested. In this way the individual would not be subjected to the same degree of embarrassment and shame associated with a formal arrest. However, the court in the case above, saw through this and realized that the police simply planned to conduct unlimited interrogation without making an arrest.

Once the suspect is arrested the police can begin the interrogation in the hopes of extracting a confession. However, there are some safeguards against convicting a person based on a false confession as we shall see in the next section.

#### 1.04. Pre-Arrest Confessions

In Japan a confession alone is not sufficient grounds for an arrest or conviction. Article 38(3) of the Constitution provides that no person shall be

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10. (case name not published) Toyama District Court Judgment, July 26, 1979, 946 Hanrei Jiho 137, 410 Hanrei Taimuzu 154.

convicted or punished where the only proof is a confession<sup>11</sup>. This provision has been interpreted to mean that the police must also have sufficient corroborating evidence before an arrest can be made. Even though an individual may have admitted to the commission of a crime this fact doesn't end the interrogation. The police will continue to question a suspect for long intervals in order to obtain information necessary for corroboration.

A good example of this is the landmark case known as the "The Takanawa Green Mansion Murder Case" decided by the Supreme Court in 1984<sup>12</sup>. A bar hostess was murdered on May 18, 1977, in a Tokyo apartment. The leading suspect in the case was a former boyfriend who had lived with the victim. He claimed an alibi which the police discovered to be false and suspicion surrounding him intensified.

In the early morning hours of June 7, an investigator went to the defendant's residence. He lived in a dormitory provided by his employer. At the investigator's request the man voluntarily went to the police station for questioning. At the station the man confessed to the murder. However, due to a lack of corroborating evidence he was not arrested. A written statement was prepared after a full day of questioning. At 11 p.m. the interrogation came to an end. The man stated that he didn't want to return to the dormitory and asked the police to find a nearby inn where he could sleep for the night. Arrangements were made at a local boarding house. The man went there accompanied by four or five policemen, all of whom stayed with him for the next four nights. He was subjected to questioning everyday even though no arrest had been made. When they checked out of the boarding house the police paid all the charges except for the last night.

The man was then released and returned to his home town. Six weeks later he was finally arrested and confessed again to the murder. At the trial the defendant recanted both confessions and claimed they were the result of police compulsion and torture. The court didn't believe him and he was convicted and

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11. The Constitution of Japan, Article 38(3):

No person shall be convicted or punished in cases where the only proof against him is his own confession.

note: that while the above provision is enforced in Japan, once the suspect confesses, there is no need to produce evidence that he is connected with the crime. (based on personal interview of Professor Yasuo Watanabe, December 1989)

12. (Japan v. Ikuhara) Supreme Court Judgment, February 29, 1984, 38 Keishu 479.

sentenced to twelve years in prison.

On appeal to the Supreme Court the conviction was affirmed<sup>13</sup>. The Court was critical of the police for their conduct in the matter, but held that pursuant to Article 198 of the Code of Criminal Procedure, the police conducted a voluntary examination of the defendant from the 7th to the 11th of June.

In determining whether the measures are voluntary the entire circumstances of the case must be carefully considered. The nature of the facts, the degree of suspicion, and the suspect's attitude are all factors relating to the question of volition.

The Court declared that even though the period of interrogation was extreme, and the intent of the police in putting up the defendant at the boarding house was not the most desired approach, there was no evidence of compulsion. The defendant went to the inn voluntarily, never complained about the questioning, and never demanded that he be allowed to leave.

There are two important points to be learned from this case. The first one is that even though a suspect confesses to a crime, an arrest cannot be made until there is sufficient corroboration. The second point concerns the issue of voluntary measures. Contrary to the case in the preceding section, the police can legitimately conduct very long interrogations provided the suspect consents<sup>14</sup>.

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13. However, there was a dissenting opinion which held that the methods employed by the police in this case had extend over the limit of what was reasonably acceptable. The fact of the investigators slept with the suspect was an important factor which the minority used to show that the authorities had exceed socially accepted standards.

In addition, the majorities' opinion was severely criticized by scholars. For example, Professor Kageaki Mitsudo, in his text book, "(Kojutsu) Keiji Sosho Ho (jo), 1987, ((oral) — The Law of Criminal Precedure (First Vol.)) at page 24, states that evidence obtained by unreasonable police procedure should be inadmissible, and that the minorities' opinion in this case was correct.

14. This practice of long and unreasonable pre-arrest questioning continues, and its approval by the Supreme Court remains. In a judgment issued on July 4, 1989, by a 4 to 1 decision of the Third Petty Bench of the Supreme Court, a murder suspect was "voluntarily" interrogate for about 22 hours. He was questioned from about 11 p.m. on February 1, 1985, until 9:25 p.m. the next day. He was not allowed to sleep during this period, and could only rest three times for durations of 20 to 30 minutes.

Judge Sakaue, Toshio stated in his dissenting opinion that the interrogation by the police under the circumstances stated above, was inherently coercive, and not "voluntary".

1.05. Stop and Question

There are times when it is necessary for the police to stop people on the street and ask them a few questions concerning a recent crime committed in the vicinity. It is generally thought that citizens have a duty to cooperate with the police in crime prevention and investigation efforts. The degree to which the police impose upon people must be reasonable. What is reasonable is determined by looking at the entire circumstances of a given case.

In one case the police stopped a large group of people for four or five minutes in an effort to find a man who had just committed a battery against a police officer<sup>15</sup>. A group of more than one hundred members of a Korean youth organization staged a demonstration outside the Korean Embassy in Tokyo. One of the demonstrators struck an officer in the face with his fist. He then turned and ran into the crowd. The officer sustained injuries requiring ten days of treatment. The injured officer got a good look at his assailant, but was unable to make an immediate arrest. Soon thereafter, about forty riot police stopped everyone in the crowd in an attempt to find the criminal. In the process one of the riot police touch a man on the shoulder who had nothing to do with the matter. The man became upset and suddenly turned toward the officer striking him. The first policeman came and confirmed that this was not the man who had hit him. This all took place in the span of four of five minutes.

The first man was never found and the second man was prosecuted. The legality of stopping the entire group was put to the Supreme Court. In holding that the police acted legally the Court said that even though the freedom of the entire group, which included many innocent third parties, was restricted, the police action was justified under the circumstances. Such justification stemmed from the fact that the injury to the first officer was serious, there was a high probability that the police could find the criminal if they took quick action, and the policeman could positively identify his aggressor.

The Court held that the degree of restraint on the liberty of the group members as a whole was slight, and it was only for a brief period. In addition, the act of touching someone on the shoulder was considered reasonable under the circumstances.

This case is significant because it was the first case decided by the Supreme

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15. (Japan v. Boku) Supreme Court Judgment, February 13, 1984, 38 Keishu 295.

Court which has dealt with the use of physical force against innocent bystanders. Suspicious characters, as well as many innocent people who are not suspected of any wrongdoing, are often stopped and questioned in Japan<sup>16</sup>. A good example of this is the drunk driver and the late night drunk watches discussed in the next section.

#### 1.06. Traffic Stops

In Japan the police frequently stop vehicles for a variety of reasons. In some cases they are looking for a violent criminal, while in others they simply want to determine if the late night driver has consumed any alcohol. The propriety of these stops and the degree to which the police can impose upon the freedom of the driver is a question which the Supreme Court has considered.

In one case two policemen were on routine patrol one night when they observed a car running a red light<sup>17</sup>. They stop the driver, who promptly gave them his driver's license, and admitted to running the red light. One of the officers asked the driver to get out of the car and come back to the patrol car. The driver agreed and as they walked to the patrol car the officer detected a strong odor of alcohol. He informed the driver that he would be subjected to a breath analyzer examination. At this point the driver became very angry and upset. He ran back to his car, got in, and attempted to drive away. The other officer reacted quickly and reached into the car through an open window and removed the ignition key. At this, the driver became infuriated and attacked the two policemen. He was charged with both obstructing an officer in the performance of official duties and battery<sup>18</sup>.

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16. This practice has been criticized by the legal community in Japan. For example, Professor Osamu Watanabe, in his book "Shokumu Shitsumon no Kenkyu," 1985, (A Study of Official Questioning) at page 43, et seq., discusses the importance of reasonableness when the police attempt to question the general populace.

17. (Japan v. Fuluoka) Supreme Court Judgment, September 22, 1978, 32 Keishu 1774, 903 Hanrei Jiho 104.

18. Articles 95(1) and 204, respectively, of the Penal Code.

For Article 95(1) see note 3, supra.

Article 204. A person, who inflicts an injury upon the person of another, shall be punished with penal servitude for not more than ten years or a fine of not more than 100,000 yen.

At the district court level the defendant was acquitted. The court held that the police action was inappropriate since the investigation was still in the voluntary stage. The prosecution appealed and the judgment was reversed by the High Court. It held that the action by the police was proper, and that the act of removing the key was necessary to prevent further crimes and to prevent a traffic hazard.

Unhappy with this result, the defendant appealed to the Supreme Court. The Supreme Court held that the Police Duty Law authorizes the police to question and stop people when it is necessary to prevent crime. In this case the act of reaching in the window and removing the key was justified based upon this law. This law is separate from the Code of Criminal Procedure, and is often relied upon by the courts to support aggressive police duty.

For example, a common method used by the police to catch drunk drivers and to prevent drunk driving in general is the use of late-night check points. These check point stops are based on the Police Duty Law, and all drivers are stopped and questioned to determine if they have consumed any alcohol<sup>19</sup>.

The Supreme Court considered the constitutionality of these type of stops in the next case. Two policemen set up a watch in an area where drunk driving was known to frequently occur. A man was stopped and the police discovered from the results of a breath examination that he had more than the legal limit of 0.25 milligrams of alcohol in his breath. Since he was not intoxicated the police just gave him a ticket. At the trial he claimed that the evidence was inadmissible because it had been obtained illegally. He claimed that it was illegal and a violation of human rights for the police to stop someone without any suspicion of criminal behavior. Since all drivers were stopped regardless of their actual driving ability, he contented that the police went too far in their zeal to prevent crime.

The defendant lost at all three levels-District Court, High Court, and Supreme Court. The Supreme Court held that the method employed by the police was a voluntary measure in the sense that all drivers have a duty to cooperate with the authorities. While no specific code provision was cited as a basis for this duty to cooperate, the Court did acknowledge that the police Duty Law allows the

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19. (Japan v. Tanaka) Supreme Court Judgment, September 22, 1980, 34 Keishu 272, 977 Hanrei Jiho 40.

police broad authority for taking action to prevent and investigate crime. In the next section criminal investigations conducted pursuant to the Police Duty Law will be more thoroughly examined.

#### 1.07. Search and Seizure Pursuant to the Police Duty Law

The Police Duty Law is often relied upon by the authorities to conduct searches in the absence of probable cause. When the police feel that criminal activity is afoot they take whatever means necessary to confirm their suspicion. This can be done without a warrant even though the police have the opportunity to obtain one<sup>20</sup>.

In one case a policeman had just received word on his two-way radio that a group of four had just robbed a bank of six million yen<sup>21</sup>. It was near 11 p.m. and the robbers fled the scene. A full scale search of the area was conducted and the defendants were stopped and questioned while driving in the vicinity. The attending officer asked the two men to get out of the car and to open a bowling bag and briefcase they had in their possession. They refused to open either of them and they were taken to the police station. At the station the two men remained silent and would not allow the bags to be opened. An hour or so thereafter one of the policeman lost his patience with the men and forced open the bowling bag without their consent. Inside he found a large amount of cash. A screwdriver was then used to break open the locked briefcase. The police discovered more currency and some money wrappers with name of the victim bank printed on them. This evidence was confiscated and used against the defendants at trial.

The Supreme Court sided with the authorities in their fight against crime. They held the Article 2(1) of the Police Duty Law gives the police the authority to stop and question anyone in connection with a criminal investigation. In order to validate the warrantless search above the Court extended this doctrine to include searches of personal belongings. The only conditions the Court placed on these types of searches is that the object of the search must have some connection with

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20. (Japan v. Sakai) Supreme Court Judgment, June 20, 1978, 32 keishu 670, 896 Hanrei Jiho 14.

21. Approx.. \$22,000 at the time.

the criminal investigation. For example the search of a purse in connection with an investigation of a theft of a stereo would not be permissible. As an ideal, the Court suggested that every effort should be made to obtain the owners consent prior to a warrantless search, but such is not absolutely required.

In principle, Article 35 of the Constitution guarantees the right not to have one's possession searched or seized without a warrant<sup>22</sup>. However, such a right is not absolute as we can see from the Court's reasoning in the case above. The Court made it very clear that the rights of the individual must yield to the public interest in situations like this. The police were dealing with a dangerous felony wherein a hunting rifle and mountain knife had been used to rob a bank. A quick arrest and fast action were required. The act of opening the bowling bag was not such a terrible violation of the defendant's rights. It would not tip the balance of justice in favor of the criminal.

This is a leading case in the field of warrantless searches in Japan and has been interpreted as a sign of the Supreme Court's pragmatic attitude toward criminal suspects and the exclusion of evidence. In America, the rights of the individual suspect as well as the rights of the general populace are often given as reasons for condemning police conduct and excluding valuable evidence. In Japan the rights of the general populace is interpreted to mean not just the right to privacy, but also the right to live in a safe community. This right to live in a safe society is considered by the Court to be equally important when compared with the individual's right to be free from official invasion of privacy.

While it may appear that people in Japan enjoy less freedom from official interference when compared with people in the United States, there are areas of personal privacy where Japanese enjoy rights not recognized in American Law. For example, in principle, people in Japan have a right not to be photographed. The scope and nature of this right will be discussed in the following section.

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## 22. The Constitution of Japan

Article 35. The right of all persons to be secure in their homes, papers and effects against entries, searches and seizures shall not be impaired except upon warrant issued for adequate cause and particularly describing the places to be searched and things to be seized, or except as provided by Article 33.

(2) Each search or seizure shall be made upon separate warrant issued by competent judicial officer.

### 1.08. Photographing By The Police

In Japan the individual enjoys some rights not known in most other countries. For example, Article 13 of the Constitution, which guarantees the dignity of the individual and the right to life, liberty and the pursuit of happiness, has been interpreted to include a constitutional right not to have one's face photographed by the police<sup>23</sup>. However, as is typical of most rights, there are exceptions.

For example, in one case the defendant was participating in a campus demonstration and his face was photographed by a plainclothes policeman at the scene. The defendant objected to his photograph being taken and when the policeman failed to identify himself upon the defendant's request, the defendant struck the police man in the jaw with a flagpole. The injuries required one week of treatment.

The defendant was tried and convicted of obstructing an officer in the performance of official duties. The defendant objected on the grounds that the policemen had violated his right not to be photographed. The Court recognized the general right not to be photographed, but held that there were exceptions. They held that the act of taking someone's photograph is not an act of compulsion, and must generally be tolerated provided it doesn't extend beyond a certain socially accepted level. Using a reasonable standard test, the Court stated that it is proper for the police to take pictures of a crime in progress without consent. This reasonable approach and pragmatic attitude of the Court is something that can be seen throughout the cases.

An example of this is the speed detection cameras<sup>24</sup>. These cameras are designed to photograph the front license plate of any normal size passenger car when the car exceeds a certain speed. The driver's face, as well as the face of anyone sitting near the driver is photographed. In one case the defendant was photographed when he drove his car 40—50 km/h above the posted speed limit.

As a defense he asserted the following four points :

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23. (Japan v. Hasegawa) Supreme Court Judgment, Grand Bench, December 24, 1969, 23 Keishu 1625, 577 Hanrei Jiho 18.

24. (case name not published) Supreme Court Judgement, February 14, 1986, 1186 Hanrei Jiho 149, 591 Hanrei Taimuzu 31.

- 1) The taking of a photograph by the speed cameras is a violation of privacy and the right not to be photographed guaranteed by Article 13 of the Constitution. Included within this argument was the point that these cameras are also a violation of the freedom to associate found in Article 21 of the Constitution because anyone sitting next to the driver is also photographed.
- 2) The cameras are a violation of equal protection because they can not be used to photograph large vehicles because of their size, or motorcycles which only have rear license plates.
- 3) There is a violation of rights in that the defendant is denied an opportunity to defend himself against such evidence.
- 4) The cameras constitute entrapment in that there is no warning or notice of their existence.

The Supreme Court rejected all of these contentions as being without merit. The Court said that the camera was a reasonable way of detecting crime in progress and there was a need to preserve such evidence. The Court adopted a no-nonsense approach to criminal investigation. If the device used by the police is effective in combating crime the Court will usually support it. The Court balances the interest of the particular defendant with the interest of the general public. The public's interest is seen not in merely having the individual's rights protected from governmental intrusion, but rather is defined as the right to live in safe community.

#### 1.09. Tape Recording Private Conversations

Wire tapping is an issue in Japan that has yet to be finally resolved by either the courts or the legislature. There is no provision in the Code of Criminal Procedure authorizing the government to obtain a warrant for a wire tap. Moreover, the Supreme Court has yet to issue an opinion dealing with this subject. Nevertheless, the scholars in Japan have come up with three different opinions. The first group believes that wire tapping is permissible as a "voluntary measure", provided the methods used are reasonable. The second group holds that wire tapping is a compulsory measure and as such must be conducted pursuant to a warrant. However, since there is no provision in the code authorizing the issuance of a warrant, until the Diet passes such a law, wire tapping is unlawful. The third group feels that wire tapping is neither a search nor a seizure, therefore, it is permissible provided there is authorizing legislation and that any wire tapping is done in manner consistent with the due process clause of Article 31 of the

Constitution<sup>25</sup>.

An indication of how the courts might resolve a wire tapping case in the future can be seen from a case dealing with recorded conversations<sup>26</sup>. A man planned to kill his daughter in order to collect insurance money. The main evidence used against him at the trial was a recorded conversation he had with the man he hired to carry out the killing. The police had negotiated with the trigger man for a tape of this conversation. When this man testified at the trial he claimed that the police had bribed him to record the conversation and that he had been offered a reward of 50,000 yen. To counter this testimony the prosecutor offered a second tape of the the conversation they had had with this witness. This tape clearly showed that it was the hired gun who had offered to sell the tape to the police for the money, and that the recording of the first conversation had not been prompted by the authorities.

Defense counsel objected to the introduction of both tapes. He claimed that the recordings were illegally obtained because they were done without the consent of one of the parties to the conversation. The Court disagreed and held that the evidence was good evidence and the defendant was convicted. Generally, the court held, that when there is gross illegality in the method used to obtain evidence, even if it is intended only as impeachment evidence, its use in court is not allowed. However, the court pointed out that this was not a case of wire tapping. Without clearly setting forth the reason for its opinion, the court simply held that the act of recording these conversations was reasonable under the circumstances.

In Japan if one of the parties to a conversation agrees to allow it to be recorded there is no problem. Both of the tapes above were of this nature. But what about a conversation which is recorded without the consent of either of the participants? This remains an open question in Japan. If the police are the ones doing the recording there is a strong possibility the courts would hold the police action unconstitutional as a violation of the right to privacy, and unauthorized by

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25. The Constitution of Japan

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

26. (case name not published) Matsue District Court Judgment, February 2, 1982, 1051 Hanrei Jiho 162, 466 Hanrei Taimuzu 189.

the code because there is no provision allowing for such<sup>27</sup>. This would be equally true if the tape was made by a private citizen because a violation of a right is still a violation of a right, whether it is carried out by a government official or an private individual. The final answer would depend on the nature of the case. If a violent criminal was being tried for a heinous murder the courts would probably allow the evidence to be admitted into evidence. The court would balance the need for the evidence with the degree of violation of the right to privacy, taking into account the gravity of the offense. No doubt the court would see a greater interest in the conviction and punishment of the criminal than the protection of privacy in such a case.

## Part 2

### Compulsory Measures

#### 1.10. Arrest, Search, and Seizure

An arrest, search, or seizure, with or without a warrant, is a compulsory measure. These measures sometimes include the use of force and are always

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27. However, illegal wire tapping by the police has been documented.

Karel van Wolferen, *The Enigma of Japanese Power*, (Mecmillan, 1989) at page 199 states :

"...The security police insist that they do not use eavesdropping devices (forbidden by the constitution), but informed observers are convinced otherwise. (citing Walter L.Ames, *Police and Community in Japan*, University of California Press, 1981, p.23) These suspicions were borne out when the news leaked out that in November 1986 workers of Nippon Telegraph and Telephone had found that the telephone of the chief of the international division of the Communist Party had been connected to a wire-tapping cable. The cable led to an apartment rented by the son of a policeman, whose contract with his landlord was countersigned by a former policeman of the public security division. There had ben numerous earlier cases of JCP officials' telephones being tapped, but the party had never before collected enough evidence to satisfy the prosecutor. This case, too, was dropped when top career policemen apologized to the prosecutor's office and the prosecutor accepted that the policemen responsible for the tapping had only followed orders from superiors. Thus, though wire-tapping is unconstitutional, the higher levels of the police are allowed to get away with it."

related to the restriction of movement or the the limitation of rights. The police in Japan are not authorized to take any action unless it is provided for by law<sup>28</sup>. Moreover, in principle, a warrant must be issued by a judge prior to utilizing a compulsory measure. In certain cases the police can dispense with the warrant requirement if certain conditions are present. For example, an arrest may be made without a warrant in the case of an emergency<sup>29</sup>, or a so-called flagrant offence<sup>30</sup>. A flagrant offense occurs when a suspect is caught in the act of committing the offense.

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28. Article 197 of the Code of Criminal Procedure :

With regard to an investigation, a necessary examination may be made in order to attain the object thereof : Provided, that compulsory measures may not be taken unless otherwise stipulated in this Code.

2. In regard to an investigation, a report on necessary matters may be requested of public offices, or public or private organizations.

29. Article 210 of the Code of Criminal Procedure :

A public prosecutor, a secretary of the public prosecutor's office, or a policeman may, when there exists sufficient reasons to suspect that the suspect has committed a crime punishable by death, life imprisonment, or penal servitude or imprisonment for a maximum period of more than three years and exigency is required, and the request for a warrant for arrest of a judge may not be obtained, arrest him and inform him of the reasons therefor. In such a case, the procedure for the requesting of a warrant for arrest shall be taken immediately. When a warrant is not issued, the suspect shall be released.

2. The provisions of Article 200 shall apply *mutatis mutandis* to the warrant for arrest as mentioned in the preceding paragraph.

30. Article 212 of the Code of Criminal Procedure :

Any person actually committing or having just committed an offense shall be called a flagrant offender.

2. In case it is deemed clearly that any person coming under anyone of the following items has just committed an offense, he shall be deemed to be a flagrant offender :

- (1) In case any person is pursued as an offender with hue and cry ;
- (2) In case any person is carrying with him stolen goods, arms or other things which appear to have been used for an offense ;
- (3) In case there is a conspicuous trace of an offense on the body or clothes.
- (4) In the case where any person who is challenged attempts to run away.

In Japan an arrest can be made only for serious offenses<sup>31</sup>. A serious offense is any offense wherein a person can be punished with thirty days or more imprisonment, or fined more than ¥8,000<sup>32</sup>. In the case of a flagrant offense, anyone can make an arrest<sup>33</sup>. But how flagrant must the offense be before an arrest can be made without a warrant? The police don't actually have to be present at the scene of the crime when it occurs provided they arrive shortly enough thereafter. For example, in a 1966 case the Tokyo police suspected that an illegal bookmaking business was being conducted at a certain residence<sup>34</sup>. They set up a stake out nearby and observed a delivery man for a local restaurant entering and leaving the premises without having made any deliveries. The police became suspicious and questioned the man when he was about 220 yards from the residence. He admitted he had just placed a bet with a man inside. The police went there and found another gambler placing a bet with the parter of the man with whom the delivery man had placed his bet. The man suspected of collecting the bet from delivery man was in an adjoining room dressed in a robe. He was not seen accepting a bet, but was, nevertheless, arrested. He protested his arrest and claimed that it was improper because he had not been observed in the act of committing an offense, and he did not, therefore, qualify as a flagrant offender.

The Court rejected this argument holding that the short lapse of time between when the bet was placed and the questioning of delivery man was short enough so as to still remain within the definition of flagrant offense. The trail was still hot and the police were justified in making an arrest without a warrant. The Court indicated that the ordinary person who observes the placing of a bet may not actually understand what is being done. This is different from the regular types of offense such as robbery and rape, etc. With these offenses anyone who observes them knows that a crime has been committed. Because of the unique nature of gambling offenses, the court held that the police can arrest

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31. In Japan there is no felony — manslaughter distinction, however they do distinguish serious and minor offenses. (Juzai (heavy) crime and Keizai (light) offense)

32. Article 18 of the Penal Code, and 199 of the Code of Criminal Procedure.

33. Article 213 of the Code of Criminal Procedure :

Any person may arrest a flagrant offender without a warrant of arrest.

34. (Japan v. Takahashi) Tokyo High Court Judgment, June 28, 1966, 195 Hanrei Taimuzu 125.

someone based on the information of others and without actually having witnessed the crime. All that is required in these situations is sufficient suspicion based on reliable information. In these cases the police can make an arrest without a warrant.

Arrests are sometimes made for questionable motives. The police may make an arrest for one crime with the intent to question the suspect regarding a different, usually more serious, offense. This will be examined in the following section.

#### 1.11. Arrest for a Different Crime-Bekken Taiho

A common technique used by the police in Japan is called the Bekken Taiho. It refers to the practice of arresting a suspect for a minor offense with the pretense of interrogating for a more serious crime. The practice violates the defendant's right to be informed of the reason for his arrest. Under Article 34 of the Constitution the suspect must be informed of the crime of which he is suspected of when he is arrested<sup>35</sup>. The courts have held that there is a gross violation of constitutional rights when the police arrest for one crime with the intent of interrogating for a different offense.

For example, in one case involving a riot at a fair in the City of Kobe a taxi was overturned and set a blaze in front of city hall<sup>36</sup>. A group gathered and began to push and rock a large police vehicle. The vehicle rolled over and killed a news reporter standing nearby. The police suspected two individuals as the ones primarily responsible for the killing, but they did not have sufficient evidence to make an arrest. Instead, the police arrested them for obstructing an officer in the performance of official duties. Once arrested, the police began to interrogate both men in relation to the news reporter's death. Both men confessed during this interrogation.

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35. The constitution of Japan

Article 34. 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.

36. (case name not published) Osaka High Court Judgment, April 19, 1984, 37 Kosai Keishu 98, 534 Hanrei Taimuzu 225.

The defendants felt that their rights had been violated and objected to the Kobe District Court on these grounds. The court accepted their argument and held that the confessions were inadmissible evidence because they were obtained through unconstitutional police tactics. The Osaka High Court affirmed. The Court said that when one is arrested and confined in relation to facts A and is questioned in regard to facts B, it is the same as if he had been arrested for B. Taking into account the type of crime, the degree of criminality, the amount of objective evidence related to the second offense, the necessity for confinement, and the subjective intent of the interrogator, the Court must determine in situations like this what are the proper limits of this practice. It is clear that when there is no evidence of another crime, there can be no questioning of the suspect pertaining to any other offense.

Although the practice of "Bekken Taiho" has been condemned by both the courts and scholarly opinion it still remains a favorite police maneuver.

#### 1.12. Right To Counsel During An Investigation

In Japan a suspect in a criminal case has virtually no right to legal counsel during the investigative stage of a case. A distinction is made between parties to litigation and suspects. The investigative stage is something completely different from the trial. Until a person is formally indicted there is no litigation, and since there is no litigation there can be no adversary parties.

Another point that seems totally unfair and one-sided is the fact that the prosecutor controls the time, place and date of all meetings between counsel and client<sup>37</sup>. In general, the Japanese Bar has been rather weak in this area and has failed to demand fairness and equality from the courts regarding client counseling. However, one attorney was ambitious enough to sue the government for interfering with his right to meet with his client. Unfortunately, he lost his case at the

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37. Article 39(3) of the Code of Criminal Procedure :

A public prosecutor, a secretary of the public prosecutor's office or a policeman may, in cases where it is necessary for the investigation, designate the date, place, and time concerning an interview with the suspect, only prior to the institution of public prosecution : provided that such designation shall not unreasonably restrict the rights of the suspect to prepare for defense.

Supreme Court level<sup>38</sup>.

Here are facts of that particular case. On the morning of April 25, 1965, an individual was arrested and confined. An assistant investigator at the police station contacted the man's attorney and told him the situation. He also informed the attorney that he would not be allowed to meet with his client unless he had a permission slip signed by the prosecutor. The two men argued about the necessity for such a document, and the attorney declared that it was a violation of Article 39(1) of the Code of Criminal Procedure not to allow him to freely meet with his client<sup>39</sup>.

When the attorney arrived at the police station he attempted to go to the interrogation room in which his client was being held. An officer on duty at the time stopped the attorney from going any further in the direction of the interrogation room and a small fracas occurred. The attorney sustained injuries requiring four days of treatment. That did not discourage him and he continued to pursue the issue through established procedures. That evening he finally obtained the permission slip to meet with his client. But, it was no great victory for he was only allowed the customary ten minutes of meeting time and could not conduct any meaningful attorney-client counseling.

Outraged by such a system the attorney sought compensation from the government in a civil suit. He was asking for ¥200,000 in his complaint and the district court awarded a judgment of ¥150,000. The government appealed and the High Court reduce this amount to ¥100,000.

The Supreme Court amazingly reversed this decision and the attorney was not allowed any damages. The Court, in its decision, went on and on about the right to counsel being a fundamental and important constitutional right, but such was only lip service according to one scholar's opinion<sup>40</sup>. The Court stated that

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38. (Sugiyama v. Osaka) Supreme Court Judgment, July 10, 1978, 32 Minshu 820, 903 Hanrei Jiho 20.

39. The Code of Criminal Procedure :

Article 39. The accused or the suspect placed under physical restraint may, without any official being present, interview with his counsel or any other person (in regard to a person who is not a lawyer, this shall apply only after the permission as mentioned in Article 31 paragraph 2 has been obtained), who is going to be his counsel upon solicitation of the person entitled to appoint a counsel, and may receive documents or articles therefrom.

40. Based on a personal interview with the Honorable Yasuo Watanabe, former Supreme Court Clerk and retired High Court Judge with more than twenty-five years on the bench (Hokkaido University, May 1989.)

from the attorney's point of view, it cannot be denied that the right to meet with a client is very important. However, in order to regulate the investigation and interrogation of criminal suspects, the prosecution has been given broad discretion to control contact with anyone on the outside, including legal counsel<sup>41</sup>. In reality attorneys are usually allowed to see their clients for ten to fifteen minutes once every three days and the attorneys have time only to pass along messages from the suspect's family<sup>42</sup>.

### 1.13. Place of Detention

In Japan there are two places where a suspect can be held pending interrogation. The first is at a prison which has a detention center (Kochikan). These centers are under the jurisdiction of the Justice Ministry of which there are only 153 throughout the country today. The other place is known as a "Daiyo Kangoku" — substitute prison, and is used much more frequently by the authorities. These Daiyo Kangokus are usually located at the police stations allowing easy access to suspects by determined interrogators. The legal basis for this stems for a 1908 provision of the Prison Law (Article 1, Paragraph 3) which states, "A holding cell at a police station can be used as a substitute for a prison."

This system of substitute prisons has been severely criticized by legal scholars, both in Japan and abroad<sup>43</sup>. There have also been allegations that the use of these substitute prisons is a violation Article 9(3) of the International Covenant of Civil and Political rights (B)<sup>44</sup>.

However, once a suspect is placed in a detention center at a prison, the prosecutor will have a difficult time in getting a court to transfer the person to a Daiyo Kangoku. For example, in a 1969 district court case a suspect who was

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41. The case cited here is still considered to be the leading case in this field, although there have been subsequent decisions which continue to support prosecution controlled interviews between suspect and counsel. For an excellent discussion of these cases see: Jiyu to Seigi (Liberty and Justice) No. 7, vol. 38, 1987, at page 57 et. seq. For example, an attorney in Fukuoka Prefecture was retained by a murder suspect and was not allowed to see his client from the time of his client's detainment on July 24, 1985, until the indictment was issued on August 10, even though he had sought permission to do so on six occasions.

42. Based on discussion with members of the Sapporo Bar Association at Hokkaido University during the summer of 1987.

being detained on suspicion of theft and fraud, was placed in a prison detention center<sup>45</sup>. The prosecutor petitioned the court to transfer the suspect to a substitute prison located at the police station. The reasons given for the request were that the present facility did not have a one-way mirror necessary for interrogation, and that the interrogators could not question the suspect after 5 p.m.

The court denied the request and held that purpose of detention is to prevent the suspect from fleeing and the destruction of evidence, and not merely to restrain the liberty of the individual. The court stated that in the absence of extraordinary circumstances which would make the interrogation virtually impossible, a transfer was not permissible. In this case the reasons given by the prosecutor were not adequate to meet this requirement.

While the use of Daiyo Kangoku continues to be disputed in Japan, it is this author's opinion that there is a more fundamental problem involved. Where the

43. Futaba Igarashi, "Coerced Confessions and Pretrial Detention in Japan," a presentation delivered at the 41st Annual Meeting of The American Society of Criminology, Session 119, November 10, 1989. At page 3, she states:

"I would like to draw your attention to the fact that poor conditions of detention in Japan's Daiyo Kangoku are purposefully used to help break down the detainee's resistance to pressure to confess.

For example, meals are so astonishingly low in nutritional value, low in calories and insufficient in quantity that detainees need supplementary food supplied from outside. Moreover, when they are under interrogation, it is within the power of the interrogator to determine when and under what conditions they can buy supplementary food or take their prison supplied meals. The interrogator can put off lunch or supper time for as long as half a day. He can also prevent the detainee from having a drink of water from early morning until midnight. Detainees have made false confessions just to receive a meal. An interrogator can deny his suspect permission to exercise, bathe, go to the toilet, stand up, sit down or even lower his head. He can prevent visits from family members, legal counsel (sic) or independent doctors if the suspect refuses to confess."

Also see: Wolferen, above, at page 189—90, where he states:

"...in police detention facilities used as substitute prisons, suspects are under 24-hour surveillance, either directly or via closed-circuit television. They are forced to sleep under glaring lights over their faces. (citing Ikarashi)

44. "Kokin Nihohan No Soten" (Contraversies of the Two Bills Concerning Detention), Published by the Tokyo Bar Association, 1988, at page 39.
45. Totori district Court Judgment, November 6, 1969, Keisai Geppo 1083, 591 Hanrei Jiho 102.

suspect is held should not be a matter of great importance, rather what is allowed to happen at interrogation sessions should be more carefully scrutinized. There should be specific restrictions on the time, method, and manner, of interrogation which would help to insure that the rights of criminal suspects will be protected.

If the prosecutors were to comprise on the issue of *Daiyo Kangoku*, they would indirectly be admitting that their interrogation techniques are questionable.

#### 1.14. Confiscation

Before any item can be seized there must exist a certain amount of necessity. How much necessity is required and who is to make such a determination is a question that has been raised in Japan. It is well known that the prosecutors enjoy broad discretion and authority over criminal investigations. Is this power so great that prosecutors have unbridled control over the confiscation of evidence? The problem is exacerbated by the existence of two conflicting provisions of the code. One provision provides that the police or prosecutor may confiscate evidence when necessary in connection with a criminal investigation<sup>46</sup>. Another

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#### 46. Article 218 of the Code of Criminal Procedure :

A public prosecutor, a secretary of the public prosecutor's office, or a policeman may, when it is necessary with respect to the investigation of an offense, make a seizure, search, or inspection under a warrant issued by a judge. In the case of a body examination, it shall be conducted pursuant to a warrant for examination of the body.

2. Taking the finger or foot prints of the suspect under arrest, measuring the height or weight thereof, or taking the picture thereof shall be made without warrant as mentioned in the preceding paragraph unless the suspect is naked.
3. The warrant as mentioned in paragraph 1 shall be issued upon the request of a public prosecutor, a secretary of the public prosecutor's office, or a police official.
4. A public prosecutor, a secretary of the public prosecutor's office or a police official shall, in making request for a warrant for examination of a body, set forth the reasons necessary for such an examination of the body, sex, and health condition of the person subjected to a body examination, and such other matters as prescribed in the rules of the courts.
5. A judge may stipulate such condition as deemed appropriate in regard to a body examination.

provision provides that the courts may confiscate any evidence when it is necessary, and may order the owner of certain items to produce them for inspection<sup>47</sup>.

The Supreme Court resolved the issue in a 1969 decision<sup>48</sup>. A demonstration occurred at a university campus in Tokyo and the university photography club took 16 mm. footage of it. The police believing that the film contained evidence of a crime obtained a warrant for the confiscation of it. The police went to the club's office and took the film. The following day the club's representative brought an action for its return, and claimed that Article 21 of the Constitution protected the film from confiscation<sup>49</sup>. This provision guarantees freedom of the press. The district court held that the action was unlawful using a balancing test to decide the issue. The court said that when the police attempt to take evidence belonging to a third party they must be able to show that the evidence is extremely necessary for the investigation. In this case the necessity for the evidence was not shown and the rights of the club were vindicated.

The prosecution appealed claiming that the trial court had made a gross violation of proper protocol. They argued that the decision to take evidence of crime should be left to the discretion of the police or prosecutor. They claimed that the courts did not have the authority to overturn a policeman's decision to take certain items. The Supreme Court dismissed this argument. It decided that it is the courts, not the police or prosecution, who decides the question of necessity.

In this case a warrant had been issued, but in many cases the police search for, and take, evidence without one. This is usually done incident to an arrest, but

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47. Article 99 of the Code of Criminal Procedure :

The court may, when it is deemed necessary, seize any evidence or article considered to be confiscated : provided, that nothing therein contained shall apply in such cases as particularly specified. (sic)

2. The court may designate article or articles to be seized, and order the owner, possessor, or custodian thereof to produce such article or articles.

48. (Prosecutor v. Tokyo District Court), Supreme Court Judgment, March 18, 1969, 23 Keishu 153 Hanrei Jiho 22.

49. The Constitution of Japan

Article 21. Freedom of assembly and association as well as speech, press and all other forms of expression are guaranteed.

(2) No censorship shall be maintained, nor shall the secrecy of any means of communication be violated.

as we shall see from the next section, the police sometimes abuse this warrantless search exception.

#### 1.15. Search Incident to an Arrest

In Japan an arrest can be made with or without a warrant depending on the circumstances. In principle, if the arrest is made without a warrant any search or seizure incident to it must be conducted “at the very spot” of the arrest<sup>50</sup>. This language has been interpreted liberally by the courts. For example, in one case, several students were arrested during a demonstration at a university campus<sup>51</sup>. They were taken to a police station some four hundred meters from away, and forty minutes later they were searched. As a result of this search, the police seized copies of the groups information bulletin, their armbands, helmets, gloves, and other personal effects.

The students argued that the search and seizure of their possessions was not authorized by statute and therefore illegal. It hadn't been conducted at the scene of the arrest. The Tokyo High Court rejected this contention and held that there is an exception to the on the spot requirement. If it is necessary for the police to avoid confusion at the scene of a crime, the police can transport the subjects to the station and carryout a search there, seizing those items relevant to the crime.

In principle, searches made incident to an arrest should be limited to the immediate vicinity of the arrest and should be limited to the discovery of guns or other dangerous weapons. However this principle is seldom observed.

For example, in a 1983 case the court approved of a full scale search

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#### 50. Article 220 of the Code of Criminal Procedure :

In case it is necessary at the time when a public prosecutor, a secretary of the public prosecutor's office, or a policeman arrest the suspect in accordance with the provisions of 199, or arrest a flagrant offender, he may take the measures necessary in accordance with the provisions of Article 210.

(1) To search the suspect by entering into a dwelling or residence, building or vessel under guard ;

(2) To seize, search or inspect at the very spot of the arrest. (emphasis added)

51. (case name not published) Tokyo High Court Judgment, November 15, 1978, 31 Kosai Keishu 265.

conducted without a search warrant<sup>52</sup>. Late at night on September 27, 1982, in Sapporo, a man was at bar with his girlfriend and the girlfriend's younger sister. The two girls got into an argument and the younger sister scolded the older sister for hanging around with the man and for getting involved with drugs. At this point, the man interfered in the conversation and slapped the younger sister on the face with his open hand. She went to the police and filed a complaint for battery.

After checking the man's background they discovered he had a history of drug usage and was a member of a local gang. Nearly two months after the woman's complaint was filed the police obtained an arrest warrant for battery. They went to the man's apartment to execute it in the morning of November 18. When they arrived the man was still asleep in his futon, a Japanese mattress used for sleeping. After entering the apartment the police notice a small box near the head of the futon. The police arrested the defendant and conducted a warrantless search. During the search the police opened the little box and found drugs. A full scale search was then conducted of the entire premises.

At the trial it was argued by the defense counsel that the police had conducted an illegal search because it exceeded the permissible scope for searches made incidental to an arrest. It was clear that the police waited for the best time to make an arrest so a search could be conducted of the entire apartment. The crime for which the arrest was made was battery, not a drug offense. Yet the court allowed the evidence to be used. In doing so, the court completely ignored the principle set forth above. The court used a balancing test to reach this result. They held that the degree of invasion was outweighed by necessity for the evidence at trial, for without it there could be no conviction for the drug violation.

The use of this balancing approach for the exclusion of illegally seized evidence has favored the authorities. While the courts give lip service to an exclusionary rule in Japan, in fact there has never been a Supreme Court decision which excluded tainted evidence. The Court has always found that necessity does exist and that the search is generally upheld.

The ploy used by the police in this case may be shocking to some, but it is a technique often employed. In Japan there is no shock test for police investigations and the authorities are allowed to obtain evidence in many ways. The following section covers this area.

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52. (case name not published) Sapporo High Court Judgment, December 26, 1983, 1111 Hanrei Jiho 143.

#### 1.16. Extraction of body Fluids.

In Japan the police can extract body fluids from a suspect provided they have the necessary warrant<sup>53</sup>. This extraction can be done by force if the suspect fails to cooperate. For example, in one case a suspected drug user was asked three times for a urine sample. He denied the request each time. The police took the suspect to a hospital where 100 cc of urine was forcibly extracted from the suspect by means of a catheter inserted into the man's penis.

This evidence was used against the man at trial. He objected claiming that the police had overstepped the bounds of common decency, and that the forced extraction of urine was a gross violation of his human rights. The trial court held that there was a sufficient showing of necessity by the government and allowed the evidence to convict the defendant.

The Supreme Court upheld the conviction and stated that the forced extraction of urine did not exceed permissible limits because it had been carried out in a hospital under medically safe conditions by a doctor. Many scholars reacted to this decision and wrote articles critical of the Court's reasoning and decision.

#### 1.17. Conclusion

In this chapter, I have attempted to introduce some of the important aspects of Japanese criminal procedure and investigation. Some of the court decisions examined in this chapter may seem strange to those unfamiliar with Japanese law enforcement techniques. The methods used by the police would not be tolerated in many other countries. However, though these methods appear highly questionable, it is also important to understand them in terms of an overall world view. Arguably, this system of investigation is one of the factors which has helped Japan to remain a relatively safe society.

The concept of individual liberty is not as potent in Japan as it is in other countries. In the United States, the idea of freedom involves the delicate balance between governmental interference and the the autonomy of the individual.

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53. Article 139 of the Code of Criminal Procedure :

The court may, when it is deemed that non-penal fines or penalty will be ineffective, order the examination of a body over the person's objections.

However, in Japan, the concept of individual freedom is of secondary importance to the perceived necessity for public safety and social control. Consequently, the Japanese procedures are not viewed as an extreme affront to individual liberties, and perhaps this helps to explain the conservative holdings in the cases above.

The public interest in Japan is a broad concept, and the courts allow the police considerable latitude in their fight against crime. While the Japanese place too much reliance on the confession, obtaining one is nevertheless viewed as an important first step toward the rehabilitation of a criminal offender. In the context of Japanese culture, if the suspect is truly the person who committed the crime, it is thought that the extraction of a confession (even by intimidation) will help the individual to feel remorse for his bad behavior, and encourage him to conform with standards of law-abiding behavior-thereafter.

Whether the issue is one related to voluntary measures, the conservative stance of Japanese courts is readily apparent. This conservative trend is likely to continue for some time, as the reasoning and decision-making process described in these cases is only a particular manifestation of a general social perspective.

## CHAPTER TWO PRINCIPLES OF PROSECUTION

### 2.01. Introduction

In this chapter five principles which prohibit prosecution of a crime and restrict the authority of the prosecutor will be examined. These principles check governmental authority and prohibit the prosecutor from seeking retribution from the individual, when doing so would be unfair (the Opportunity Principle), unequal (prohibition against selective prosecutions), unjust (prejudicial information in the indictment), not timely (the statute of limitations), or prohibited by statute (administrative proceedings).

Requests for prosecution will also be dealt with in this chapter. When the prosecution fails to prosecute the accused in a given case, the victim or others may request prosecution. The nature of this request and the duties of the prosecutor pursuant thereto will be examined.

### 2.02. The Opportunity Principle-Kiso Bengi Shugi

In Japanese criminal procedure there is a principle known as the opportunity principle (Kiso Bengi Shugi) found in Article 248 of the Code of Criminal

Procedure<sup>1</sup>. This principle is designed to ensure fairness, justice, and equity in the prosecution of criminal defendants. This principle grants the prosecution the power to suspend prosecution for certain humanitarian reasons.

Generally, the prosecutors enjoy a great deal of discretion in the handling of criminal cases. It is their decision to prosecute or refrain from prosecution. This power of the prosecutor has to be checked in some way and the opportunity principle provides such a device. Simply stated the principle means that the prosecution must exercise discretion rationally, and may not bring someone to trial when it would be unjust. In other words, when it is unnecessary to prosecute or punish someone because of their character, age, or environment, the prosecution is prohibited from seeking a criminal trial. Sometimes the individual who commits a trivial offense has suffered such a terrible personal loss that it would be unfair to seek further retribution by the government.

The gravity of the offense may be minor and the penalty sought might be unreasonable when the defendant is, himself, a victim of unfortunate circumstances. When determining whether a particular prosecution is unfair, the courts try to evaluate how the prosecution normally deals with a similar case.

The Minamata Mercury Poisoning case is an example of the opportunity principle and its application<sup>2</sup>. This case was very complicated and resulted in many different trials. The trial that is dealt with here is the trial related to the negotiation for compensation between the Chisso Corporation and some of the victims.

The defendant was a victim of the dreaded Minamata sickness. The sickness was caused by the Chisso Corporation's discharge of mercury into the waters surrounding Minamata City, a small city in Kyushu. Not only was the defendant a victim of the sickness himself, but he had also lost his father due to it. He was prosecuted for assault and battery when he entered the headquarters of the Chisso Corporation and struck and bit a security guard who tried to stop his movements within the building.

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1. The Code of Criminal Procedure :  
(Opportunity principle)

Article 248. In case it is unnecessary to prosecute according to the character, age and environment of an offender, taking into consideration the weight and conditions of an offense as well as the circumstances after the offense, the public prosecution may not be instituted.

2. Supreme Court Judgment, December 17, 1980, 34 Keishu 672, 984 Hanrei Jiho 37.

At the trial court, the defense argued that this was a case of abuse of prosecutorial discretion because the defendant was being prosecuted for a trivial matter when the Chisso Corporation was responsible for causing the death and suffering of many people.

This argument was rejected by the court, but the defendant was given a very unusual sentence. The court imposed a suspended fine of ¥50,000. Suspended sentences are often used by the courts, but suspended fines are virtually unheard of.

The defendant appealed. The High Court applied Article 248, and concluded that the prosecution had abused its discretion. The factors that the court considered important were that the Chisso Corporation had tried to escape liability for unprecedented injury caused by the Minamata sickness, and that the government was responsible for failing to adequately investigate and control the activities of Chisso. Under the circumstances it would be unjust to hold the defendant culpable in light of the suffering he had already experienced.

The prosecution appealed to the Supreme Court. The First Petty Bench of the Supreme Court, by a decision to 3 to 2, upheld the High Court decision. It held that because the dispute between the defendant and Chisso had already been settled there was no longer any reason to punish the defendant.

In this case we see the Court telling the prosecutor not to bring an action against someone who has suffered personal hardship and for whom further punishment by the government would be inhumane and unfair. In this case the prosecution had abused its discretion because it deviated from normal practice.

### 2.03. Selective Prosecution

The principles of equal protection and due process prohibit the prosecution from selectively prosecuting someone and letting others go free. The rich and powerful, as well as the weak and poor, are both responsible for the criminal acts which they commit. The law knows no favors and everyone is supposed to receive the same fair treatment. However, there are times where one must question the ability of the government to uphold this important principle.

For example, in one case the defendant was prosecuted for accepting a ¥30,000 gift from the eldest son of a candidate who was running for mayor of a small town<sup>3</sup>. At the trial court the defendant was convicted of violating the

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3. (Akazaki Mayor Election violation Case) Supreme Court Judgment, June 26, 1981, 35 Keishu 426, 1006 Hanrei Jiho 22.

Election Law. The defense argued that the investigation was improper because neither the Mayor nor his son were investigated, yet there existed substantial evidence indicating their involvement.

The High Court reversed the conviction of the man who had accepted the money in exchange for his vote. That Court gave three reasons for its decision. First, the police had violated the equal protection guaranteed by Article 14 of the Constitution<sup>4</sup> in that they actively investigated the defendant, yet, without any valid reason, took no action against the Mayor or his son. Second, the discriminatory investigation resulted in a violation of due process of law guaranteed by Article 31 of the Constitution<sup>5</sup>. Third, Article 338(4) of the Code of Criminal Procedure<sup>6</sup> had been enacted to carry out the provisions of the Constitution and that dismissal of the prosecution was required in this case.

The prosecution appealed to the Supreme Court claiming that there had been no discriminatory investigation, that the High Court had misinterpreted Articles 14 and 31 of the Constitution, and that the High Court's decision was in violation of prior case law.

The Supreme Court reversed the High Court's decision and found that the defendant had been justly convicted, in spite of the apparent unfairness. The Court distinguished the role of the police from the role of the prosecutor. The Court held that the Mayor and his son may have received some kind of favoritism from the police and could have been given special consideration because of their relative high social status in the community. But, this alone was insufficient to

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4. The Constitution of Japan :

Article 14. All of the people are equal under the law and there shall be no discrimination in political, economic or social relations because of race, creed, sex, social status or family origin.

(2) Peers and peerage shall not be recognized.

(3) No privilege shall accompany any award or honor, decoration or any distinction, nor shall any such award be valid beyond the lifetime of the individual who now holds or hereafter may receive it.

5. Id. Article 31. No person shall be deprived of life, or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

6. Code of Criminal Procedure :

article 338. The public prosecution shall be dismissed by a judgment in the following cases :

(4) In case the procedure for the institution of public prosecution is void due to the violation of the provisions thereof.

reverse the conviction of the defendant based on a claim of selective prosecution. The police had never sent the Mayor's case or the son's case to the prosecutor. The prosecutor never had a case to prosecute, and therefore, exercised no discretion in the matter. There could not have been a violation of the Criminal Procedure Code in the investigation of the offense by the prosecutor. The court found that as to the defendant, the investigation had been proper. Without specific evidence of police misconduct there is no way to prove that the Mayor or his son had received special treatment by the police. The Court relied on its own precedent and concluded that one cannot complain when he is justly convicted, even if others involved in the crime are treated differently by the police.

This case is considered to be significant in Japan because it was the first case wherein the Supreme Court established a standard for deciding equal protection issues related to selective prosecution. From this case it appears that it will be very difficult for a criminal defendant to make out a case of selective prosecution when he himself is guilty of wrong doing.

#### 2.04. Prejudicial Information In The Indictment

It is the prosecutors duty to draft the indictment in a criminal case. The language of the indictment must include the name of the accused, the facts constituting the offense, and the name of the offense<sup>7</sup>. The indictment may not

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#### 7. The Code of Criminal Procedure :

Article 256. The institution of public prosecution shall be made by filing an indictment.

#### 2. The indictment shall contain the following matters :

- (1) Name of the accused and other matters sufficiently specifying the accused ;
  - (2) Facts constituting the offense charged ;
  - (3) Offense.
3. Facts constituting the offense charged shall be stated by clearly indicating counts. The indication of counts shall be made by specifying facts constitution the offense through stating the date and time, place and method as possible.
  4. Offense shall be stated by showing the penalty Articles applicable thereto : Provided, That an error in stating penalty Article shall not affect the validity of the institution of public prosecution unless there is a fear that a substantial disadvantage may be resulted in the defense of the accused.
  5. Several counts and penalty Articles may be stated in reservation or alternatively.
  6. Docummments and other Articles that may cause the judge to create presupposition on the case shall not be attached to the indictment, or the contents of which shall not be cited therein.

include, nor be supplemented with, information which may cause the court to create an unfavorable attitude toward the defendant.

Sometimes simply stating the background of an individual may cause the court to adopt a negative opinion of the accused. For example, in one case three members of gang were indicted for loan sharking<sup>8</sup>. One of the defendants was a young leader of the gang, and the other two defendants were lower ranking members. One of their borrowers had failed to pay on time and was subsequently roughed up by the two lower ranking members. The borrower sustained injuries requiring ten days of treatment.

The indictment filed in the case clearly indicated the relative status of the defendants and indicated their rank within the gang to which they belonged. The defense argued that the inclusion of such information was unnecessary for prosecution and a violation of Article 256(6)<sup>9</sup>. The trial court rejected this argument and the defendants were given a six month sentence.

The Osaka High Court upheld the judgment, but the sentence was reduced to four months. The Court held that the purpose of Art. 256(6) was to prevent prejudice to a defendant. Information irrelevant to the case and which could affect the impartiality of the judge's decision making process should not be presented to the judge(s).

Section 3 of that article requires that the indictment include the court and the facts constituting the offense, as well as the time, place, and method of carrying out the illegal act.

When the crime involves more than one defendant acting together in a common plot, the indictment must set forth the relationship between the co-conspirators. In one case the inclusion by the prosecution of the fact that the defendants were gang members was proper in order to show such a relationship.

In general, it is proper for the prosecution to include in the indictment information which shows the defendant to be a habitual offender, or which includes information of prior violations when necessary to show the method of

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8. Osaka High Court Judgment, September 27, 1982, 481 Hanrei Taimuzu 146.

9. The Code of Criminal Procedure :

Article 256(6). The institution of public prosecution shall be made by filing an indictment.

6. Documents and other articles that may cause the judge to create a presupposition on the case shall not be attached to the indictment, or the contents of which shall not be cited therein.

committing the offense.

## 2.05. The Statute of Limitations

In Japan there are two statute of limitations related to a criminal case. The first one is a time restriction on punishment and is found in the Article 32 of the Penal Code<sup>10</sup>. The second one is a time restriction on prosecution<sup>11</sup>. Concerning the time restriction on punishment, a person who has been convicted of a crime may have his punishment relieved if the sentence has not been carried out within a specific period. For example, a person who was sentenced to die would have his penalty relieved if the death penalty had not been carried out within thirty years from the date when the sentence became final and irrevocable.

While there have been very few cases dealing with the limitation on punishment, there have been several interesting ones concerning the limitations on

### 10. The Penal Code :

Article 32. Prescription shall be completed when the penalty has not been executed within the following periods starting from the time when the sentence became irrevocable :

- (1) For death penalty, thirty years ;
- (2) For penal servitude or imprisonment for life, twenty years ;
- (3) For penal servitude or imprisonment for a limited term, fifteen years if the term is ten years or more ; ten years if three years or more ; five years if less than three years ;
- (4) For fine, three years ;
- (5) For penal detention, minor fine, and confiscation, one year.

### 11. The Code of Criminal Procedure :

Article 250. The prescription shall be completed upon the lapse of the period as mentioned hereunder :

- (1) Fifteen years with regard to offenses punishable by death penalty.
- (2) Ten years with regard to offenses punishable by penal servitude or imprisonment for life ;
- (3) Seven years with regard to offenses punishable by penal servitude or imprisonment for the maximum period of more than ten years ;
- (4) Five years with regard to offenses punishable by penal servitude or imprisonment for a maximum period of less than ten years ;
- (5) Three years with regard to offenses punishable by penal servitude or imprisonment for the maximum period of less than five years or fine ;
- (6) One year with regard to offenses punishable by penal detention or minor fine.

prosecution. This type of limitation prevents the prosecution from indicting someone on stale charges. The length of prescription for a given offense is determined by the gravity of the offense. For example, in Japan if a crime is punishable by death the statute of limitations is fifteen years<sup>12</sup>.

Usually, it is not difficult to determine when the period of limitation begins to run. The period begins when the criminal act ended<sup>13</sup>. This is a simple calculation for most crimes. For example, for the crime of theft the period begins when the money was stolen. However, the calculation is more complicated in criminal negligence cases. The act of an individual may cause injury followed by death. The period of prescription for negligent injury begins when the victim received the injury. Thereafter, if the same victim dies as a result of the injuries, a new period of prescription begins as to crime of criminal homicide.

For example, in one case dealing with the Minamata Mercury Poisoning affair, the question of the statute of limitations in relation to a charge of criminal negligence resulted in a landmark case by the Supreme Court<sup>14</sup>. In this case the president of the Chisso Corporation and the plant manager of the Minamata factory were indicted on May 4, 1976, for professional negligence resulting in injury and death. The Chisso plant had discharged mercury into the local waste water which polluted the adjacent river and fisheries. This pollution injured and killed many people.

There were seven specific victims in this case. Victims A thru E became ill in 1959, and all but D died in the same year. Victim F and G contracted the illness while in their mothers' womb and were born on September 12, 1959, and August 28, 1960, respectively. Victim D died on December 16, 1971 and Victim G died on June 10, 1973. Victim G died some twelve years and nine months after birth.

The issue in this case concerned the proper application of the statute of limitation and the interpretation of Article 211 of the Penal Code pertaining

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12. See note 10, above.

13. The Code of Criminal Procedure :

Article 253. The prescription shall commence to run as from the time when the act of the offense ended.

2. In the case of complicity the prescription to all accomplices shall commence to run as from the time when the last act ended.

14. Supreme Court Judgment, February 29, 1988, Keishu 314.

criminal negligence in a profession<sup>15</sup>.

First, it must be understood that there are two separate and distinct crimes contained in the first part of Article 211. Negligence resulting in injury is a separate offense from negligence resulting in death. The defense tried to argue that the two were actually the same and that when the statute of limitations had run as to a negligent injury, that the statute had also run as to any subsequent death which resulted from the original injury.

With regard to the statute of limitations, in general, the statute begins to run from the time the offense ends. The statute of limitation for professional negligence is three years. Since victim G was born on August 28, 1960, the statute of limitation for the crime of negligent injury ran until August 27, 1963. After that time it would have been impossible for the defendants to have been convicted for the injury caused by their negligence.

But what happens when the same person dies some twelve years later? Even though the statute of limitation may prohibit prosecution for negligent injury, does it also prohibit prosecution for negligent death? If Article 211 is interpreted to mean that both negligent injury and negligent death are the same crime, then prosecution would not be allowed. However, the court held that they were two different crimes, and even though the injury occurred first and the statute of limitation may have passed as to that offense, when the victim died a different crime was established, the crime of negligent homicide. Since the defendants were indicted within three years from the victim's death, the prosecution did not violate the statute of limitation.

The Fukuoka High Court upheld the Kumamoto District Court's decision and held that the two defendants were guilty of criminal negligence resulting in death as to victims D and G. Victim G had died on June 10, 1973, and the defendants had been indicted on May 4, 1976; therefore, the prosecution had been initiated within the three year limitation.

The Supreme Court upheld the conviction, and in dicta held that the lower courts had misinterpreted the statute of limitations with regard to the five early

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15. The Penal Code :

Article 211. A person, who fails to use such care as is required in the performance of a profession, occupation or routine and thereby kills or injures another, shall be punished with penal servitude or imprisonment for not more than five years or a fine of not more than 200,000 yen. The same shall apply to a person who, by gross negligence, injures or causes the death of another. (emphasis added)

victims. The lower courts had held that the statute of limitation had lapsed and that conviction on these charges was impermissible. The Supreme Court held that the defendants could have been held accountable for these deaths also because *the negligent act of the defendant was considered to be one continuous act*. In such a case, when the last victim dies the statute of limitation begins to run for all prior victims as well. However, since the prosecution failed to appeal the lower court's decision, the Supreme Court did not modify the two year suspended sentence given to both defendants.

In reaching its decision, the Court focused on the growing nature of the damage done to the fetus. The mother gave birth to a baby with a birth defect which manifested itself in abnormal brain development. This development occurred to a human being and as such was a crime. Even though the mother and fetus are considered to be the same being, when the baby is born any injury received in the womb which continues to worsen with the growth of the child is grounds for a prosecution based on criminal negligence.

The next issue to be addressed is the tolling of the statute of limitation. In Japan the statute of limitation is suspended when an indictment is filed with the court<sup>16</sup>, or when the offender is outside the territory of Japan or conceals himself to avoid service of process<sup>17</sup>. Initiating the prosecution stops the period of

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16. the Code of Criminal Procedure :

Article 254. The prescription shall be suspended to run by the institution of public prosecution made in regard to the said case, and shall be commenced to run as from the time when the decision on wrong jurisdiction or dismissal of public prosecution became final and conclusive. (emphasis added)

2. The suspension of prescription by the institution of public prosecution made to one accomplice shall be effective to the other accomplices. In such a case, the suspended prescription shall be commenced as from the time when the decision rendered on the said case became final and conclusive.

17. The Code of Criminal Procedure :

Article 255. In the event that an offender is outside Japan or conceals himself so that it has been impossible to effectively serve upon him the transcript of indictment or to notify him of the summary order, the prescription shall be suspended to run during the period in which he is outside Japan or conceals himself.

2. Such matters as are necessary for demonstrating that the offender is outside Japan or conceals himself so that it has been impossible to effectively serve upon him the transcript of indictment or to notify him of the summary order, shall be prescribed by the rules of the courts.

prescription. But for how long? According to statute, the indictment must be served on the defendant within two months of filing with the court<sup>18</sup>. After that time the indictment must be dismissed.

Thereafter, the prosecution may re-indict the defendant. The second indictment may come several years after the original indictment was dismissed and still not violate the statute of limitations. The first indictment, even though it may be dismissed for lack of service, is still effective in suspending the period of prescription.

For example, in one case the defendant caused an accident while driving in an intoxicated condition and two people were injured<sup>19</sup>. The accident occurred on April 4, 1969, and the prosecutor filed charges on May 19, alleging traffic violations and criminal negligence. However, due to the defendant's change of residence, the prosecution was unable to serve the defendant with a copy of the indictment until June 13, 1977, some seven years after the accident.

On September 8, 1977, the case was dismissed pursuant to Art. 271(2), above. The prosecution then re-indicted the defendant on November 30, 1977. The defense claimed that the five year statute of limitation for criminal negligence barred the prosecution. The prosecution argued that the statute of limitation had been tolled when the first indictment had been filed even though it was subsequently dismissed.

The Tokyo District Court agreed with the prosecutor and held that even if an indictment is dismissed for failure to serve the defendant within two months of the offense, the statute of limitation is suspended. The defendant was fined ¥100,000. This judgment was affirmed by both the Tokyo High Court and the Supreme Court.

The Supreme Court held that Art. 254(1) was effective in tolling the statute of limitation even if the indictment was dismissed for a failure to serve the defendant within the two month time period.

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18. The Code of Criminal Procedure :

Article 271. The court shall, when the public prosecution has been instituted, serve upon the accused the transcript of indictment without delay.

2. In case the transcript of indictment is not served within two months as from the day of the institution of public prosecution, it shall lose its validity retroactively.

19. Supreme Court Judgment, May 12, 1980, 34 Keishu 185, 967 Hanrei Jiho 132.

From this case it can be said that the filing on an indictment, even a bad one, or an indictment which never reaches the accused, will still toll the statute of limitations for an indefinite period. In reality, this gives the prosecution a unfair advantage. Simply by the filing of an indictment, the government can eliminate any argument concerning the statute of limitations.

## 2.06. Administrative Proceedings

In Japan there are statutes which prohibit any criminal prosecution under certain circumstances. These statutes usually prescribe some type of administrative sanction in lieu of criminal prosecution. For example Article 128(2) of the Road Traffic Law prohibits the government from seeking a criminal prosecution if a person guilty of a minor traffic offense pays the requisite fine<sup>20</sup> upon a demand therefor.

However, the above rule only applies if the violator is truthful in dealing with government. If the individual lies to the authorities in an attempt to avoid prosecution, the administrative remedy may be inapplicable, and the individual will be subjected to a criminal prosecution.

For example, in a 1979 case the defendant drove a car after his license had been revoked<sup>21</sup>. At five minutes past midnight on November 17, 1973, he was stopped by the police in Yokohama City. When he was asked by the police to present his driver's license he stated that he had forgotten it at home. The police believed his story and gave him a ticket for a traffic infraction. The defendant paid a ¥20,000 fine. Sometime thereafter, it was discovered that the defendant had not told the truth, and he was prosecuted for driving without a license.

His defense was a claim of double jeopardy. He believed that he had already been punished, and that no further penalty could be imposed. He relied on Article 128(2) of the Road Traffic Law as set forth above.

The Supreme Court rejected his argument and held that no constitutional

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20. The Road Traffic Law :

Article 128(2). A person who has paid the penalty in accordance with the provision of the preceding paragraph shall neither undergo prosecution nor be subject to a trial of the Family Court. . . .

21. Supreme Court Judgment, June 29, 1979, 33 Keishu 389, 933 Hanrei Jiho 146.

violation occurred. In spite of Article 128(2), minor fines are imposed as an administrative sanction, and as such, only apply to licensed drivers. Since the defendant was not licensed at that time when he was stopped by the police, he was not entitled to have his case dealt with as a minor traffic violation.

The Supreme Court said that in such a case there is no violation of the prohibition against double jeopardy. The defendant by his own lies had caused the second prosecution. In reality, the second prosecution was for the separate offense of not having a license.

## 2.07. Demand For Prosecution

While the prosecution enjoys broad discretion concerning whether to prosecute or not, such discretion is not unlimited. A person aggrieved by a decision not to prosecute may request the court having jurisdiction of the matter to order the prosecution to prosecute if the above request is reasonable<sup>22</sup>. Usually these cases arise when someone within the police or prosecution's own ranks is suspect of illegal conduct.

All countries face the question of what to do with a public official who commits a crime. Can the prosecutor ethically prosecute another prosecutor or police officer? Should a special prosecutor be called in to take the place of the regular prosecutor? What should the court's role be in investigating the facts of the case? Our next case reveal some of the answers to these questions concerning crimes committed by public officials in Japan.

Articles 193 to 196 of the Penal Code pertain to crimes committed by public official, including police brutality<sup>23</sup>. When a case of police brutality arises, the question of whether investigation reports should be made available to the complaint, or his/her representative, is one which the Japanese Supreme Court had

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### 22. The Code of Criminal Procedure :

Article 262. Any person having complained of or accused in regard to an offense as mentioned in Article 193 to 196 of the Penal Code (crimes of official corruption) or Article 45 of the Subversive Activities Prevention Law may, when aggrieved by such measure not to institute the public prosecution as taken by a public prosecutor, request the district court having jurisdiction over the place of the public prosecutor's office to which the said public prosecutor belongs, to order the trial of the case.

to face in one case<sup>24</sup>.

A policeman in Osaka got into a fight with a drunk man. The man fell down, cracked his skull, and died. The prosecution decided not to prosecute the policeman. A request for prosecution was made to the Court pursuant to Article 262 of the Code of Criminal Procedure. The Osaka District Court decided that in the interest of justice the proceedings, including the investigation of evidence, should be open to both sides, the policeman's and the victim's representative.

There are certain provisions in the Code of Criminal Procedure which protect the privacy and reputation of criminal suspects. Article 47 provides, in part: "*Documents relating to litigation shall not be made public prior to the opening of public trial.*" In addition, the prosecutor, police, or counsel, etc., have a duty to take precaution as not to injure the reputation of suspects and not to disturb an investigation, pursuant to Article 196.

The policeman objected to the District Court's decision to allow both sides open access to the investigation, and made a special appeal to the Supreme Court to have the district court judges replaced. The Supreme Court severely criticized the District Court for abusing its discretion by allowing the victim's representative

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23. The Penal Code :

Article 193. A public servant, who abuses his power and causes a person to perform an act being not bound to perform or obstructs a person from exercising a right being entitled, shall be punished with penal servitude or imprisonment for not more than two years.

Article 194. When a person, who exercises or assists in judicial, prosecutorial or police functions, arrests or detains an individual, by abusing his power, he shall be punished with penal servitude or imprisonment for not less than six months nor more than two years.

Article 195. When a person, who exercises or assists in judicial, prosecutorial or police functions, in the performance of his duties, commits an act of violence or cruelty against a criminally accused or other person, he shall be punished with penal servitude or imprisonment for not more than seven years.

2. The same shall apply to a person who commits an act of violence or cruelty against a person, confined by law or ordinance, whom he is guarding or escorting.

Article 196. A person, who commits the crime mentioned in the preceding two articles and thereby kills or injures another, shall be punished with the penalties for the crimes of inflicting injury, if they be the graver.

24. Supreme Court Judgment, March 13, 1974, 28 Keishu 1, 734 Hanrei Jiho 3.

such an open hand at the investigation which was to the detriment of the policeman. The Court held that the degree of openness was patently unfair.

The District Court, as a result of this decision, modified the proceedings to a certain extent. Nevertheless, it held that the victim's representative was entitled to a copy of the investigation report, and that, in principle, the representative should be allowed to be present when the policeman is questioned concerning the facts of the incident.

The policeman believed that the District Court had violated both the former decision of the Supreme Court, and due process of law by allowing the victim's representative to receive a copy of the investigation report.

The Supreme Court held that in the absence of special circumstances, a copy of the investigation report should not be given to the victim's representative. The Court held that such a ruling was necessary to protect the privacy and reputation of the suspect and those who cooperated with the investigation. This was true even if the victim's representative agreed to keep the report secret.

In this case the Osaka District Court had abused its discretion and that its action was illegal when it decided that the victim's legal representative was entitled to a copy of the report.

One prominent scholar in this field believes that disputes of this kind stem from the lack of adequate provisions in the Criminal Procedure Code<sup>25</sup>.

## CHAPTER THREE THE INDICTMENT

### 3.01. Introduction

In this chapter the effect of indictment will be examined in relation to three important areas. These are: interrogation, the right to counsel, and the right to bail. In principle, once indicted the individual should not be subjected to further interrogation. The prosecution should have obtained sufficient information from the accused during the investigative stage.

Prior to indictment the suspect is isolated from everyone, including counsel. After the indictment has been filed with the court, the "suspect" becomes the "defendant". As a defendant, and a party to the litigation, he should be allowed

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25. Based on personal communication with Dr. Hiroyuki Nose, Professor of Criminal Procedure, Hokkaido University, Sapporo, Japan, Summer 1989.

to meet freely with his lawyer. At this stage it is important for client and counsel to meet so that an appropriate defense can be prepared.

The final point to be examined here is bail. In Japan, the individual has no right to bail until an indictment has been filed with the court. This is sharp contrast to other countries where a person has a right to bail within a reasonable time after arrest.

### 3.02. From "Suspect" to "Defendant"

Prior to the filing of an indictment a person who is believed to have committed an offense is considered to be a "suspect". The police can request such a person to come voluntarily to the station for questioning<sup>1</sup>. At this stage of the proceeding the police are trying to find the person responsible for committing the crime. However, once indicted, the suspect becomes a party to the litigation and assumes an adversary role in relation to the prosecution. The person is now considered to be a "defendant".

When the person is being confined prior to trial and after an indictment has been filed, the question arises as to whether the police can continue to interrogate the defendant. Generally, the interrogation ceases once the indictment is filed. However, if the individual is suspected of additional offenses, the authorities may start to question the defendant again.

For example, in a 1961 Supreme Court case the defendant was indicted on July 20, 1960, and the trial was set for September <sup>7</sup>2. On September 6, the prosecutor obtained an sworn statement from the defendant which was later used against him at trial. On appeal the defendant claimed that it was improper for the prosecutor to seek such a statement after he had been indicted.

The High Court rejected the defendant's claim. The Court held that while the prosecutor is a public organ he is also a party to the litigation. When he attempts to seize evidence he must have a warrant. However, the admissibility of a statement given after an indictment depends on whether the statement is given voluntarily or not. There is no illegality if a statement is obtained after the indictment provided the prosecution can show that it was obtained in a proper manner. The Court held that there is no compulsion per se just because the

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1. See note 1 in chapter One.

2. Supreme Court Judgment, November 21, 1961, 15 Keishu 1764, 281 Hanrei Jiho 30.

defendant is being confined.

The Supreme Court held that while Article 198 uses the term “suspect”, such usage does not prohibit the prosecution from obtaining statements from the defendant after an indictment has been filed. The Court said that the prosecution should remain at arms distance from the defendant, but that when it was necessary, further interrogation is permissible. The courts must determine whether the statement was given voluntarily or not.

The Court decided in favor of the government and against the defendant. In doing so the Court ignored the plain language of Article 198 which clearly excludes from its operation people who have seen arrested or who are being detained<sup>3</sup>. In these situations compulsory measures have already been employed in the case and it would be contrary to logic to allow the police to further interrogate someone under the guise of voluntary “questioning”.

### 3.03. The Right to Counsel After Indictment

The institution of public prosecution, that is the filing of an indictment, is a significant step in a criminal case. Before the indictment the person who is thought to have committed the crime is considered the suspect. At this stage the police and prosecution are concerned with gathering evidence and extracting a confession.

In order to allow the prosecution unfettered access to the suspect, and to prevent any obstacles to obtaining a confession, the prosecution is allowed to designate the date, place, and time that the suspect can meet with his attorney. This authority is based on Article 39(3) of the Code of Criminal Procedure<sup>4</sup>. However, such authority can be exercised “only prior to the institution of public prosecution.” Once indicted, the suspect should be allowed to meet freely with his attorney in order to prepare a defense. But what happens when the suspect is indicted for one crime and is still under suspicion for another offense? As to the

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#### 3. The Code of Criminal Procedure :

Article 198. A public prosecutor...may, when it is necessary for conduction an investigation of an offense, call upon the suspect to appear and examine him : Provided that the suspect may, except in such cases as arrested or detained, refuse to appear, or leave at any time after appearance.

#### 4. See note 30 of Chapter One.

second offense, can the prosecution designate the date, place, and time for an interview with defense counsel?

The following 1980 Supreme Court decision answers this question<sup>5</sup>. The defendant, while under arrest, was indicted for corruption on March 15, 1980. On April 7th, a supplementary indictment was filed for a separate case of corruption. After that, the defendant was considered to be a suspect in yet another case of corruption. The prosecution decided that interrogation was necessary as to this last case of corruption, and pursuant to Article 39(3) designated the date, time, and place that the defendant could meet with counsel.

The defense counsel brought a motion to quash the designation for two reasons. First, he contended that the power to designate only exists prior to indictment, and that to prohibit free access to counsel at the post-indictment stage of the proceedings would be a violation of Articles 34 and 37 of the Constitution<sup>6</sup>. Second, even if suspicion concerning other crimes exists, and further interrogation is considered to be necessary, based on the Supreme Court decision of July 26, 1966, such designation by the prosecution is not allowed<sup>7</sup>.

The Supreme Court rejected the defendant's arguments. It held that this case was factually different from the 1966 case; the defendant was not being confined. The Court held that as long as the prosecution doesn't unjustly limit the

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5. Supreme Court Judgment, April 28, 1980, 34 Keishu 178, 965 Hanrei Jiho 116.

6. The Constitution of Japan :

Article 34. 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 apresence of his counsel.

Article 37. In all criminal cases the accused shall enjoy the right to a speedy and public trial by an impartial tribunal.

(2) He shall be permitted full opportunity to examine all witnesses, and he shall have the right to compulsory process for obtaining witnesses on his behalf at public expense.

(3) At all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.

7. See : facts and holding of case.

defense in the preparation of a defense, the designation of date, time, and place, by the prosecution is permissible.

In this case the individual was both a "suspect" and a "defendant" simultaneously. He was a defendant as to the first and second acts of corruption and a suspect as to the last act of corruption. In such a case, the police may treat the individual as a suspect in regards to the designation of counsel visits. It is thought that the police, in their pursuit of evidence, must have unfettered access to the suspect, and therefore, the designation of counsel visits are necessary to insure that nothing will interfere with this aim.

### 3.04. Bail-Hoshaku Hosho Kin

The decision to release the defendant on bail prior to trial is made by the trial judge. In Japan there are two types of bail release, one is granted as of right<sup>8</sup>, and the other is granted as a matter of judicial discretion<sup>9</sup>.

The courts have much discretion on the question of bail, and may also

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#### 8. The Code of Criminal Procedure :

Article 89. Bail shall, upon request, be granted except in the following cases :

- (1) In case the accused is charged with an offense punishable by death, life imprisonment, penal servitude, or imprisonment for a minimum period of more than one year ;
  - (2) In case the accused has been previously convicted of an offense punishable by death, life imprisonment, or penal servitude, or imprisonment for a maximum period exceeding ten years ;
  - (3) In case the accused has habitually committed an offense punishable by penal servitude or imprisonment for a maximum period of more than three years ;
  - (4) In case there are reasonable grounds to suspect that the accused may destroy or conceal evidence.
  - (5) In case there are reasonable grounds enough to suspect that the accused may injure the body or damage the property of the injured persons who are considered to have knowledge necessary for trial of the case or their relative, or may otherwise act threaten them ;
  - (6) In case the name or dwelling of the accused is unknown.
9. Id. Article 90. The court may, when deems appropriate, grant bail upon its own authority.

impose reasonable conditions on the defendant when they grant pre-trial release<sup>10</sup>.

When the defendant fails to demand release on bail, or when the defendant is denied bail for one of the six reasons stated in the statute, the court, may grant it on its own. The next case is an example of this type of bail and deals with a defendant involved in several criminal acts<sup>11</sup>.

In this case the defendant was indicted for three separate offenses. First he was indicted for committing an act of violence, and subsequently he was indicted for two counts of blackmail. Even though the three offenses were filed before the same Oita District Court, only the first offense was mentioned in the warrant of detention.

The defenses motion for release on bail was granted by this court. The prosecution appealed the motion to the Fukuoka High Court which ruled that the granting of the release was improper. It based its decision on Article 89(3) which states that bail may be denied when "the accused has habitually committed an offense punishable by penal servitude or imprisonment for a maximum period of more than three years<sup>12</sup>." Furthermore, the Court held that it was proper to consider the two other offenses even though they were not specified in the warrant of detention. The defendant argued that it was improper for the court to consider information ; that was not mentioned in the warrant of detention. Simply stated, the defendant said that he had only been detained for one violation, and it was improper for the court to take into consideration suspicion concerning other crimes.

The defense counsel appealed to the Supreme Court which held that High Court's decision was proper. It said that there was no reason why the courts

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10. The Code of Criminal Procedure :

Article 93. In granting the bail the amount of bail money shall be fixed.

2. The bail money shall be such an appropriate amount as to sufficiently insure the appearance of the accused, taking into consideration the nature and circumstances of the offense, probative power of the evidence, as well as the character and assets of the accused.

3. In granting the bail, conditions restricting the dwelling of the accused or other appropriate matters may be imposed.

11. Supreme Court Judgment, July 14, 1969, 23 Keishu 1057,561 Hanrei Jiho 82.

12. The Code of Criminal Procedure :

Article 89. Bail shall, upon request, be granted except in the following cases :

(3) When the accused has habitually committed an offense punishable by penal servitude or imprisonment for a maximum period of more than three years.

should not consider all the relevant information concerning the defendant, his history, character, and method of committing the offense when deciding to grant release on bail.

Courts are allowed to consider crimes for which the defendant has been accused even though there may be no mention of them in the warrant of detention.

The next question to be addressed concerns conditions which a court may place on the defendant when he is released on bail. It is clear from the Code that the courts have the authority to impose conditions on the defendant when he is released on bail. Those conditions usually deal with the restriction on his movements and dwelling. But, after the release has been granted can the court change, or add on additional conditions?<sup>13</sup>

The defendants were indicted for breaking and entering, interference with a business, and trespassing, etc. The court granted the defendants' release on the condition that they take no action which would give even the appearance of hiding or destroying evidence.

The defendants returned to the scene of the crimes, a supermarket, and repeatedly harassed the victim owner. They used loud speakers to call out insults to him so that the store employees and surrounding neighbors could hear. They also placed a red flag in front of the store and distributed handbills criticizing him.

The court, in response to the defendants' action, imposed the condition that they refrain from interfering with the business operations of the store and using of loud speakers, etc.

The defense objected to the court imposing additional conditions. They claimed that it was illegal to impose any additional conditions once the release had been granted. In the alternative, they argued that if the court were to impose additional conditions it must be based on proper reasons and to prevent any further crimes.

The Tokyo High court disagreed. The Court explained that the setting of the condition for release was different from the granting of bail. The setting of conditions was to apply to future situations and had nothing to do with the trial itself. Release is a substitute for confinement to which the defendant must voluntarily submit to certain conditions. In order to preserve the system of release as a substitute for confinement, the court must be allowed to change or add conditions if the situation changes.

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13. Tokyo High Court Judgment, May 2, 1979, 32 Kosai Keishu 129, 957 Hanrei Jiho 116.

However, the Court held that in this case there had been no additional conditions imposed, but merely the specification of the existing conditions. The Court used Article 96(4) which provides that bail may be revoked when the accused attempts to threaten, or injure the property of, those who have knowledge necessary for the trial<sup>14</sup>. The defendants began to harass the victim immediately after he testified. The initial conditions prohibited the defendants from hiding or destroying evidence. The Court reasoned that by their action, the defendants were attempting to influence the victim's testimony, and as such destroy evidence.

### 3.05. Conclusion

In this chapter the affect of issuing an indictment was examined in relation to three areas; interrogation, the right to counsel, and bail. In Japan, a big distinction is made between the pre-indictment stage and the post-indictment stage of a case. At the early stage, the individual enjoys fewer rights and is isolated from others. The purpose of this isolation period is to give the authorities an opportunity to determine if formal charges should be filed.

Once the decision has been made to take legal action against the individual, the authorities must deal with him at arms length. The interrogation should cease, the person should be able to meet freely with counsel, and bail should be

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#### 14. The Code of Criminal Procedure :

Article 96. The court may, upon request of a public prosecutor or upon its own authority, revoke the bail or the stay of execution of commitment by ruling in any one of the following cases :

- (1) In case the accused has been summoned, but has failed to appear without justifiable reasons ;
- (2) In case the accused has escaped, or there exist considerable reasons enough to suspect that the accused may destroy or conceal evidence ;
- (3) In case the accused has destroyed or concealed evidence, or there exist considerable reasons enough to suspect that the accused may destroy or conceal evidence ;
- (4) In case the accused has injured or attempted to injure the body or has damaged or attempted to damage the property of the injured persons or others to be deemed to have knowledge necessary for trial of the case or their relatives ; or has otherwise acted to threaten them ;
- (5) In case the accused has violated the dwelling restriction, or such other conditions as stipulated by the court.

granted when appropriate.

## CHAPTER FOUR AMENDING THE INDICTMENT

### 4.01. Introduction

In this chapter issues concerning the process of amending an indictment will be examined. The indictment is a formal document used against the defendant in the criminal process. It informs the defendant and the court of the charges and the facts that the government intends to prove. Amendments to the indictments are usually allowed provided the defendant is informed of them, and they do not cause a substantial disadvantage to him<sup>1</sup>.

The language of the indictment must be specific. It must inform the defendant of the facts in precise enough terms so that an adequate defense may be prepared. However, there are times when, the nature of the offense necessitates a lesser degree of specificity.

The lesser-included-offense concept provides the basis for the court to allow the prosecution to unilaterally amend an indictment by changing the offense to a lighter one. This can be done without giving the defense an opportunity to participate in the matter.

Criminal negligence cases usually present some type of causation issue. When amending an indictment, the question of causation must be examined to determine if such a change would be disadvantageous from the defendant's point

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#### 1. The Code of Criminal Procedure :

Article 312. Upon the request of a public prosecutor, the court shall permit him to add, withdraw, or to change the count or penalty Article stated in the indictment so long as it does not affect the identity of the facts constituting the offense charged.

2. The court may, when it deems proper in view of the development of the proceedings, order the addition or modification of the count or penalty Article.

3. When an addition, withdrawal, or modification of the count or penalty Article has been made, the court shall forthwith inform the accused of the part added, withdrawn, or modified.

4. The court shall, when it deems that there exists a danger of causing a substantial disadvantage to the defense of the accused through the addition or change of the count or penalty Article, suspend by ruling upon the request of the accused or the counsel, the public trial procedure for a period necessary in order to allow the accused to prepare a sufficient defense.

of view.

The concept of consolidated crimes (Heiko Zai) in connection with the amendment of the penalty provision is a factor considered by the court to determine if an error in the indictment will be harmless or otherwise. These and other issues related to the amending of an indictment will be explained and examples will be provided in the following sections.

#### 4.02. Specificity

As stated previously, the filing of an indictment is a major step in a criminal case. From that point, the individual is considered to be the accused, the defendant, and a party to the litigation. One of the functions of the indictment is to let the defendant know for what crime he is being charged, and the facts which the government intends to prove. Without such information the defendant would be unable to prepare an adequate defense.

The question often arises as to how specific must the prosecutor be in drafting the indictment. Article 256 of the Code of Criminal Procedure tells us that the name of the accused and other matters sufficiently specifying the accused must be stated<sup>2</sup>. In addition, the facts constituting the offense, as well as the

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#### 2. The Code of Criminal Procedure :

Article 256. The institution of public prosecution shall be made by filing an indictment.

##### 2. The indictment shall contain the following matters :

- (1) The name of the accused and other matters sufficiently specifying the accused ;
  - (2) Facts constituting the offense charged ;
  - (3) Offense.
3. Facts constituting the offense charged shall be stated by clearly indicating counts. The indication of counts shall be made by specifying the facts constituting the offense through stating the date, time, and place and method as possible.
  4. The Offense shall be stated by showing the penalty Articles applicable thereto : Provided, That an error in stating penalty Article shall not affect the validity of the institution of public prosecution unless there is a fear that a substantial disadvantage may be result in the defense of the accuse.
  5. Several counts and penalty Articles may be stated in reservation or alternatively.
  6. Documents and other articles that may cause the judge to create presupposition on the case shall not be attached to the indictment, or the contents of which shall not be cited therein.

name of the crime must be stated in the indictment.

In some cases it is very difficult to determine with precision just when the illegal act occurred. This is particularly true for drug offenses as we can see from the following case<sup>3</sup>. The defendant was arrested for committing an act of violence. While he was being held he agreed to a urine test for drugs. The results of the test were positive, yet the defendant denied any drug use. There were no witnesses and the date, time, place, and method were not clearly indicated.

The prosecutor stated in the indictment that, "sometime during the period from September 26 to October 3, 1979, within the vicinity of a Yoshida Town, Takada District, Hiroshima Prefecture, that the defendant had either self-injected or ingested a slight amount of a prohibited substance."

The Hiroshima District Court rejected the defendant's claim that the count lacked the required specificity. The Hiroshima High Court affirmed this decision.

The Supreme Court held that there is some degree of flexibility concerning the notation of the date, time and place of the offense. Even though a count in the indictment does lack exactness when setting forth the facts of the offense, it is enough if the prosecution indicates the details of the offense based on the existing evidence in the case of a drug offense.

#### 4.03. Amending The Indictment

Once an indictment is filed the question often arise as to whether it can be amended, and if so how? Sometimes the prosecutor failed to observe an aspect of the facts which would have been grounds for an additional count. Can he now change the indictment? Does the defendant have a right to oppose the amendment.

Article 312(1) provides:

Upon request of a public prosecutor the court shall permit him to add, withdraw, or to change the count or penalty Article stated in the indictment so long as it does not affect the identity of the facts constituting the offense charged.

In one case, the defendant was indicted for possession of handguns and ammunition<sup>4</sup>. The indictment was for a single offense and contained a statement

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3. Supreme Court Judgment, April 25, 1981, Keishu 116, 1000 Hanrei Jiho 128.

4. Tokyo High Court Judgment, December 20, 1977, 30 Kosai Keishu 423.

that for a certain period of time the defendant possessed these items. However, after further examination of the evidence the prosecutor learned that the person to whom the defendant had delivered the weapons to, had subsequently returned them to the defendant. Therefore, there had been two separate and distinct periods wherein the defendant had possession of the evidence.

The prosecution was granted permission by the court to change the counts in the indictment to include an additional possession count. The defense protested claiming that they were not given an opportunity to argue the issue. The Tokyo High Court agreed. It held that the defense has a right to an opportunity to present a statement against the amendment to the indictment. It is the court's duty to give to the defendant a chance to contest any amendment to the indictment which seeks to affect his legal interest, in this case by increasing the number of offenses.

#### 4.04. Amending The Indictment-Lesser Included Offense

When someone is indicted for a serious offense, can the court amend the indictment without a hearing and hold the person accountable for a lesser-included offense? This question arose in the context of a drunk driving case<sup>5</sup>. In Japan there are two offenses dealing with driving an automobile after having consumed alcohol. The first one stems from Article 117(2)(1) of the Road Traffic Law and concerns driving while intoxicated<sup>6</sup>. This provision deals with the driver's actual ability to drive properly and is not related specifically to the amount of alcohol consumed. Upon conviction a person could receive as much as a two year sentence or a ¥100,000 fine. The second provision is a lesser-included offense and deals with the specific alcohol content in the driver's body. This type of case usually arises when someone is stopped and the police detect the odor of alcohol

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5. Supreme Court Judgment, March 4, 1980, 34 Keishu 89, 956 Hanrei Jiho 134.

6. The Road Traffic Law :

Article 117—2. A person falling under any of the following respective items shall be liable to imprisonment with hard labor not exceeding two years or a fine not exceeding ¥100,000 :

(1) A person having driven a vehicle, etc. in violation of the provision of Article 65 (prohibition of driving under the influence of intoxicating liquor) paragraph 1, who was in drunken state while operating a vehicle (meaning the state feared to be incapable of normally driving due to influence of alcohol).

on their breath. The person is usually asked to take a test to determine the content of alcohol remaining in their body. The penalty for violating this law is found in Article 119(1), it provides for up to a three month sentence or ¥50,000 fine.

In this case the defendant was indicted for the graver offense of drunk driving. As the trial court level the defendant was found guilty. The Tokyo High Court, without a hearing on the issue of amending the indictment, found the defendant guilty of the lesser-included offense. The Court held that there had been no proof that the defendant's driving ability had been impaired.

The defendant appealed to the Supreme Court claiming that the he had been convicted for an offense separate from the one for which he was indicted, therefore the proceedings had been illegal.

The Supreme Court held that there was nothing improper in amending the indictment in this case without giving the defendant an opportunity to oppose the action. The crime for which the High Court held the defendant guilty was a lesser-included offense of the original offense for which he was indicted. The action by the High Court did not affect the defendant's ability to prepare a proper defense because the record already contained information related to the percent of alcohol remaining in the defendant's body at the time of the incident.

The rule to be derived from this case is that there is no need to give the defendant an opportunity to oppose an amendment to a count in an indictment when it relates to a lesser-include offense and does not interfere with the defendant's ability to prepare a defense.

#### 4.05. Amending The Indictment-Criminal Negligence

The next issue to be considered is the language of the indictment and its relationship to causation. For most crimes causation is not a problem. This is especially true for intentional acts. However, when someone is indicted for criminal negligence the issues become more complicated. One of the primary question is: did the defendant's negligence cause the victim's injuries? When the defendant's act is the only one in the change of causation the matter remains fairly simple. However, when there exist intervening causes the language of the indictment must be carefully considered. This point is made clear in the next case<sup>7</sup>.

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7. Tokyo High Court Judgment, February 8, 1979, 32 Kosai Heishu 1, 962 Hanrei Jiho 129.

The defendant was driving his car late one rainy night at approximately 55 km/h. He failed to pay sufficient attention to what was ahead of him and struck a pedestrian resulting in fatal injuries. The indictment stated that the pedestrian *made contact with the front left portion of the defendant's car, landed on the hood, and then fell off*. It further stated that a second car failed to notice that the victim had fallen off the defendant's car and, thereafter, this car also had struck the victim. As a result of these two blows the victim suffered head injuries resulting in death.

The Urawa District Court, without a hearing on the issue, changed the indictment eliminating that portion of the indictment dealing with the other vehicle. The defendant appealed claiming that it was illegal for the court to take such action.

The Tokyo High Court reversed. It held that while the question of foreseeability was a factor to be considered when dealing with a question of negligence, it was not the only consideration. The issue of how the result occurred, taking into account acts of third parties, is also important in determining whether there was negligence. The degree of illegality which should be attached to the defendant's act must also be evaluated.

Whenever there is a change in the indictment which could affect the ability of the defendant to prepare a defense, a hearing must be held and the defendant must be given an opportunity to oppose the change. Otherwise, such a change could be disadvantageous to the defendant, come as a surprise, and unfavorably affect his position. In this case the prosecution, in both the opening and closing statements, said that this case involved two cars. If only the District Court's finding of facts is considered, based on the change in the indictment, only the defendant's vehicle was responsible for the victim's death. The Court concluded that it is necessary to consider the position of the victim and the impact with the second car in order to determine the degree of the defendant's culpability.

#### 4.06. Amending the Code Section

The indictment must state the name of the defendant, the facts constituting the offense, and the code section. Changes in the indictment usually occur to the count, i.e., the facts constituting the offense. Nevertheless, there are occasions when the court is called upon to evaluate a change in terms of the code section. For example, the facts stated in the indictment may be accurate yet the provision of the Penal Code selected by the prosecution is in error. What should the court do?

How will the change effect the position of the defendant and his ability to defend his case?

Article 256(4) provides part of the answer, it states :

Offense shall be stated by showing the penalty provisions applicable there-to : Provided, That an error in stating the penalty provision shall not affect the validity of the institution of public prosecution unless there is a fear that a substantial disadvantage may result as to the defense of the accused.

In the next case the indictment included two provision of the Penal Code<sup>8</sup>. The graver of the two offenses is Article 204 which imposes a penalty of up to ten years in prison for intentionally injuring another person<sup>9</sup>. Article 208 is the lesser offense and provides for a penalty of up to three years for using violence against another without causing injury<sup>10</sup>.

The facts stated in the indictment are as follows. The defendant, together with some other persons, went to a certain bar and over a trivial matter, used violence against four individuals. Three of the individuals sustained serious injuries requiring as much as two weeks of treatment. The trial court applied Article 204, the graver offense, to all four of the victims, including the one who was only slightly injured. The court imposed a sentence of two years and eight months.

The defendant appealed and claimed that the trial court erred when it failed to apply Article 208, the lesser offense to facts related to the one individual who was not seriously injured. The High Court agreed and held that the trial court had erred, but that it was a harmless error as to the question of guilt. The High Court reduced the sentence to two years.

The defendant appealed to the Supreme Court, which held that it was permissible to use a different penal provision from the one stated in the indictment provided it doesn't adversely affect the defendant's ability to present a defense. The Court held that when there are two or more acts of the same nature they are

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8. Supreme Court Judgment, February 16, 1978, 32 Keishu 47, 881 Hanrei Jiho 155.

9. The Penal Code :

Article 204. A person who inflicts an injury upon the person of another, shall be punished with penal servitude for not more that ten years or a fine of not more than ¥100,000 or a minor fine.

10. Id. Article 208. A person, who uses violence against another without injuring him, shall be punished with penal servitude for not more than two years or a fine of not more than ¥100,000, penal detention, or a minor fine.

combined to form what is called "consolidated crimes"<sup>11</sup>.

As consolidated crimes, the method for calculating the sentence is by taking the penalty for the gravest offense and increasing it by one-half<sup>12</sup>. The Court held that in this case the defendant was not adversely affected by the error because he had been found guilty of three counts of the graver offense, Article 204. As such the penalty would be calculated as a consolidated crime and the one count concerning Article 208 would be meaningless due to the three graver acts of violence which resulted in injury.

Changing the section number of a code provision sometimes occurs in bribery cases. The following is an example of a this type of case and illustrates the court's position with regard to technical changes.

One provision of the Penal Code deals with accepting a bribe on the part of a public servant in exchange for doing a wrongful act or for omitting to do a proper act<sup>13</sup>. Another provision penalizes those who give, offer, or promise a bribe to a public servant<sup>14</sup>.

In this case the defendant was the individual who paid the bribe<sup>15</sup>. The indictment stated that he had, as part of a conspiracy with two public servants,

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11. The Penal Code :

Article 45. Several crimes which are not yet irrevocably adjudicated upon shall become consolidated crimes. If one component crime has been irrevocably adjudicated upon to punish with a penalty heavier than imprisonment, only such crime and other crimes committed before the judgment therefore became irrevocable shall become consolidated crimes.

12. Id. Article 47. When two or more crimes are punishable with penal servitude or imprisonment for a limited term, the maximum shall be the maximum prescribed for the gravest crime increased by one-half ; however, it shall not exceed the total of the maximum of the penalties specified for the several crimes.

13. The Penal Code :

Article 197(3). When a public servant or an arbitrator, who commits the crime mentioned in the preceding two Articles, takes a wrongful action or omits a proper action, he shall be punished with penal servitude for a limited period of not more than five years.

14. Id. Article 198. A person who gives, offers or promises for a bribe mentioned in Articles 197 to 197-4 inclusive, shall be punished with penal servitude for not more than three years or a fine of not more than ¥100,000.

15. Supreme Court Judgment, March 6, 1978, 32 Keishu 218, 882 Hanrei Jiho 117.

been guilty of Article 197(3) of the Penal Code for having solicited two public servants to do improper acts. At the trial the prosecution, with the permission of the court, changed the offense to that of giving a bribe. (Art. 198)

The defense counsel objected to the change stating that if the defendant had been prosecuted for violating 197(3) the court would have found him not guilty because the section only applies to public servants. They claim that because the prosecution was allowed to change the indictment, the change adversely affected the defendant.

The Supreme Court held that the facts relied upon to prove both offenses were the same. Therefore, there was no violation of Article 312 which requires that the identity of the facts must remain the same.

Bribery, by its nature, is a crime committed by at least two people. One person pays the money and the other accepts the money and changes his behavior as a result. The facts used to prove that a person paid a bribe are the same facts which will be used to prove that a public servant accepted the bribe. The only difference is that one provision of the penal code applies to the giver and another to the receiver. The fact that the prosecution changes the penal provision will not have any affect whatsoever on the defendant's preparation of his defense.

As we can see the courts adopted a balancing test to determine if a change is permissible. If the change substantially impairs the defendant's ability to prepare a defense the court won't allow the change. If the change doesn't affect the defendant's position concerning defense preparation the court will usually allow such a change. The court is seeking to ensure real justice, and will not dismiss a case when the defendant is obviously guilty because the prosecutor made a mistake concerning the applicable code section.

#### 4.07. Amending the Indictment At The Appeal Stage

Sometimes the facts of a certain case will make it difficult for the prosecution to choose between one of several possible offenses to include in the indictment. The appeal court may feel that the prosecution's selection of the offense was in error and that the defendant is actually guilty of an offense different from the one with which he is being charged. What happens when the prosecution initially selects Crime A, and thereafter, with the consent of the defendant and permission from the court, adds Crime B to the indictment? If the trial court finds the defendant guilty of only Crime A, can the appellate court reverse and hold that the defendant is guilty of Crime B, but not Crime A?

These issues were presented in the following case<sup>16</sup>. The defendant lent his cart to a man whom he knew was going to use it to steal some copper plates from a nearby factory. Following the theft, the defendant purchased the plates from the man.

Initially the defendant was charged with aiding the theft. At the trial the prosecution, with the permission of the court and the consent of the defense, added a count of buying stolen property. At the conclusion of the trial, the court found the defendant guilty of only aiding the theft and sentenced him to ten months in prison.

The defense appealed claiming that the trial court erred in the finding of the facts, and for imposing an unjust sentence. The High Court reversed. It held that the defendant was guilty of buying stolen goods, the subsequent count, and reduced the sentence to eight months and a fine of ¥20,000.

The defendant appealed to the Supreme Court claiming that the two crimes were different and should have been treated as consolidated offenses. In addition, the defendant contended that there did not exist unity of facts between the two counts.

The Appellate Court decided a question that had not been presented to it. The Trial Court found the defendant guilty of Crime A, and only crime A. Was this issue of the second offense even a proper matter for adjudication by the appellate court? Article 378(3) of the Code of Criminal Procedure provides that an appeal can be made to the Supreme Court when "the judgment was not rendered on a case the trial of which was requested, or when it was rendered on a case the trial of which was not requested". This means that an appellate court can only decide matters presented to it.

The Supreme Court held that it was improper for the High Court to find the defendant guilty of buying stolen goods. The Court said there was no unity of facts between the offenses of aiding a theft and buying stolen goods. For this reason, the High Court could only render a judgment as to the crime for which the defendant was found guilty by the trial court, that is *aiding of a theft*.

In other words, what the court said was that an amendment can not occur at the appellate stage of the proceedings. This case is also important because it shows that crimes which originate from a chain of connecting facts may not have

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16. Supreme Court Judgment, February 21, 1958, 12 Keishu 288.

“unity of facts.” Where there is not unity of facts the counts in the indictment can not be changed. This is so even if the defendant agrees to the change. When two crimes do develop from a chain of connecting facts, as in the present case, two separate offenses must be charged. As such, the defendant can have the two offenses combined together as consolidated offenses and thereby benefit by having the amount of the sentence reduced<sup>17</sup>.

#### 4.08. An Amendment Favorable to the Defendant

The power of the prosecutor is great, for it is he who decides to bring a charge against an individual. Usually the prosecutor will seek a change in the indictment which is in the interest of the government. Nevertheless, the prosecution sometimes asks the court to allow a change which benefits the defendant. The prosecution may feel that, even though the person could be found guilty of a serious crime, severe punishment would not be appropriate<sup>18</sup>. The prosecutor can withdraw the prosecution at any time during a trial before a judgment is rendered<sup>19</sup>.

The defendant in this case was a pimp for two young girls in their early twenties<sup>20</sup>. He worked out of a street vendor where he sold hot foods. His business was located in the nighttime bar district of Sapporo, known as Susukino. He was indicted for operating a prostitution business, and facts sufficient to prove his guilt were presented to the trial court. However, the prosecution just prior to the close of trial, requested permission to change the indictment. The government wanted to withdraw the count for operating a prostitution business and insert a single count of procurement, a lesser offense.

Generally, the prosecution may initially indict for a grave offense, and prior to the end the trial, change the count in the indictment to a lesser offense, provided there remains unity of facts between the two crimes.

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17. Article 45 of the Penal Code. see note 11, above.

18. The Code of Criminal Procedure :

Article 248. When it is unnecessary to prosecute according to the character, age and environment of a an offender, the weight and conditions of an offense as well as the circumstances after the offense, the public prosecution may not be instituted.

19. Id. Article 257. The public prosecution may be canceled until a judgment in the first instance is rendered.

20. Supreme Court Judgment, August 31, 1967, 21 Keishu 879, 497 Hanrei Jiho 77.

Operating a prostitution business carries a penalty of up to ten years imprisonment<sup>21</sup>. Procurement, carries a maximum sentence of only two years imprisonment<sup>22</sup>. The Court allowed the change and the defendant was convicted of the lesser offense.

On appeal, the High Court felt that an injustice had occurred. Facts sufficient to prove the defendants guilty for the heavier offense had been proven, yet the trial court allowed the prosecution to change the count resulting in the defendant's conviction for a lesser crime. The Trial Court may have wanted to impose a heavy penalty but was immediately disarmed when the prosecution changed the count.

The question in this case concerned the interpretation of Article 312(1) of the Code of Criminal Procedure which states that the court must allow the prosecution to add, withdraw, or change a count in the indictment so long as it doesn't affect the unity of facts. The High Court held that it was the duty of the trial court to render a decision based on the facts that were proven in court. In other words, the high court was telling the lower court that if the prosecution proves beyond a reasonable doubt that the defendant committed a serious offense, the prosecution should be prohibited from amending the count to a lesser charge. In this case the High Court could not understand what motivated the prosecution to let the defendant off on a much lighter charge after it had presented evidence of a graver one. The Court held that Article 312(1) did not limit the denial of permission to alter the indictment to only the question of the unity of facts. It remanded the case to the Trial Court.

The defendant appealed to the Supreme Court. The Supreme Court held that the language of Article 312(1) was absolute, and that the only reason a court could deny a prosecutor's request to modify the indictment was when such action would affect the unity of facts. The prosecution has the authority to decide not prosecute. Such authority comes from the opportunity principle of Article 248 of the Code of Criminal Procedure. In addition, the prosecutor may withdraw the prosecution at any time prior to judgment<sup>23</sup>.

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21. Article 12 of the Prostitution Prevention Law.

22. *Id.* Article 6(1).

23. The Code of Criminal Procedure :

Article 257. The public prosecution may be cancelled until a judgment in the first instance is rendered.

The Supreme Court held that the trial court had been correct in its interpretation of the law, and that the High Court erred by usurping the prerogative of the prosecution. This case illustrates the fact that the discretion of the prosecutor, which begins when he receives a case from the police and continues until judgment is rendered. If the prosecution wants to change a count to a lesser crime after it has proven a graver offense, the court can't interfere in that decision. The Court's role is to make a judgment after all the evidence has been submitted and both sides have made their closing arguments. Until that point, the prosecution enjoys the prerogative of withdrawing or amending the indictment.

#### 4.09. Bill of Particulars

In Japan the defense counsel can request the court to order the prosecution to clarify the counts in the indictment (*shakaumei seikyu*)<sup>24</sup>. There are times when the language of the indictment is vague, ambiguous, or lacks sufficient information. Under such circumstances counsel would be hindered in the preparation of an appropriate defense. To prevent such situation, the rules provide that a court may order the prosecution to clarify the indictment. At the opening of a trial the prosecution must state with preciseness the act(s) it intends to prove. Once it has done this, any extraneous evidence should be excluded even though it may be proof of a different crime.

For example, in a 1976 case the defendant was indicted for causing the death of a policeman during a demonstration<sup>25</sup>. The indictment charged that the defendant and a few others beat the policeman with wooden sticks and flag poles. Thereafter, they threw flammable liquid on him, and then set him on fire. At the opening of the trial, the counsel for the defendant requested the prosecution to specify the exact nature of the defendant's acts. In response, the prosecution said that the defendant had pulled the policeman from the fire by the shoulders and stepped on his face twice and kicked him in the ribs once. The prosecution said nothing about the acts of the defendant prior to when the policeman became engulfed in flames. From this point, the prosecution should have been limited to evidence related to facts occurring after the fire.

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24. Section 208 of the Rules of Criminal Procedure.

25. Fukuoka High Court Judgment, April 5, 1976, 345 Hanrei Taimuzu 321.

But, when the defendant claimed that he was trying to extinguish the fire on the policeman, and that he was helping to rescue him, the prosecution attempted to introduce evidence of the defendant's conduct prior to the fire. On the eighteenth day of the trial the prosecution moved to amend its early explanation and opening statement regarding the defendant's specific acts of violence. The government wanted to add the fact that the defendant had kicked the policeman in the pelvic area and made him fall on the street prior to the fire.

The Trial Court did not directly allow this. However, before the close of the prosecution's case it heard evidence that the defendant had kicked the victim once prior to the fire. Based on this evidence the court was convinced that the defendant's action were less than honorable concerning the rescue of the victim and convicted him of injury resulting in death. Both sides appealed.

The High Court held that the prosecution had the basic responsibility and the duty to amend an indictment, and that the courts should not interfere with this except in rare instances. In the present case the Trial Court had not directly allowed the prosecution to add facts in the count as to what occurred prior to the fire, nevertheless, it did receive evidence on this issue.

The High Court held that this additional testimony was irrelevant because it didn't relate to an issue before the Court. As the prosecution had stated at the beginning of the trial, the defendant would be held accountable for what he did after the fire, not before it. The High Court acquitted the defendant.

In addition to the reasoning stated above the Court also noted that it would be a violation of the defendant's right to a speedy trial if the prosecution could add more facts at the end of the trial, for such could prolong the trial indefinitely.

#### 4.10. The Role Of The Court

The court has a very limited role concerning the amendment of an indictment, and the responsibility for the content of the indictment rests with the prosecutor. It is he who decides what charges should be included in the indictment. He may also decide to add, withdraw, or change the counts of an indictment depending on the facts of given case. What then is the court's role in the indictment process? What should the court do if the prosecution fails to seek amendment of the indictment when to do otherwise would be unfair to the defendant?

Article 312(2) of the Code of Criminal Procedure provides that the court may order the prosecution to add or change the count or penalty article of an in-

dictment when it is proper, in view of the development of the proceedings<sup>26</sup>.

This problem usually arises where there are multiple defendants. For example, the prosecution may decide to indict only one of the two culpable co-conspirators. If this is seen as unfair to the court, it may, in theory, order the prosecution to amend the indictment in order to eliminate the element of unfairness. For example in one case the defendant, together with five or more other students occupied a building on a university campus as part of a demonstration<sup>27</sup>. From 5:20 am. to 6:15 am. one morning they threw rocks and other things from every floor of the building at the policemen below. When the police tried to enter the building the defendant together with some students hurdle large pieces of concrete from the fifth floor window. Eighteen police officers were injured, and one died as a result of injuries received from the falling concrete.

The defendant was indicted for both obstructing a police officer in the performance of official duties (the act of occupying the building), and for and injury causing death, (the act of hurdling the concrete). The other students were indicted for only the second set of facts, ie. the throwing of the concrete on the police.

The prosecution lack sufficient evidence to determine exactly who threw the concrete. It was also unable to prove complicity among the students. The Court had no other choice but to find some of the students not guilty. If however, the prosecution amended the indictment and included the initial fact of occupying the building, then complicity could be established as to the entire episode. The Court questioned the prosecution as to his intent to seek an amendment. The prosecution answer that it had no intention of amending the indictment. The Court accepted the prosecution's answer, and did not order or urge the prosecution to amend the count. As a result, two of the students were found not guilty and the others, excluding the defendant, were found guilty of only minor offenses.

The defendant was the only one who was found guilty of injury resulting in death, a much more serious offense.

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26. *The Code of Criminal Procedure* :

Article 312(2). The Court may, when it deems it proper, in view of the development of the proceedings, order the prosecutor to add or change the count or penalty article.

27. Supreme Court Judgment, September 6, 1983, 37 Keishu 930, 1097 Hanrei Jiho 11.

The High Court remanded the case for what it felt was unfairness concerning the defendant. It held that the Trial Court should have gone beyond merely asking the prosecution if it intended to amend the indictment. It should have ordered the prosecution, or at least, strongly encouraged the prosecution to do so. If the count had been amended, the Court could have held that complicity did exist as to the entire action by the students, and as such, all the students could have been dealt with in a more uniform manner.

The Supreme Court held that the Trial Court was correct when it did not order the prosecution to amend the indictment. It was enough that the Trial Court had asked the prosecution its intention concerning a possible amendment. During the eight and a half years the case was being heard, the prosecution was treating the facts related to the occupation of the building separate from the facts related to the hurdling of the concrete on the policemen. In conclusion, the Supreme Court held that the Court did not have the duty to order the prosecution to change the indictment. If such change had occurred it would have unfairly affected the other defendants, who for such a long time, had been prepared only to defend charges concerning the lesser offenses.

If the court had ordered the prosecution to change a count in the indictment and the prosecution refused, it could not have changed it on its own.

The prosecution is the one seeking a conviction for a crime committed against society. It is the duty of the defense counsel to attack the prosecution's case, and to make the prosecution prove beyond a reasonable doubt that the defendant is guilty. The judge sits in between, and his role is fundamental because it ensures a fair and just result. If the court steps into the shoes of the prosecution at any time during the trial, this delicate balance will be tipped in favor of the government and against the defendant.

For example, in one case the defendant was indicted for helping another buy votes in an election<sup>28</sup>. The defendant introduced several people to the man who paid 3,000 yen to each of them in exchange for their vote.

At the trial, the Court asked the prosecution if it wanted to change the count from one of helping to buy votes, to one of conspiracy to buy votes<sup>29</sup>. The prosecution answered that it had no intention of changing the original count. The

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28. Supreme Court Judgment, April 28, 1965. 19 Keishu 270, 406 Hanrei Jiho 20.

29. Article 221(1) of the Public Election Law.

Court then ordered the prosecution to change the count, to which the prosecution refused. The Court finally took it upon itself and changed the count. Thereafter, the defendant was found guilty of conspiracy to buy votes and given a fine a 30,000 yen.

The defendant appealed claiming that the court had violated the principle of giving fair notice by changing the count in the indictment, and that the court lack the authority to effect a change in it.

The Tokyo High Court held that a change in the indictment wasn't necessary for the Trial Court to reach it's decision. Even without amending the count, it was possible for the Trial Court to find the defendant guilty of conspiracy.

The Supreme Court reversed and remanded the case to the Trial Court, and held that both the Trial Court and High Court had violated a important legal principle. It held that if the Court changed a count in an indictment when the prosecution refused to do so, it would be directly involved in the indictment process. It is the prosecution who has the authority over the contents of the indictment, and the counts contained therein, not the courts. This separation of roles is fundamental to the basic structure of criminal procedure, concluded the Supreme Court.

## CHAPTER FIVE DUE PROCESS

### 5.01. Introduction

Article 31 of the Constitution requires that all criminal trials be regulated by procedure established by law<sup>1</sup>. Due process, in this regard, means that the authorities must base all their action on statutory provisions. It also requires that both the letter and the spirit of the law must be observed.

In this chapter due process will be examined in four areas. First, the necessity of the victim filing a complaint with the police and its relationship to due process will be explained. In Japan there are some crimes which cannot be prosecuted without a complaint from the victim. In these cases, it is a violation

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1. The Constitution of Japan :

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

of due process to institute a prosecution without a complaint.

The second area to be covered is the “no-prosecution” statutes. Even though someone violated a law, there may be a statutory provision which prohibits prosecution. A good example of this is a minor traffic violation.

The third area of due process concerns the neutrality of the Court. Due process requires that fair and impartial tribunals hear criminal cases. If the judge is biased or prejudiced toward the defendant a grave violation of due process would result. A specific example of such will be provided in this chapter.

The last area deals with courtroom control and its relationship to due process. A judge may be unreasonable and obnoxious without violating the principles of due process, as we shall see from a Supreme Court case.

## 5.02. The Complaint

There are two types of crimes in Japan, those which can be prosecuted without a complaint from the victim, and those which require a complaint. Crimes related to the violation of secrecy, certain sexual offenses, criminal negligence, certain kidnaping offenses, crimes against reputation, certain theft crimes, certain crimes of fraud and extortion, embezzlement, and certain crimes related to destruction and concealment of personal or real property are offenses that may only be prosecuted when a valid complaint has been filed<sup>2</sup>. Due process in Japan requires that the government authorities follow the exact letter of the law. If the government lacks a complaint, due process would prohibit a prosecutor from bringing a case to trial when one is required by statute. Generally, this is not a problem because prosecutors want convictions, and in order to get a conviction victim cooperation is necessary. However, there are times when the count in the indictment will be modified from a count charging a crime that doesn't require a complaint, to one that does.

For example, in one case the defendant was charged with theft when he took six keys from his employer<sup>3</sup>. Theft is a crime which does not require a complaint. He was angry at his employer and wanted to do something to annoy the company. He took three truck keys, two car keys, and a key to a warehouse, and threw all of them into a drainage ditch. The prosecution reconsidered the charge of theft and decided that the defendant should have been charged with destruction of personal property, a crime which does require a complaint. The prosecution, thereafter obtained a complaint from the employer.

Since no complaint had been filed when the defendant was indicted for theft,

defense counsel contended that it was improper to change the count to a crime requiring a complaint, after the defendant had already been indicted. In other words, he claimed the complaint must come prior to the indictment.

The court disagreed with the defendant. It held that there is no problem in

## 2. The Penal Code:

Article 135. The crimes mentioned in this Chapter (art. 133, opening a sealed letter without due cause punishable with one year imprisonment; art. 134, disclosure of a secret by a doctor, pharmacist, druggist, midwife, lawyer, notary punishable with six months imprisonment) shall be prosecuted only upon receipt of a complaint.

Article 180. The crimes provided for in the preceding four Articles (art. 176, indecency through compulsion; art. 177, rape; art. 178, Constructive compulsory indecency and rape, (refers to taking advantage of an unconscious female), art. 179 attempts of the above) shall be prosecuted only upon receipt of a complaint.

Article 209. A person, who inflicts an injury upon the person of another by negligence, shall be punished with a fine of not more than ¥100,000 or minor fine.

2. The crime mentioned in the preceding paragraph shall be prosecuted only upon receipt of a complaint.

Article 229. The crime mentioned in Article 224 (Kidnaping by force or allurement), the crime mentioned in Article 225 (Kidnaping for profit), and the crime mentioned in Article 227(1) (Assistance in kidnaping, receiving kidnaped person), as well as the attempts of those crimes shall, unless committed for the purpose of obtaining profit, be prosecuted only upon receipt of a complaint; provided, however, that when the person kidnaped or sold is married to the offender, no valid complaint can be made until a court decision declaring such marriage null and void has become irrevocable.

Article 232. The Crimes mentioned in this Chapter (art. 230 defamation; art. 231 insult) shall be prosecuted only upon receipt of a complaint.

2. When a complaint is made by the Emperor, Empress, Grand Empress Dowager, Empress Dowager or the Imperial Heir, or the Prime Minister, it shall be made in his or her behalf, and when the complainant is a Sovereign or President of a foreign power, a representative of the country concerned shall make it on his or her behalf.

Article 244. Penalty shall be remitted for the crime mentioned in Article 235 (theft of personal property), the crime mentioned in Article 235—2 (theft of real property), or attempts of these crimes when committed by a person against his lineal blood relative, spouse, or relative living together in the same house: when the crime is committed against a relative other than those mentioned above, prosecution shall take place only upon receipt of a complaint. (note: the same shall apply to crimes of fraud and extortion [arts. 246—251], and embezzlement [arts. 252—255]).

Article 264. The crimes mentioned in Article 259 (destruction of private documents), Article 261 (damage or destruction of things in general), and the preceding Article (concealment of letters) shall be prosecuted only upon receipt of a complaint.

## 3. Tokyo District Court Judgment, September 30, 1983, 1091 Hanrei Jiho 159.

obtaining a complaint after the issuance of an indictment, provided there is a valid complaint prior to beginning of the trial. The court stated that this case was completely different from the case where the prosecution either blatantly ignores the complaint requirement, or simply overlooks it. When the keys were taken, it was assumed that they had been stolen with the intent to take. However, when the true facts came to light, it was obvious that the defendant didn't have the necessary intent to be guilty of theft, and that destruction of personal property was the proper charge. The Court held that all the prerequisites for a public trial had been met and the defendant was properly convicted.

### 5.03. No Prosecution Statutes

The concept of due process is firmly rooted in Japanese Criminal Procedure Law. Both the Constitution and statutes provide for it many ways<sup>4</sup>. One of the most fundamental requirements of due process is that the defendant must be charged with a crime. Crimes are specified not only in the Penal Code, but in other laws as well. For example, the Road Traffic Law is a law with several penal provisions. A person who violates certain provision may be sentence for up to five years at hard labor<sup>5</sup>.

On the other hand, not all violations of the this law are worthy of a formal procecuton. There are times when the law provides for administrative remedies to deal with minor infractions. For example, pursuant to Article 130 of the Road Traffic Law, certain traffic violators are not prosecuted until the person has received the announcement for payment of a penalty, and has failed to make payment within a specified time.

The degree of the violation determines whether the individual will be subject to prosecution. For example, speed violators who exceed the speed limit

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#### 4. The Constitution of Japan :

Article 31. No person shall be deprived of life or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law.

The Code of Criminal Procedure :

Article 338. The public prosecution shall be dismissed by a judgment in the following cases :

- (4) When the procedure for the institution of public prosecution is void due to a violation of the provisions thereof.

#### 5. Article 115 of the Road Traffic Law, (five years for removing a road sign).

by 25 km/h or more are subject to prosecution<sup>6</sup>. Those who exceed the posted speed limit by less than 25 km/h will receive a notice in the mail indicating the amount of the fine. If the fine is paid within a specified time, the case is finished. In one case, the defendant was initially charged with exceeding the posted speed limit of 60 km/hour by 40 km/h, that is to say he was going 100 km/h<sup>7</sup>. He was found guilty and ordered to pay a fine of 30,000 yen. On appeal, the High Court held that there had been a factual error at the trial, and that in fact, the defendant had only exceeded the speed limit by 20 km/h. The fine was reduced to 20,000 yen.

The Supreme Court held that there had been a gross violation of due process because the defendant should not have been prosecuted in the first place. When the High Court found that a factual error had been committed by the Trial Court in determining the amount of excessive speed, the case should have been immediately dismissed. Pursuant to Article 130 of the Road Traffic Law, driving a car at a speed of 20 km/h above the posted speed limit is considered to be a "traffic violation", and as such "traffic violators" are not subject to prosecution if they pay a fine ranging from 7,000 yen to 15,000 yen, depending on the size of the vehicle.

This case is important because it demonstrates the fundamental principle that all prosecutions must be brought according to law. If there is no code provision prohibiting a certain activity, then such activity is deemed to be legal. Moreover, if there is a specific provision, such as Article 125 et al. of the Road Traffic Law, which states prosecution shall not be brought in certain cases, any attempt to prosecute would not only be a violation of that statute, but also a grave violation of due process.

In a case similar to the previous one, but where the violation was not so clear, the Supreme Court had to decide the scope of a trial in relation to the facts stated in the count<sup>8</sup>. The Court held that it was not a violation of due process for the government to prove more than the facts stated in the indictment. The problem stems from two provisions of the Public Election Law. Article 221(1) prohibits the giving of a bribe, and Article 221(1)(5) prohibits the delivery of bribe to someone who will later distribute it to others. A candidate for the Diet was indicted for delivering bribes to his campaign workers, who in turn passed the money on to others.

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6. Article 125 of the Road Traffic Law and attached list.

7. Supreme Court Judgment, March 15, 1973, 27 Keishu 128, 701 Hanrei Jiho 119.

8. Supreme Court Judgment, January 27, 1984, 38 Keishu 136, 1105 Hanrei Jiho 32.

The prosecution, as a tactical maneuver, indicted the defendant for only delivering a bribe, and not for giving one, even though, based on complicity concepts, such could be proven.

At the trial, evidence of both the delivering of the bribe to the campaign workers, and their distribution to others was shown. The defendant claimed that it was unfair for the government to show evidence of crime for which he hadn't been indicted. He believed that the Court would treat the crime of giving the bribes to the final recipients as part of his crime of delivering the money.

The Supreme Court approved of the prosecution's tactics, provided that the Trial Court only ruled on the counts stated in the indictment. The Court owes no duty to urge the prosecution to amend the indictment to include additional counts, even though there is clear evidence of additional offenses shown to the court at trial.

#### 5.04. Judicial Impartiality - Pretrial Knowledge of Case

An impartial tribunal is one of the most important aspects of any criminal case. Judges are expected to enter the trial with an open mind and without any prior knowledge of the facts and circumstances of the case to which they are about to hear. Their final decisions must rest on the evidence presented at trial, not on information received outside the courtroom. Nevertheless, there are times when a judge will gain some information about the nature of the case through the administrative process of assigning cases.

In one case some six hundred people were indicted for crimes related to campus unrest at Tolyo University<sup>9</sup>. In order to effectively handle such a large number of cases the judges held a meeting and decided to separate the defendants into 37 groups. In the Number 2 group all the defendants were found guilty. These defendants appealed their convictions on the ground that they had not received a fair trial by an impartial tribunal. They contended that the judges had been prejudiced by the information they received prior to the trial. In addition to knowing the defendants position, faction, and school, the judges examined the record to determine if they had any prior convictions or arrests, and whether there had been a confession or not.

The Supreme Court reject these arguments and held that there had been no evidence of prejudice on the part of the trial judges. The Court stated that judges

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9. Supreme Court Judgment, July 18, 747 Hanrei Jiho 45, 312 hanrei Taimuzu 188.

are exposed naturally to some information about their cases through their work as judicial administrators and managers of the court. Such information does not affect their ability to render a fair judgment a judgment based only on the evidence presented in court.

#### 5.05. The Removal Of A Judge

In Japan a judge can be challenged when there is a fear that he may not be able to executed his duties in a fair and impartial manner<sup>10</sup>.

Conversely, a judge can deny a motion for his removal when it is clear that the purpose of the motion is to delay the proceedings<sup>11</sup>.

In one case dealing with the Chisso Corp. (Minamata Sickness Case) the judge was called upon to rule on a challenge made to his sitting on the bench<sup>12</sup>. At the trial, the attorneys for the defendants were making repetitive arguments and the Court ordered them to stop. When the attorneys and defendants attempted to leave the courtroom, he order them to stay. They ignored his order and held a meeting outside of the courtroom. Afterwards, the judge refused to let them back in the courtroom. When the audience became noisy, the judge order everyone out.

For these reasons, the defendants challenged the judge. The judge denied the motion and held that the motion had been made simply to delay the proceedings.

The Supreme Court held that Trial Court's action of denying the motion was proper. Disagreement with the judge's method of controlling the court room, or his attitude, is not grounds for a challenge. In order for a judge to be removed from a case, a special relationship must be shown between the judge and one the parties, or when the judges have obtain information outside of the proceedings which would prejudice the truth finding process.

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#### 10. The Code of Criminal Procedure :

Article 221. The prosecutor or the accused may challenge a judge and request his removal from the case when there is an apprehension that he may render a partial judgment.

2. A counsel may file a motion for challenge on behalf of the accused : Provided, that the shall not make anything contrary to the clear intent expressed by the accused.

#### 11. The Code of Criminal Procedure :

Article 24. A motion for challenge that has been clearly made only for the purpose of delaying the proceedings shall be turned down by ruling. ....

#### 12. Supreme Court Judgment, October 8, 1973, 27 Keishu 1415, 715 Hanrei Jiho 32.

## THE LAW OF CRIMINAL PROCEDURE IN CONTEMPORARY JAPAN

(現代の日本における刑事訴訟法)

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第一章では、捜査段階について若干の問題点を論証する。任意捜査の限界と強制捜査の仕方の区別を述べる。この章の前半は次の問題を取り上げる：1) 任意捜査における有形力の行使，2) 任意同行と逮捕，3) 宿泊を伴う取調べ（高輪グリーン・マンション殺人事件）4) 集団の停止，5) 職務質問における有形力の行使，6) 自動車検問，7) 所持品検査（米子銀行強盗事件），8) 写真撮影（京都府学連デモ事件），9) 秘書録音，10) 交通違反の捜査方法，11) おとり捜査。後半は次の問題を考察する：1) 現行犯逮捕，2) 別件逮捕・勾留と余罪取調べ（神戸まつり事件），3) 弁護人の接見交通権，4) 勾留の場所，5) 差押の必要性（国学院大学映研フィルム事件），6) 逮捕に伴う搜索，7) 強制採尿。

第二章では、公訴の提起に関する六つの重要な原則を考察する。第一は、起訴便宜主義（The Opportunity Principle）である。ここでは、チッソ補償交渉事件と公訴権濫用論を取り上げる。第二は、不公平・差別的な捜査と公訴提起の関係を検討する。第三は、起訴状一本主義と起訴状における余事記載の問題を分析する。第四は、公訴時効の起算点と熊本水俣病事件を議論する。第五は、行政手続きの効力、つまり、交通反則金納付の効力の問題を考察する。第六は、不審判請求の審理方式の問題を検討する。

第三章では、起訴後の捜査及び保釈を検討する。被疑者から被告人の変

遷の過程、被告人の取調べ、起訴後の余罪捜査と接見指定、保釈の許否と余罪の四つの問題を議論する。

第四章では、訴因と公訴事実の問題を考察する。訴因を特定する義務、即ち刑法第256条3項は、公訴事実、訴因を明示してこれを記載しなければならない。訴因を明示するには、できる限り日時、場所及び方法を以て罪となるべき事実を特定してこれをしなければならないと規定する。しかし、覚せい剤の自己使用の場合は、訴因を特定することは、複雑である。よって、この問題を取り扱う。訴因変更の要否と公訴事実の同一性の問題も検討する。この章の末には、釈明請求 (bill of particulars) の手段と不意打ちを防止するために被告人に十分な防禦の機会を与える義務を論証する。

第五章では、憲法第31条と適正手続の保障に関する問題を取り上げる。ここで、親告罪と非親告罪を区別している。それから、交通反則制度と一般刑事法を区別する問題を検討する。もう一つは、係属中の事件について審理にあたる裁判官が、事件配点という裁判所の司法行政事務に関連して該当事件につき何らかの知識をうることがあった場合は、予断防止 (排除) の原則は適用するかどうかの問題を分析する。最後に、裁判官の忌避の問題を考察する。

第六章では、公判に関する次の四つの事を議論する。第一は、裁判所の権力、事件の移送と土地管轄、職権審理義務の存否と、被告人の確定と既判力 (res judicata) の問題を検討する。第二は、弁護人の選任方式、国選弁護人の辞任と、必要的弁護事件における弁護人不在の問題を検討する。第三は、迅速な裁判の一般論を考察しながら、被告人の迅速な裁判の権利と検察官の迅速な裁判の権利を比較する。第四は、公判の分離・併合 (首相官邸侵入事件) と証拠開示命令の問題を取り上げる。

第七章では、次の八つの証拠に関する問題点を検討する： 1) 厳格な証明と自由な証明の区別、 2) 公知の事実、 3) 同種前科による事実認定、

4) 違法収集証拠の証拠能力, 5) 共犯者の証人適格, 6) 幼児の証言能力, 7) 目撃者の証言の信用性, 8) 免責による証言強制 (immunity) (ロッキード事件嘱託証人尋問調書の証拠能力)。

第八章では, 次の五つの科学的証明に関する問題を取り上げる: 1) ポリグラフ検査, 2) 声紋鑑定, 3) 警察犬による臭気選別, 4) 疫学的証明 (千葉大チフス菌事件), 5) 責任能力の判定。

第九章では, 次の六つの自白証拠に関する問題を考察する: 1) 約束による自白, 2) 偽計による自白, 3) 勾留質問と自白, 4) 不任意自白に基づいて発見された証拠物, 5) 補強証拠 (法廷内と法廷外), 6) 共犯者の自白と補強証拠。

第十章では, 次の十二の伝聞証拠に関する問題を取り扱う: 1) 伝聞の意義, 2) 検察官面前調書, 3) 外国語による調書, 4) 実況身分調書, 5) 検証立会人の供述, 6) 酒酔い鑑識カード, 7) 鑑定受託者による鑑定書, 8) 再伝聞, 9) 伝聞証拠の任意性, 10) 任意性と黙諾 (implied consent), 11) 伝聞証拠と回復証拠, 12) 写真と伝聞証拠。

第十一章では, 次の六つの判決に関する問題を考察する: 1) 判決言い直しの効力, 2) 択一的認定と疑わしきは被告人の利益に (in dubio pro reo), 3) 理由を書いていない判決, 4) 量刑と余罪, 5) 一事不再理効の範囲, 形式裁判の内容的確定力。

第十二章では, 次の十四の上訴に関する問題を検討する: 1) 弁護人の上訴, 2) 公訴棄却決定に対する上訴, 3) 上訴の取り下げ, 4) 不利益変更の禁止, 5) 審判の対象, 6) 訴因・罰条の追加変更, 7) 不意打ち認定 (よど号ハイジャック事件), 8) 上訴とやむを得ない事由, 9) 新たな証拠の取調べ, 10) 事実の取調べと破棄自判, 11) 上告理由としての憲法違反, 12) 上告理由としての判例違反, 13) 重大な事実誤認の疑い, 14) 準抗告の許否。

第十三章では, 再審の問題を検討する。特に根本的な条件, 再審と憲法

の関係、及び白鳥事件を取り扱う。

第十四章では、少年手続の問題を考察する。特に目撃者に対する立会い・反対尋問の機会を与えるかどうかの問題、少年審判と再抗告、審判不開始の決定と一事不再理の効力の問題を検討する。

最後に、日本語版からの翻訳ということではなく、英文で最初から著述された日本の刑事訴訟法ということは、はじめてにして意義のあるものであったと自負している。