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THE LAW OF CRIMINAL PROCEDURE IN CONTEMPORARY JAPAN (3)

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11.01. Introduction

In this chapter the problems of finalizing a judicial decision through the issuance of a formal judgment will be examined in six areas. First, the court may correct an error in the judgment provided it is made promptly. Second, sometimes it is impossible for the court to reach a decision because the exact crime committed by the defendant cannot be determined. An example of such a case will be provided. Third, it is generally required that the court give the reasons for its decision. However, such is not always necessary as will be shown in a 1971 case. Fourth, a court can consider other crimes not contained in the indictment when it determines the appropriate penalty to be imposed. Fifth, the "final and conclusive" judgment rule is another way of prohibiting the state from placing the individual in jeopardy twice for the same offense. An example of this principle will be given. Sixth, the affect of the statute of limitations on judgments will be reviewed and a specific example will be provided.

11.02. Corrections

At the end of criminal trial in Japan the judge usually reads aloud the sentence to be imposed on the defendant. In most cases there is no problem and the sentence is executed in accordance with the courts declaration. However, there have been cases when the court has erred when proclaiming the sentence. The question then arises as to whether the court can correct the sentence, or must the incorrect sentence be allowed to stand.

The Supreme Court dealt with this issue in a 1976 case[1]. On April 16, 1975, the Yokohama District Court, in a one judge trial, pronounced a judgment of sentence on the defendant of one year and six

1. Supreme Court Judgment, November 4, 1976, 30 Keishu 1887, 833 Hanrei Jiho 19.

months, sentence to be suspend for three years and the defendant to be placed on probation. Five minutes after declaring the sentence, the judge hastily announced that there had been a mistake, and that the sentence of one and a half years was not to be suspended and that the defendant would have to serve time in prison.

The reason for the error stemmed from the fact that the defendant previously had been convicted and sentence by the Shizuoka District Court, in a one judge trial, for theft and fraud on February 29, 1972. At that time, the defendant received a one and a half year sentence, suspended for three years. The court was confused about the affect of the earlier suspended sentence on the present case, and quickly decided that a second suspended sentence was improper.

The defendant appealed this decision to the Supreme Court claiming that the trial court was not allowed to change a sentence once it had been declared in open court. The claim was grounded on Article 31 of the Constitution which guarantees due process of law in criminal proceedings[2].

The Supreme Court held that a court could correct an error of this nature. The correction must occur before the end of the day on the last day of the trial. To accomplish this the defendants can be ordered back into the court room and the corrected sentence read. It was not illegal for the court to impose an actual imprisonment after it had erroneously declared a suspended sentence.

11.03. The Impossible Judgment - In Dubio Pro Reo

There are times when it is impossible to determine exactly what offense the defendant has committed. It is certain that he committed one of two related offenses, but the evidence is insufficient to made an exact determination. For example, a person who abandons his child while the child is in the process of dying may be guilty of either aggravated desertion[3], or abandonment of corpse[4], but not both. When

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

it is impossible to determine whether the child was living at the time of the offense must the defendant be acquitted of both offenses? This was the issue in the next 1971 case[5].

The defendant was carrying her one and half year old baby girl one evening across a vacant lot. It was raining and the defendant was distraught. When the child cried, the defendant attempted to feed her. She became angry at the continued crying and viciously struck the infant with the baby bottle. The defendant carried the victim another ninety meters when the infant started to cry again. The defendant then violently shook the child up and down two or three times. As a result of this violence the baby girl died.

The defendant was found guilty of injury resulting in death. The question arose as to whether she could also be found guilty of either aggravated desertion (P. C. 218, see note 2) or abandonment of a corpse (P. C. 190, see note 3). It was clear she was guilty of one or the other, but due to a lack of evidence, it could not be determine which offense she had committed.

The Osaka District Court held that in this situation, the defendant must be acquitted of both crimes, The Court adopted the principle of "in dubio pro reo", which means when in doubt judgment is

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3. The Penal Code:
Article 218. A person, who deserts an aged person, juvenile, or deformed or sick person whom he is obliged to protect, or who fails to five to such person necessary protection for existence, shall be punished with penal servitude for not less than three months nor more than five years.
2. When the crime has been committed against a lineal ascendant of the offender or the spouse thereof, the offender shall be punished with penal servitude for not less than six months nor more than seven years.

4. The Penal Cod:
Article 190. A pserson, who damages, destroys, abandons, or takes possession of a corpse, remains, or hair of a dead person or any article deposited in a coffin, shall be punished with penal servitude for not more than three years. (emphasis added)

5. Osaka District Court Judgment, September 9, 1971, 662 Hanrei Jiho 101.

to be made in favor of the defendant.

Perhaps the result would have been different had the court had been faced with the dilemma of letting the defendant go free. In this case the defendant was clearly guilty of injury resulting in death, and a minimum sentence of two years would be imposed. If however, the court was faced with a situation where there is only one offense, and a determination of which of offense has been committed is impossible, it should be able to convict on at least the lesser of the two offenses. For example, if a man is hiking with his son on a dangerous mountain trail and the son suddenly slips off the edge and falls, is the father guilty of any offense when he flees the scene? It is impossible to determine whether the son died instantly (abandonment of a corpse, note 3) or whether he could have been saved had the father done something (aggravated desertion, note 2).

Applying the Osaka District Court rationale, the man should be acquitted of both offense. It is my opinion that he should be found guilty of at least the lesser of the two crimes (abandonment of a corpse), if the court properly applies the principle of In Dubio Pro Reo.

11.04. Judgments Without Stated Reasons

In Japan the court must indicate the facts constituting the offense, the description of the evidence, and the application of the laws and orders when issuing a judgment of conviction. In addition, the court must indicate the reasons for its decision concerning each element of the offense, and any matter which affects the increase, reduction, or remission of the penalty[6]. The application of these provisions are presented hereafter.

In one 1971 case the defendant resorted to self-help in dealing with a dispute he had with a business partner[7]. He owned a fishing pond with another person. When the relationship between them went sour he decided to destroy the buildings of the business. He also drained the water from pond and destroy the fish. The defendant was indicted for damage to structure and for the destruction of personal property. As a defense, he claimed mistake of fact. He thought that the property in question was his own, and that his action was one of self-help.

The trial court rejected these arguments, but did not state any

reason for its decision. The defendant appealed claiming that the trial court had violated criminal procedure law by not stating the reason for its decision in response to the affirmative defenses raised.

The Supreme Court held that acts of self-help and self-defense are affirmative defenses which would negate the element of illegality. As such, when these defenses are put in issue, the court must state its reason for its decision on the matter, Failure to do so results in a violation of Article 335 (2) of the Code of Criminal Procedure[8]. In this case the trial court did violate this rule, however, after examining the record in the case the Court held the violation didn't affect the outcome of the case. It was clear that those defenses were invalid. In other words, it was considered a harmless error for the court not to indicate the reasons for rejecting the affirmative defenses raised by the defendant.

11.05. Other Crimes

In Japan, the courts are not allowed to consider other crimes which the defendant may have confessed to in determining an appropriate sentence in the case at bar. This was made clear in the following 1967 Supreme Court decision[9]. The defendant was a postal worker who had taken money from the post office where he work. At the time of the offense he was working the night shift. In his statements to the

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6. The Code of Criminal Procedure:
Article 335. In pronouncing a guilty verdict, the court shall indicate the facts constituting the offense, the description of the evidence, and the application of laws and orders.
2. When any fact constituting a reason which would impair ipso jure the formation of the offense, or reasons for increase, reduction, or remission of the penalty have been alleged, the determination thereon shall be indicated.

7. Supreme Court Judgment, July 30, 1971, 25 *Keishu* 756, 641 *Hanrei Jiho* 104.

8. The Code of Criminal Procedure:
Article 335 (2). see note 2 above.

authorities he admitted that he had done the same thing before on approximately 130 other occasions. The total amount taken was estimated to be 890,000 yen. He was only indicted for the last act of theft. However, in handing down a prison term of one year and two months to the defendant, the court said it could not ignore the other offenses.

The defense claimed that it was improper for the court to consider these other acts of theft when it decided the penalty to impose on the defendant. The high court had ruled that it was permissible for the lower court to consider the other crimes. They were of the same type and the same offense repeatedly occurred. The High Court did reduce the sentence to ten months, holding that the trial court's sentence was too severe.

The Supreme Court upheld the conclusion reached by the high court, but disagreed with its reasoning. It held that the lower courts had violated the basic principles of proper notice and failure to corroborate a confession[10]. It held that it was permissible for the court to consider the character and personal history of the defendant, as well as the nature, method, and motive of the offense in determining sentence.

The trial court had considered offenses for which the defendant had not been indicted in reaching its decision. Moreover, there had not been any corroborating evidence presented to the court to substantiate the defendants admissions. However, since the high court had reduce the sentence to ten months, an appropriate sentence for the crime, the Supreme Court held that the error in reasoning by the lower courts was harmless and did not affect the rendering of a just and fair decision.

11.06. "Final and Conclusive" Judgments

Once a final and conclusive judgment has been rendered, the court is prohibited from hearing the same matter again. If the prosecution attempts to bring the same charges again, the court must issue a judgment of acquittal[11]. The following case is an example of

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9 . Supreme Court Judgment, July 5, 1967,21 Keishu 748, 485 Hanrei Jiho 15.

10. See Articles 31 and 38 (3) of the Constitution.

this rule.

The law for the prevention of theft contains a provision for dealing with habitual offenders. It is a law separate from the penal code with penalty provision more severe than those for ordinary one-time theft offenses. It is aimed at punishing professional thieves who make it a habit of stealing other people's property.

From a procedural standpoint, there is a problem with double jeopardy concerning the interpretation and application of this act. If a person has committed several thefts but the prosecution initially selects only one offense to prosecute, and then later tries to indict for the remaining thefts under the special theft prevention act, the question arises as to whether the person is being prosecute twice for the same offense. The first indictment and conviction contained only part of the entire crime spree.

This question was answered in a case decided by the Takamatsu High Court in a 1984 decision[12]. The defendant was a habitual thief with a criminal record dating back to his youth. From 1954 to 1964 he had been convicted of theft on four different occasions. From the period of June 1979 to September 1981, he, acting together with others, and sometimes acting alone, committed thirty-five acts of burglary.

One of the thirty-five acts was committed against a victim whom we shall call K. The prosecution selected this one act of burglary, together with the offense of falsifying a stamp on a public document, as crimes with which to indict the defendant. The defendant was convicted and given a sentence of one year and eight months.

Thereafter, he was subsequently prosecuted and convicted of the other 34 acts of burglary under the special habitual offenders law. The

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11. The Code of Criminal Procedure:
Article 337. A judgment of acquittal shall be pronounced in the following cases:
(1) When a *final and conclusive* judgment has been made;
(2) When the penalty has been abolished by laws and orders enforced after the commission of the offense;
(3) When a general amnesty has been proclaimed; and
(4) When the prescription has been completed. (emphasis added)

12. Takamatsu High Court Judgment, January 24, 1984, 1136 Hanrei Jiho 158.

34 acts of burglary was considered a single offense under the act and the defendant was given a severe sentence of six and a half years.

The defense objected to this second conviction on the grounds of double jeopardy. It claimed that the prosecution was prevented from seeking a conviction for a offense which had already been partially adjudicated. Since the defendant had actually been guilty of the graver offense of being a habitual thief when he was indicted for only one of the thirty-five acts of burglary, he claimed that the prosecution should be barred from bringing any further action.

The Takamatsu High Court agreed. It stated that the defendant, motivated by greed, committed a long series of burglaries. He was an incessant thief with bold methods for carrying out his deeds. It was clear from the facts that the defendant was an individual subject to the penalties of the special law dealing with habitual thieves. However, the prosecution unwittingly selected only one of the acts of burglary to prosecute. In doing so, it locked itself out seeking any further convictions based on the other thirty-four offenses under the special habitual thief law. Under that law the entire series of burglaries is treated as a single offense. As a single offense it includes all of the thirty-five acts of burglary. Since the defendant had been already been partially punished in the first trial related to victim K's burglary, it would be a violation of double jeopardy to seek additional punishment.

In Japan a court is required to pronounce a judgment of acquittal whenever there exist a final and conclusive judgment[13]. This case helps to define what a "final and conclusive" judgment means in Japan, and demonstrates the binding effect of such judgments.

11.07. Binding Effect and the Statute of Limitations

The binding effect of judicial decisions is a topic that was addressed by the Supreme Court for the first time in a 1981 opinion[14]. In that case the defendant was indicted for fraud in connection with the registration of certain piece of real estate. On October 6, 1972, the

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13. Article 337 of the Code of Criminal Procedure.

14. Supreme Court Judgment, July 14,1981, 35 Keishu 497, 1013 Hanrei Jiho 3.

defendant submitted false documents in order to have the transfer registered. This type of registration is known as "hyoji touki". On the 11th of October, the defendant submitted false document in connection with a second type of registration. This second type of registration is known as "hozon touki", and is related to giving notice that a structure is located on the property in question.

In the indictment, the prosecutor erroneously proclaimed that the crime occurred on October 6 with the false registration of the "hozon touki", when in fact it was the "hyoji touki" that occurred on that day. The court refused to allow the prosecution to correct the error and the case was dismissed.

The above indictment was issue on December 26, 1975. Thereafter, the prosecution issued a second indictment on June 6, 1978. Since the crime occurred in 1971, the defendant argued that the second indictment was barred by the statute of limitation which was five years for this specific offense. The prosecution counter by arguing that the *filing of the first indictment tolled the statute of limitation even after it* had been dismissed.

The Supreme Court accept the prosecution's theory and held that even though the first indictment had been dismissed for errors in its content, it was sufficient to put the defendant on notice that the prosecution intended to take action against him. The Court held that while there had been an mistake made as to the type of registration, there had been no change in the date of the offense, the place it occurred, the method used to commit it.

CHAPTER TWELVE APPEALS

12.01. Introduction

In this chapter nine areas related to appeals will be examined. Among them are the right of the prosecution, attorney, and legal representative to seek an appeal. Also, the principles of abatement, withdrawal and disadvantageous modification will be explained in detailed and specific examples provided. At the appeal stage of the

proceeding the issues have been narrowed, and additional counts cannot be added. To allow the introduction of additional counts at the appeal stage would be considered an unfair surprise to the defendant and would affect his ability to defend. This area will be explained below. Also, new facts, new evidence, and appeals based solely on the record will be reviewed. The final section of the chapter will deal with the grounds for appeals, especially to the Supreme Court.

12.02. The Right To Appeal

In Japan, both the accused and the prosecutor have the right to file an appeal[1]. The trial, the first appeal to a high court, and the second appeal to the Supreme Court, are all considered the same proceedings for the purposes of double jeopardy. Therefore, the prosecutor can seek a heavier sentence when he is unsatisfied with the punishment imposed by the trial court[2]. In addition, both the attorney who represents the accused in the original action as well as the legal representative of the accused have an independent right of appeal[3]. In a 1979 case decided by the Supreme Court, a wife hired a lawyer different from the one who represented the defendant in the original action to represented her husband on appeal. When the judgment was announced in the original action, neither the accused nor his counsel made any motion for an appeal to be taken. However, on the following

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1. The Code of Criminal Procedure:
Article 351. A public prosecutor or the accused may file an appeal.
2. ....

2. Supreme Court Judgment, (Grand Bench) September 27, 1950, 4 Hanreishu 1805 (Criminal). An English translation of the case appears in Maki, *Court and Constitution in Japan, Selected Supreme Court Decisions, 1948-60*, at page 219.

3. The Code of Criminal Procedure:
Article 353. The legal representative or the legal guardian of the accused may file an appeal on behalf of the accused.
Article 355. The representative or the counsel in the original instance may file an appeal on behalf of the accused.

day, the defendant's wife hired a new lawyer to file an appeal with the trial court.

The court did not allow the appeal to be filed by this lawyer because he hadn't been retained until after the original judgment had been declared. Pursuant to Article 355 of the Code of Criminal Procedure, only the counsel who represented the defendant in the original action could file an appeal. The newly retained counsel had no authority to take such action. The court also held that the wife had no power to obtain counsel for her husband after the original judgment had been announced. The wife appealed this holding to the Supreme Court.

The Supreme Court upheld the lower courts decision. It held that the wife had no legal authority to obtain legal assistance for her husband's appeal. The right to appeal was his, not the wife's. The newly selected counsel had no right to seek appeal on his own because he was not the counsel of record in the original action.

Presumably, the result would have been different if the husband had agreed to the appeal. Even though the attorney would not have had a right to file an appeal under his own right pursuant to Article 355, he could nevertheless be considered the representative of the accused under Article 353, and file an appeal under that section.

The reason given in Japan to explain this reasoning is that since the new attorney is unfamiliar with the facts of the original action, he is not is a favorable position to represent the defendant on appeal.

In the above case the critical point in time was the announcement of judgment. If an attorney was of record before that time he would have an independent right of appeal. Since the new attorney was retained the day after the judgment was announced, it was too late. Professor Hirano, as well as Judge Eriguchi who dissented in the above judgment, felt that if new counsel had been obtained before the judgment became final, the filling of an appeal by him would be proper[4].

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4 . Hirano, *Criminal Procedure*, p.299.

12.03. The Abatement of Appeal on the Death of the Defendant

When the defendant dies in the middle of trial the case is dismissed by ruling and the action is abated. Article 339(4) provides that the prosecution must be dismissed by ruling when the accuesd has died[5]. Since the object of a criminal trial is to punish the defendant, when he is no longer alive the object of the trial vanishes. If we look at it from the defendant's family's point of view, we may reach a different conclusion. To have the case dismissed in the middle of the trial still leaves unanswered the question of the defendant's guilt or innocence. Doesn't the family have a right to have the trial proceed to it's conclusion in order to have the deceased's good name and honor restored and his reputation in the community vindicated?

In the following 1978 case the defendant had been indicted for offense involving the possession of dangerous weapons. However, the prosecution moved to dismiss the prosecution when the defendant's corpse was discovered in a nearby river[6]. The defense claimed that the corpse was not that of the defendant. However, the defense did believe that the defendant had been murder, but that the body found was not his. Based on Article 339 (1) (4) the prosecution moved for the case to dismissed. The motion was thereafter granted.

The attorney objected to the action being dismissed. He argued that it was unfair to the defendant because such a ruling denied the defendant his right to appeal.

On appeal to the Supreme Court the judgment was affirmed. However, Justice Shigemitsu Dando dissented. In his opinion the defendant has a right to demand a trial in order to protect his legal interests. The most favorable outcome for a defendant is an acquittal. The counsel for the defendant should be allowed to appeal any guilty

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5. The Code of Criminal Procedure:
Article 339. The public prosecution shall be dismissed by ruling in the following cases:
(4) When the accused died, or a juridical person named as the accused has ceased to exist;

6. Supreme Court Judgment, October 31, 1978, 32 Keishu 1793, 907 Hanrei Jiho 123.

verdict in order to clear the defendant's good name and restore his reputation.

12.04. The Withdrawal of an Appeal

In one famous cases of recent vintage (The Piano Murder Case) a defendant who was sentenced to die requested the court to allow the withdrawal of his appeal. He wanted the sentence excuted[7]. The defendant was charged with the murder of a woman and her two daughters. The defendant was an extremely sensitive to noise. For weeks he had grown more and more impatient with the noise in his neighborhood. One morning, the sound of the piano coming from the apartment below irritated him to such an extent that he decided to murder the women and the two girls. He made sure that the husband had left for work when he entered the apartment and killed all three with a knife.

The question of the defendant's sanity was an issue in the case. The court determined the defendant was sane at the time of the crime and sentenced him to die. The defense counsel petition the court for further mental examinations in conjunction with the appeal. However, the defendant refused to cooperate and expressed a desire for the appeal to be withdrawn and sentence to be executed. He stated that he could no longer bear to live in this world and wanted to escape from it.

The court held that while a normal person would not make such a request, the defendant, who was suffering from paranoia at the time, was competent to make such a request. The court took note of the fact that after he killed the three victims, he committed a theft in order to get money so he could flee from the area.

This case indicates that in Japan a defendant has a right to withdraw an appeal in order to have a sentence imposed. The right to withdraw an appeal is the defendant's right. His counsel can't interfere with the exercise of that right if the court finds that the decision to withdraw the appeal is made when he is sane.

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7. Tokyo High Court Judgment, December 16, 1976, 29 Kosai Keishu 667, 857 Hanrei Jiho 117.

12.05. The Prohibition of Disadvantageous Modification

As stated previously, in Japan both the defendant and the prosecution are allowed to appeal a decision of a trial court. Article 402 of the Code of Criminal Procedure provides that when an appeal is filled by only the defendant, a heavier penalty than that imposed by the trial court can not declared[8]. The prosecutor can appeal the amount of punishment. However, when he doesn't, and only the defendant appeals, the appellate court is not allowed to increase the punishment on its own. We can see how this principle is applied in the following 1980 Supreme Court decision[9].

The defendant was convicted of a few theft related offenses and sentenced to actual imprisonment for one year. Feeling that the penalty was too severe, he appealed to the high court. The high court increased the length of the sentence to a year and six months, but suspended it for a period of three years. While the defendant was relieved of actual imprisonment, he was given a lengthier term of confinement. On this ground, he appealed to the Supreme Court contending that to increase the sentence, even though it was suspended, was in violation Article 402, above.

The Supreme Court reviewed the public policy in favor of suspended sentences and concluded that even though the length of the sentence had been increased by six month, there had not been any disadvantageous modification. The defendant was spared the personal experience of life in a prison in exhcange for six month longer suspended sentence with supervised probation.

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8. The Code of Criminal Procedure:
Article 402. With respect to the case for which a Koso-appeal has been filed by or on behalf of the accused, a heavier penalty than that imposed by the original judgment may not be pronounced.

9. Supreme Court Judgment, December 4, 1980, 34 Keishu 499, 991 Hanrei Jiho 54.

12.06. The Object of The Appeal

The object of the appellate court is to review the decision of the trial court on those matters indicated in the application for appeal. The application for appeal can be filled by either, or both, the prosecution and/or the defense. The appellate court is not allowed to decided issues to which the parties themselves have no dispute. This principle was illustrated in the following 1971 Supreme Court case[10].

The defendant had been indicted for several offenses related to battery and burglary. At the trial court he was convicted of some of the offenses and acquitted as to others. The prosecution filed no appeal; and the defendant filed an appealed as to the offenses for which he was convicted.

The high court, in a surprising decision, found the defendant guilty on all counts, including the ones which the trial court had found him not guilty. The high court had re-opened the factual aspect of the case, and determined that there was sufficient proof to find the defendant guilty on all counts. However, the penalty imposed was exactly the same as the one imposed by the trial court.

The Supreme Court reversed. It held that an adversary system is designed to allow the parties to determine the issues to be litigated. Each offense must be set out in a separate count in an indictment so that the defendant will have a fair opportunity to prepare his defense. By allowing the parties themselves to determine the issues, the possibility of surprise to the defendant is eliminated. The defendant should only have to address those points raised by the prosecution concerning his guilt. The Supreme Court held that the high court had exceeded the limits of its authority to determine questions of fact.

12.07. Prohibition against Adding New Counts on Appeal

Since the function of an appellate court is to review the findings of facts and determinations of law made by the lower court, it can not allow the prosecution to add new charges or change the penal provision

10. Supreme Court Judgment, March 24, 1971, 25 Keishu 293, 627 Hanrei Jiho 6.

at a late stage. Do to so would be unfair to the defendant in the preparation of his case. In the 1967 case this issue was addressed by the Supreme Court[11].

The defendant had been convicted of violating Article 261 of the Penal Code for destroying a rock wall on property belonging to his neighbor[12]. The defendant removed the wall to widen the street so that the fire trucks would be able to travel on it. In addition to the destruction of the wall, four trees were also uprooted. The trial court imposed a fine of 10,000 yen and suspended it for a period of two years.

Both the prosecution and the defense filed appeals in the case. The defense claimed that the defendant lacked any criminal intent when he took down the wall. On the other hand, the prosecution argued that the penalty was too lenient. In order to justify a heavier penalty, the prosecutor added an additional count concerning the destruction of a boundary sign[13].

The high court allowed the prosecution to add the additional count, but did not modify the sentence. As a result, the defendant was found guilty of two offenses but received the same sentence. He appealed to the Supreme Court.

The Supreme Court held that it was reversible error to allow the prosecution to add different counts to the indictment at the appellate stage of the proceedings. There had been no error made by the trial court in this case which would justify the appellate court to take the action it did.

Pursuant to Article 393 (2) of the Code of Criminal Procedure, the appellate court is allowed to investigate the facts of the case in order to determine if the trial court committed reversible error[14]. However the scope of the investigation is limited to those issues raised at the trial

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11. Supreme Court Judgment, May 25, 1967, 21 Keishu 705, 486 Hanrei Jiho 75.

12. The Penal Code:
Article 261. A person, who damages, destroys or otherwise makes useless an object other than those mentioned in the preceding three Articles, shall be punished with peal servitude for not more than three years or a fine of not more than five hundred yen or a minor fine.

13. Article 262-2 of the Penal Code.

below. The investigation can not extend over into new matter, for to do so would be to place the defendant at an extreme disadvantage.

12.08. The Degree of Surprise

The reason the defendant was placed in a disadvantageous situation in the case above is because the prosecution injected a new element into the case which the defendant hadn't anticipated. In order to ensure a fair trial, the element of surprise should be eliminated from the case. While this is not always possible, the next case helps to demonstrate the line which the Supreme Court has drawn in this area. The 1983 case concerns a surprised defendant[15].

Several years ago a group of radicals highjacked a domestic airline flight and ordered the pilot to fly to North Korea. The actual highjackers are not involved in this case, but an alleged organizer of the group was indicted for his participation in the planning stages. The date of a certain meeting was the crucial fact in the case.

According to the facts set forth by the government the defendant met with some of the highjackers at a cafe in Tokyo on the evening of March 13, 1970 to plan the crime. However, the defendant claimed an alibi for the evening of the 13th. This alibi was not believe by the trial court which determined that the defendant had met with the criminals on either the 13th or 14th, and he was sentenced to ten years in prison. The defendant appealed claiming that the court had erred by not believing his alibi. The defendant also offer a new witness and evidence to corroborate his defense. The prosecution attempted to impeach the additional testimony and the credibility of the witness, but made no statement indicating that the alleged date of the meeting was erroneous. The main issue in the case, as clarified by the parties, was the

14. The Code of Criminal Procedure:
Article 393 (2). An appellate court may, when it deems it necessary, conduct upon its own authority the examination in regard to such circumstances as emerged after the judgment in the first instance and as should affect the penalty determined.

15. Supreme Court Judgment, December 13, 1983, 37 Keishu 1581, 1101 Hanrei Jiho 17.

defendant's whereabouts on the evening of March 13.

The high court decided that, according to the evidence presented at trial, the actual date of the meeting was March 12. It held that the trial court had committed only a harmless error in confusing the dates. Thereafter, the defendants prison term was reduced to eight years in prison.

The defense appealed to the Supreme Court claiming that there had been a violation of due process. The Supreme Court held that the high court had determined that the evening of the March 12 was the date of the meeting even though the parties themselves never asserted such a thing. The high court had made the decision based on its own independent investigation. It suddenly declared that the defendant's alibi was truthful, but that the government had been mistaken as to the date of the meeting.

The Supreme Court held that the high court had committed a gross violation of the defendant's due process rights, and reversed the decision. It held that defendant had been surprised by the court's findings of facts as to the events on March 12. He had asserted an alibi which the court eventually believed, yet was not given an opportunity to present an alibi for the 12th.

The Supreme Court made it clear that it is not the Court's role to investigate the facts on its own to such a degree. It should not obtain evidence on it's own without giving the defendant an adequate opportunity to prepare a defense in order to rebut the findings and conclusions.

Article 308 of the Code of Criminal Procedure is the hallmark of the adversary system in Japan[16]. It provides that both the prosecution and the defense should be given the opportunity to contend the probative power of all evidence. In order to give both sides the necessary information to prepare their case, both sides are required to reveal, prior to the beginning of the trial, the name and address of any witness, expert, interpriter, or translator to the other side beforehand[17].

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16. The Code of Criminal Procedure:
Article 308. The court shall give a public procurator and the accused or the counsel an adequate opportunity necessary for contending the probative power of evidence.

12.09. New Facts on Appeal

Generally, the appellate court must confine its investigation of the case by only examining the record of the court below. However, there are times when, due to some unavoidable circumstances, the appellate court may allow the introduction of new evidence[18]. The problem for the courts to address is the meaning of the term "unavoid-

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17. The Code of Criminal Procedure:
Article 299. A public prosecutor, the accused, or the counsel shall, when requesting the examination of a witness, an expert, an interpreter, or a translator, beforehand give the adverse party an opportunity to know his name and address. When requesting the examination of evidential documents or articles, he shall beforehand give the adverse party an opportunity to peruse them: Provided, that this shall not apply when there is no objection from the adverse party.
2. The court shall, when determining the examination of evidence upon its own authority, hear the opinion of a public prosecutor and the accused or the counsel.

18. The Code of Criminal Procedure:
Article 382-2. The facts that may be proved by evidence, the request for examination of which could not be made prior to the closing of oral argument in the first instance due to unavoidable causes, and that may sufficiently make it believable that there exist such reasons for a motion for Koso-appeal as stipulated in the preceding two Article, may be referred to in the statement of reasons for Koso-appeal even though the facts are those other than appeared in record of the proceedings and the evidence examined in the original court.
2. The same shall apply in the case of the preceding paragraph with respect to the facts which came into existence prior to the pronouncement of a judgment but after closing of oral argument in the first instance and which may make it believable that there exist such reasons for a motion for Koso-appeal as provided for in the preceding two Articles.
3. In the case of the preceding two paragraphs materials explaining such facts shall be attached to the statement of reasons for Koso-appeal. In the case of paragraph 1 materials explaining that the examination of evidence could not be requested owing to the unavoidable causes shall also be attached thereto.

able". In the next case, the Supreme Court attempts to explain the meaning of this term[19].

This 1972 case involved drunk driving and driving without a license. The defendant had been involved with three previous cases of the same nature, and had been fined each time. In addition, he had been given a four month suspended sentence in one of the cases. The offense in this case occurred during the period of suspension. When questioned by the prosecution, the defendant only mentioned two of the three prior offenses, and indicated that he had only received fines. The record obtained by the court also indicated the same thing. He was given a six month suspended sentence.

Thereafter, the truth was discovered regarding the prior suspended sentence of the defendant. The prosecution requested the court to re-open the fact finding process and allow the introduction of this new evidence in an effort to have a heavier penalty imposed. The defense objected claiming that the government's failure to obtain the correct records regarding the defendant's criminal history was not an unavoidable circumstances within the meaning of the code.

The high court sided with the government. It held that the meaning of unavoidable circumstances is not limited to the physically unavoidable, but also refers to the situation where one of the parties had no way of previously knowing about the new evidence. The high court imposed actual imprisonment for a period of six months. The defendant appealed this decision to the Supreme Court.

The Supreme Court upheld the conviction and actual imprisonment. It held that the defendant had deliberately concealed his prior record from the authorities by only indicating he had just two prior violations of the same nature, and that he had only been fined. Under such circumstances, the court held that the reason for not submitting the evidence at the trial court was "unavoidable" with the meaning of Article 382-2 of the Code of Criminal Procedure, above.

12.10. The Examination of New Evidence on Appeal

The primary function of the appellate court in Japan is to

19. Supreme Court Judgment, February 16, 1972, 27 Keishu 58.

review the proceedings of the trial court to determine if there has been any erroneous findings of fact or conclusions and applicatins of the laws. However, there are times when one or both of the parties want to introduce new evidence at the appellate stage. The evidence may have been in existence during the trial stage, but was not discovered until after the trial. On the other hand, the evidence may not have come into existence until after the close of the case.

The party seeking the introduction of this new evidence must show that is was "unavoidable"[20]. As we shall see in the next case, the definition of "unavoidable" is very liberal.

The defendant was charged with a minor traffic violation. He was given a suspended fine for crossing over the solid center line of a road[21]. The prosecution appealed claiming that the penalty was too lenient. On appeal, the prosecution sought to introduce the prior record of the defendant in order to justify a more severe penalty. The defendant objected and claimed that there were no "unavoidable" reasons which would allow the prosecution to introduce the prior record at the appellate stage. The appellate court held that the prior record constituted new evidence, and as such was admissible. The suspend fine was modified and the defendant was given actual imprisonment.

The Supreme Court held that even when the party seeking the introduction of new evidence is unable to prove unavoidable reasons, the Court, on its own, may examine the new evidence to determine the appropriateness of the lower court's decision. The Court relied on Article 393 of the Code of Criminal Procedure in reaching its decision[22]. That provision states that new evidence may be admitted by an appellate court for proving that the penalty imposed by the trial court was improper.

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20. Article 382-2 of the Code of Criminal Procedure.

21. Supreme Court Judgment, September 20, 1984, 38 Keishu 2810, 1133 Hanrei Jiho 155.

12.11. The Examination of Facts and the Appellate Court's Independent Judgment.

Usually the appellate court is required to examine the facts again to determine the appropriateness of the judgment reached by the trial court. In doing so, the appellate court should allow the parties the opportunity to argue over the facts. However, as we shall see from the next decision reach by the Grand Bench of the Supreme Court, there is an exception to this rule[23].

The Marquis de Sade trial is a landmark case in Japan, in the field of freedom of expression and obscenity[24]. It is also an important case in the field of criminal procedure. The facts are simple. The

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22. The Code of Criminal Procedure:
Article 393. An appellate court may, when it is necessary to conduct the investigation as mentioned in the preceding Article, examine facts upon request of a public prosecutor, the accused, or the counsel, or upon its own authority: Provided, That the facts, the explanation as mentioned in Article 382-2(above) of which has been made shall be examined only when they are indispensable for proving the penalty determined improperly or the errors in and/or of facts to affect the judgment.
2. And appellate court may, when it deems it necessary, conduct, upon its own authority the examination in regard to such circumstances as emerged after the judgment in the first instance and as should affect the penalty determined.
3. The examination as mentioned in the preceding two paragraphs may be undertaken by a constituent member of the panel, or may be entrusted to a judge of the district court, the family court, or the summary court. In such a case the commissioned judge or the entrusted judge shall have the same power as the court or the presiding judge.

23. Supreme Court Judgment, October 15, 1969, 23 Keishu 1239, 569 Hanrei Jiho 3.

24. For a complete background on this case concerning free speech see: Lawrence W. Beer, *Freedom of Expression in Japan* at page 349, Kodansha International LTD. 1984; and Hideo Tanaka, *The Japanese Legal System* at page 754, University of Tokyo Press, 1976.

defendants were indicted for the publication and distribution of a translation of a risque book entitled "Marquis de Sade" (Akutoku no Sakae). In Japan a person who distributes or sells an obscene writing may be imprisoned for up to two years[25].

The Courts have adopted a three prong test for determining if something is obscene. First, the writing must stimulate sexual desire. Second, it must offend the average person's sense of modesty. And, third, it must violate the concept of proper sexual morals. The court held that while the first two elements had been proved, the first element had not. It found the defendant not guilty and the prosecution appealed. The appellate court did not allow the parties to argue the facts of the case and held that the question of obscenity was a question of law which could be decide on the evidence submitted in the trial below, i.e. on the record.

The Tokyo High Court reversed the decision and held that the book did violate all three of the elements outlined above. The defendants were convicted. The defendants appealed to the Supreme Court on the grounds that the High Court had violated prior Supreme Court precedent which requires the appellate court to re-open the case when it wants to alter a not guilty verdict.

The Supreme Court held that generally there is a duty on the part of the appellate court to re-open the case when a not guilty verdict is to be changed to a guilty one. However, when the issue to be decided by the appellate court is strictly a question of law, the Court held that the appellate court can make a decision based on the record alone. Generally, the parties are allowed to argue the facts directly before the court. But, in this case the parties were in agreement as to the facts. The defendant admitted publishing and distributing the book. The only issue in the case was whether it was obscene or not.

This case is considered to be important in Japan because of its

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25. The Penal Code:
Article 175. A person, who distributes or sells an obscene writing, picture, or other thing or publicly displays the same, shall be punished with penal servitude for not more than two years or a fine of not more than 100,000 yen or minor fine. The same shall apply to a person who possesses the same for the purpose of selling it.

impact on the freedom of expression and because of the procedural ramifications which emanated from it. Until now, appellate courts were required to hold hearings whenever it wanted to convict a defendant. Now, if the issue is truly one of law, the appellate court can make a decision on the record alone.

12.12. Appeal to the Supreme Court - Duty to Raise Constitutional Questions Early

In order to open the doors to the Supreme Court, a defendant must be able to show one of the followings: a) that there is a violation of the Constitution, or an error in its interpretation; b) that there has

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26. The Code of Criminal Procedure:
Article 405. A motion for a Jokoku-appeal may be filed on the ground that there exist the following causes against the judgment rendered by the high court as the first or second instance:
(1) That there is a violation of the Constitution, or there exists an error in the interpretation of the Constitution;
(2) That the determination was made contrary to the precedent of the Supreme Court;
(3) That in the case of no precedents of the Supreme Court, the determination was made contrary to the precedents of the Dai Shin In (former Supreme Court) or the high court as a court of last resort, or the high court as an appellate court after the enforcement of this Code.
Article 411. Even if there does not exist a cause provided for in each item of Article 405, the court of last resort may, if it is deemed to be conspicuously contrary to justice, unless the original judgment be quashed for the following causes, quash it by a judgment:
(1) That there exists a violation of laws and orders which affects the judgment;
(2) That the penalty determined is so improper;
(3) That there exists a serious error in and/or of facts which affects the judgment;
(4) That there exists a cause falling under such cases as may file the request for retrial;
(5) That there has been the abolition of penalty or the alteration thereof, or the general amnesty after the judgment.

been a violation of precedent, either of the Supreme Court, or the Dai-Shin-In (former Supreme Court); or c) that there is a serious violation of justice requiring that the original judgment be quashed[26].

While this requirement appears to be straight forward, there is a problem concerning the timing of the defendant's constitutional claim. In a 1964 case the Grand Bench determined that a person who was slow to raise constitutional grounds necessary for an appeal will not be allowed into the Supreme Court[27].

The defendant was charged with violating two provisions of the penal code. The offenses involved giving a bribe[28] and breach of trust[29]. The count charged that he had given things of value to a public official in exchange for special treatment in connection with his livestock business. He was found guilty of both provisions by the trial court. On appeal, two points were raised. First, he claimed that there had been errors made concerning the facts related to the giving of a bribe. Second, he claimed that there had been a misinterpretation of the law concerning the breach of trust count. His arguments were rejected by the high court.

On appeal to the Supreme Court, defense counsel raised a new issue concerning the constitutionality of Article 198 of the Penal Code which prohibits the giving of a bribe. He claimed that this provision violated Article 29 of the Constitution[30]. That provision guarantees the right to own or hold property. It implies that everyone is free to dispose of his or her property as they wish.

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27. Supreme Court Judgment, November 18, 1964, 18 Keishu 597, 395 Hanrei Jiho 49.

28. Article 198 of the Penal Code.

29. Article 247 of the Penal Code.

30. The Constitution of Japan:
Articel 29. The right to won or to hold property is inviolable.
(2) Property rights shall be defined by law, in conformity with the public welfare.
(3) Private property may be taken for public use upon just compensation therefor.

The Supreme Court rejected the defendant's appeal on the grounds that he failed to raise a timely constitutional issue. According to the trial record, the defendant did not raise the issue concerning the constitutionality of Article 197, at the trial court level. On appeal to the high court, the defendant again failed to make any claim concerning the constitutionality of that provision.

The Court held that the new claim was not sufficient grounds for an appeal to the Supreme Court. The Court declared that it should be understood that the raising of new matter will not be accept by the Court as grounds for appeal.

There is scholarly opinion which interprets this case differently. They contend that the Court, by rejecting the appeal, did in fact rule on the substitutive issue concerning the constitutionality of Article 29, and believe that by rejecting the appeal, the Court was upholding the constitutionality of Article 29[31].

12.13. Violation of Precedent

As stated previously, one of the grounds for an appeal to the Supreme Court is violation of precedent. While it has been said that precedent plays an important role in Japanese law[32], the concept of stare decisis has not taken firm root. In addition, a case which has not been finally decided by the Supreme Court will not be considered precedent within the meaning of the above principle. The next case is a good illustration of this concept[33].

Some members of the Hokkaido University student association were charged with causing injury and trespassing. They had demanded to meet with the president of the university and refused to leave the main office of the campus when the president rejected their demands.

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31. Based on a personal interview with Dr. Hiroyuki Nose at his office at Hokkaido University, Sapporo, Japan, on July 21, 1989.

32. Hideo Tanaka, above, *The Japanese Legal System* at page 59.

33. Supreme Court Judgment, September 14, 1976, 30 Keishu 1611, 827 Hanrei Jiho 122.

During the process of removing the students, some university employees were injured. The trial court found the students guilty of causing injury to the employees, but not guilty on the trespassing count. Both sides appealed; and the high court found them guilty of both offenses. The defendants appealed.

Their appeal was based on the fact that the courts below had failed to follow precedent. There was a Sendai High Judgment which held that student organizations do have the right to meet with the president of a university. However, the prosecution in that case had appealed to the Supreme Court and the final decision on the matter had not been rendered. For this reason the precedent relied upon the defendants was not the type of precedent which constitutes grounds for an appeal. While a high court decision might be considered precedent if the decision has become final, this was not case here. When an appeal is pending, the case is not ripe enough to be considered a precedent.

12.14. Gross Factual Error as Grounds for Appeal

The usual grounds for an appeal to the Supreme Court is either a violation of the Constitution or precedent. However, when there has been a serious error made by the lower courts related to the facts of the case, an appeal may be made[34]. In the next case we see how this principle is applied.

The defendant was sentenced to ten years imprisonment for having solicited another to kill the leader of a rival gang. The defendant continuously denied any involvement in the killing and offer an alibi. The hit man confessed to the crime and gave a deposition before a prosecutor. This deposition was used as the sole evidence against the defendant. Both the trial court and high court were convinced that the defendant was guilty based on the hit man's account of the facts. Little, if any, attempt was made to confirm or deny the defendant's alibi.

On appeal, the Supreme Court reversed the conviction. Even though the appeal was not raised on constitutional grounds or for a violation of precedent, the court held that a serious error regarding the

34. Article 411 (3) of the Code of Criminal Procedure.

facts of the case had been committed by both the lower courts. The court exercised its judicial prerogative and raised the issued on its own.

As you can see the Supreme Court has much discretion regarding the way in which an appeal can be treated, and can take an active part in defining the issued of a given case.

12.15. Collateral Appeal

In Japan a collateral appeal is known as a "kokoku" appeal. The provisions pertaining to this type of appeal are contain in Articles 419 to 434 of the Code of Criminal Procedure[35]. There are two types of kokoku apppeals, general and special. Simply stated general kokoku appeals are appeals made to a high court and special kokoku appeals are made to the Supreme Court.

The kokoku appeal is not an appeal of a judgment, but is an appeal of a ruling made by a judge on a matter other than the main issue in the case. It is the counter part of the Anglo-American collateral appeal. Before a court will entertain a kokoku appeal, it must be shown that the matter is important and that certain rights will be jeopardized if the matter is not corrected prior to the issuance of a final judgment. These matters may involve questions concerning bail, detention, impoundage or restitution of impounded articles, and the detention of expert witness.

Before a special kokoku can be made to the Supreme Court the moving party must show that a violation of either the Constitution or precedent is involved.

In the following 1982 case, we see how the Supreme Court strictly construes the provisions related to kokoku appeals[36]. The defendant had been arrested for offenses related to the obstruction of an

35. The Code of Criminal Procedure:
Article 419. In additin to the cases as provided for therein that an immediate Kokoku-appeal may be particularly made, Kokoku-appeal may be filed to the ruling rendered by the court: Provided, That this shall not apply in such cases as otherwise prescribed in this code.
Article 434. The provisions of Articles 423, 424 and 426 shall apply mutatis mutandis to Kokoku-appeal as mentioned in paragraph 1 of the preceding Article except as otherwise specified in this Code.

electric street car. An arrest was made pursuant to a warrant. The defendant claimed that the warrant was issue without proper cause. The question for the high court was whether this was an issue which qualified for a kokoku appeal. The relevant section of the Code of Criminal Procedure is Article 429, which provides, in part, that the detention of the defendant is grounds for a kokoku appeal. However, the high court ruled that an arrest is different from detention, and that the validity of an arrest is not a matter subject to kokoku appeal.

The Supreme Court affirmed the decision. It simply held that the validity of an arrest is not a basis for a kokoku appeal.
The Court strictly construed the statute in order to limit the types of issues which can be collaterally attack prior to the rendering of a final judgment.

Likewise, questions regarding the admissibility of hearsay evidence are not matters which qualify for collateral attack. The defendant must wait for a decision from the trial court before he can raise such issues. In addition, he must prove that the admission of the hearsay evidence will affect the outcome of the judgment. In other words, he must prove that the error was something more than harmless[37].

36. Supreme Court Judgment, August 27, 1982, 36 Keishu 726, 1051 Hanrei Jiho 158.

37. Supreme Court Judgment, October 8, 1954, 8 Keishu 1588, 38 Hanrei Jiho 26.

CHAPTER THIRTEEN NEW TRIAL (SAISHIN)[1].

13.01. Introduction

In Japan the issue of granting a convicted criminal a new trial is an area of the law which has significantly changed since the Second World War. In this chapter the basic requirements for granting a new trial will be examined, and an explanation of how the law in this area has changed as a result of one landmark decision, known as the "Shiratori" case.

A new trial is an extraordinary remedy. It is the condemned person's only hope of being freed from years behind bars, or perhaps, even death. It is a remedy for the innocent (muko no kyuusai), and has been referred to a "bridge of benevolence" (ai no kage bashi)[2]. It is a bridge that extends from inside the penitentary to the normal everyday society that exists outside such an institution.

13.02. Basic Requirements

A new trial is proceeding which attacks a prior judgment of conviction. In order to obtain a new trial the convicted person must be able to prove certain things which will be examined hereafter[3]. The concept of a new trial is a two-step process. First, a hearing must be conducted to determine if the petitioner has met the statutory requirements for granting a new trial. If the court determines that a new trial

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1. The translation of "saishin" is given as "reopening of the proceedings" (Wiederaufnahme des Verfahrens; revision) in Professor B.J. George's translation of Shigemitsu Dando's, *Japanese Law of Criminal Procedure* (Fred B. Rothman & Co. 1965) at page 480.

2. Nose, Hiroyuki, *Keiji Sosho Hoh 25 koh* page 259.

3. A person for a retrial may be made by a convicted person. In addition, a public prosecutor, the legal representative or guardian of a convicted person, or the spouse, lineal relatives, and brother or sister of a convicted person. (Article 439, Code of Criminal Procedure)

is warranted, then the second step, i.e., a new trial will be conducted and the facts of the case will again be examined.

A new trial may be requested against any court's determination of guilt[4]. In this case, the petitioner must prove one of the following:

1) that a document used to convict was forged or altered;
2) that the testimony of a witness or expert witness was perjured, or any translation or interpretation has been falsified;
3) that there is a judgment in a separate proceeding which shows that the defendant was falsely accused;
4) that a judgment used as evidence in the trial has been alter by a subsequent judgment;
5) that a patent, trade mark or copywrite, which the defendant was found guilty of violating, subsequently has been declared void by the Patent Office or a court;
6) that there is clear evidence which has been newly discovered showing that the defendant should have been found not guilty(muzai) or acquitted on procedural grounds(menso), that the penalty should have been remitted(kei no menjo), or that he should have been convicted of a lesser offense; or
7) that a governmental official connected with the case was guilty of corruption[5].

13.03. The Constitutional Right to A New Trial

In the previous section the statutory provisions for granting a new trial were examined. However, the right to a new trial is not

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4. Articles 435 of the Code of Criminal Procedure.
Note: In Japan there are four possible types of disposition that a court can resort to in a given case.
1) Article 336. Judgment of Not Guilt (muzai no Hanketsu)
2) Article 337. Judgment of Acquittal (based on procedural defects or a violation of res judicata)(Menso no Hanketsu)
3) Article 338. Judgment Banning The Prosecution (Kikyaku no Hanketsu)
4) Article 339. Ruling Banning The Prosecution (Kikyaku no Kettei)

5. Article 435 of the Code of Criminal Procedure.

merely a statutory right; it is a right of constitutional proportion. It is part of the defendant's fundamental right to due process as guaranteed by Article 31 and 39 of the Constitution. The guiding principles of this right include the presumption of innocence (muzai no suitei) and "in dubio pro reo," i.e. doubts in favor of the accused (utagawashiki wa hikokunin no rieki ni).

13.04. The Reason for Granting a New Trial

In section 13.02, above, the statutory grounds for obtaining a new trial were set out. As you can see there are many reasons for obtaining a new trial, for example, perjury by a witness, the forging of a document, or corruption by a governmental official. However, according to the cases, the ground most often relied upon is the recent discovery of clear evidence of innocence(Art 435 (6)).

In order to qualify for a new trial, the petitioner must be able to prove two things in relation to evidence of innocence. He must prove that the evidence is "clear" evidence (akiraka na shoko) of innocence. Moreover, he also must prove that it was "newly discovered" evidence (aratani hatsuken shita shoko).

This newly discovered evidence is not limited to the sudden appearance of a new witness or document, but also extends to changes in the testimony of prior witnesses or new findings by an expert witness.

The second requirement, that the evidence be clear evidence, has undergone a considerable transformation in recent times. Prior to the landmark decision known as the "Shiratori Case," the standard was extremely high. A convicted individual had to do more than raise a doubt as the presumption of his innocence. He had to virtually prove that he was 100 percent innocent. As a result of the Shiratori decision, the standard for obtaining a new trial was drastically lowered allowing for an easier access to the courts.

13.05. The Shiratori Case[6]

In this case the defendant had been convicted of killing a police

6 . Supreme Court Judgment, May 20, 1975, 29 Keishu 177, 776 Hanrei Jiho 24.

chief by the name of Shiratori in the City of Sapporo on the evening of January 21, 1957. Shiratori was shot in the back as he rode his bicycle home from the police station. The defendant received a twenty year sentence for his part in the offense and the case became final on October 17, 1963. Thereafter, the defendant sought a new trial based on new expert testimony related to the ballistics in the case. This new evidence indicated that the bullets found inside the victim's body could not have been fired from the gun which the authorities discovered.

The Supreme Court examined the newly discovered evidence and stated that if the defendant could raise a doubt as to propriety of the prior guilty verdict, the doubt would be weighed in his favor. The Court, for the first time, applied the principle of in dubio pro reo (doubts favor the defendant) in when it reached its decision. The Court examined this new evidence, not in a vacuum, but considered it together with all the previous evidence of guilt, and determined that there was no doubt as the defendant's culpability. For this reason the Court denied the new trial. However, by lowering the hurdle for obtaining a new trial, this case paved the way for series of new trials wherein individuals sentenced to death were finally released[7].

After Shiratori, a convicted person no longer had to prove that he didn't commit the crime. He just had to show that there existed a reasonable doubt as to the ligitimacy of the guilty verdict. It is enough if he can prove that there was insufficient evidence of guilt[8].

13.06. The Effect of the Guilty Verdict Pending a New Trial

When the court has decided to grant the defendant a new trial

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7. Three of the more famous cases wherein a person condemned to death was saved from the hangman's rope as a result of successful retrials are:
1) The Menda Case, Kumamoto District Judgment, July 15, 1983, 1090 Hanrei Jiho 21.
2) The Zaitagawa Case, see note 9.
3) The Matsuyama Case, Sendai District Court Judgment, July 11, 1984, 1127 Hanrei Jiho 34.

8. Zaitagawa Case, Supreme Court Judgment, October 12,1976, 30 Keishu 1673.

the court which originally issued the conviction must try the case again[9]. At the new trial the defendant is protected by the rule prohibiting disadvantageous modifications, which means that he can receive no greater penalty than that imposed in the original judgment[10].

However, the original judgment stays in effect until the new trial is over. That is to say, that even though a person is granted a new trial, he still remains convicted until a determination of not guilty is made at the new trial. During the new trial the court has the discretion to stay the execution of the originally imposed penalty pending the outcome[11].

In death penalty cases there is a special problem in this area which stems from a contradiction between the Code of Criminal Procedure and the Penal Code. According to Article 11 (2) of the Penal Code, a person condemned to death must be confined in a prison until the penalty is carried out. All of the defendants in the *Menda, Zaitagawa*, and *Matsuyama* new trial cases continued to be held in prison pending the outcome of their new trials.

There are some scholars who contend that this is wrong[12]. They argue that the courts discretionary power to stay the execution of the penalty (Code of Criminal Procedure, Art. 448 (2)) also includes the power to stay the confinement in a prison. However, this opinion has never been tested by the courts yet.

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9. Code of Criminal Procedure, Article 451 (1).

10. Code of Criminal Procedure, Article 452.

11. Code of Criminal Procedure, Article 448 (2).

12. See Nose, Ibid. at page 268.

CHAPTER FOURTEEN JUVENILE PROCEEDINGS

14.01. Introduction

Under the old Juvenile Law the prosecutor exercised total discretion over the decision whether to prosecutor juvenile offenders. The purpose of the new Juvenile Law, enacted in 1948, is to protect the welfare of juveniles in general. A juvenile (Shonen) is any person under twenty years of age[1]. The decision to prosecute a juvenile as an adult now rests with the family court. Under Article 41 and 42 of the Juvenile Law *all cases involving juveniles first must be sent to the family court*[2]. If family court determines that the offense committed is punishable by death or imprisonment, and the offender is older than sixteen, it must send the case to prosecutor for prosecution as an adult in a district court[3]. The prosecutor, at this point, has little discretion in the matter,

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1. The Juvenile Law:
   Article 2. The term "juvenile" (Shonen) as used in this law shall mean any person under 20 years of age, and the term "adult" (Seijin) shall mean any person who is 20 years of age or older.
   2. The term "guardian" (Hogosha) as used in this law shall mean any person who is legally responsible to a juvenile for his custody and education or who actually has a juvenile in his custody.

2. The Juvenile Law:
   Article 41. When a judicial police officer believes, upon investigation of a suspected juvenile case, that the juvenile is suspected to have committed an offense punishable with a fine or a lesser penalty, he shall send the case to a Family Court. This shall apply when he believes that there are grounds for referring the case to a Family Court for trial even if there is no suspicion of a crime.
   Article 42. When a public prosecutor believes, upon investigation of a suspected juvenile case, that there is suspicion of a crime, he shall send the case to a Family Court, unless it is the case prescribed in the main part of item (5) of Article 45, (when the case has already been sent to the prosecutor from the Family Court). This shall apply when he believes that there are grounds for referring the case to a Family Court for trial even if there is no suspicion of a crime.(explanation added)

and must prosecute the case[4].

14.02. The Send All Case Rule - Zenken Sochi Shugi

In an early 1953 case decided by the Supreme Court, we can see how serious the Court was in its determination to transfer the control of juvenile cases from the prosecutor to the family court[5]. This case is a classic example of the principle known as "send all cases to the family court" (zenken sochi shugi). The defendant's case (a theft offense) was first sent from the prosecutor's office to the family court. The family court determined that the case should be sent back to the prosecutor, and that the youth should be tried as an adult. After the prosecutor received the case, it was discovered that the defendant had committed three other thefts. The prosecutors felt that since the case had already been sent to them from Family Court, they could add the additional offenses to the prosecution without first clearing the family court.

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3. The Juvenile Law:
Article 20. When, with respect to a case involving an offense punishable with death, penal servitude, or imprisonment, the Family Court finds it proper, after investigation, to give the offender a criminal disposition according to the nature and circumstances of the offense, it shall transfer the case, by means of a ruling, to the public prosecutor,... provided that, when the offender is a juvenile under sixteen years of age at the time of the transfer, it shall not transfer such a case to the public prosecutor.

4. The Juvenile Law:
Article 45 (5). When a public prosecutor believes that there is suspicion of a crime sufficient to institute a public action with regard to the case in which has been transferred from the Family Court, *he shall institute a public acition*. Provided that, this shall not apply when it is deemed improper to prosecute because there is no suspicion of a crime sufficient to institute a public action with regard to a part of the case which has been transferred, or new facts which are material to the extenuation of the criminal circumstances have been discovered, and also when it is deemed improper to prosecute because the circumstances have changed after the transfer of the case. (emphasis added)

5. Supreme Court Judgment, March 26, 1953, 7 Keishu 641, 11 Hanrei Jiho 19.

The Tokyo District Court disagreed with prosecutor's decision. It held that the prosecution was obliged to first submitted the additional three offenses to the family court. The defendant was convicted of only one theft, the one which had originated from the family court. As to the other three thefts, the court declared that the prosecution failed to follow Articles 41 and 42 of the Juvenile Law, and dismissed the proceedings.

This decision was upheld by both the Tokyo High Court and the Supreme Court. The Supreme Court held that the prosecution had been granted the authority to decided how to handle juvenile case under Article 62 of the old Juvenile Law. However, under the new Juvenile Law, the main concern is the welfare of the juvenile rather than the prosecution of crime. The authority to decide matters related to juveniles resides totally in the family court. All juvenile offenses must be screened by the family court before the prosecution has the authority to bring charges in a district court.

14.03. The Right of Confrontation and Cross Examination

The family court has primary jurisdiction over juvenile cases. Courts of general jurisdiction only became involved when the family court transfers a case to the prosecutor. When the family court decides to retain jurisdiction and hear the matter the question arises as to the nature of the trial. Is a juvenile defendant being tried in a family court entitled to the same rights and protections afforded an adult defendant? Unfortunately for the juvenile offenders in Japan, this question was answered in the negative by the Supreme Court in the 1983 Judgment[6].

A seventeen year old high school senior was unhappy with the discipline and counseling he had received at his high school. To demonstrate his displeasure, he and several of his friends wrote graffiti on the walls and windows of the school building. In addition, he was accused of attempting to set the school on fire. Apparently, he and his companions set fire to a cardboard box. The fire was quickly extinguished by some of the teachers who had been on campus at time.

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6. Supreme Court Judgment, October 26, 1983, 37 Keishu 1260, 1094 Hanrei Jiho 16.

The youth admitted writing the graffiti but denied setting fire to the school. The family court called as witnesses two female students who had observed the boy's conduct. Also, three of his companions were also called to testify. At the hearing neither the defendant, nor his counsel were allowed to be present when the court examined all of the above witnesses. The defendant was found guilty of writing the graffiti and setting fire to the school. He was given protective parole (hogo kansatsu).

On appeal, he claimed that the family court had denied him his right to due process as guaranteed by Article 31 of the Constitution[7]. The Supreme Court held that the defendant had not raised a constitutional issue, a requirement for such an appeal. The Court held that his claim was merely a question of statutory law. The Court did state as dictum, however, that the family court was required to exercise reasonable discretion in such matters.

In two concurring opinions, Justices Dando and Nakamura stated that the family court had abused it's discretion by not allowing the defense a right to confront and cross examine all the witnesses. Justice Dando cited the U.S. Supreme Court position which has required that juvenile courts ensure that the principles of due process are applied to juvenile hearings[8].

The Supreme Court dodged the issue completely and dismissed the appeal on technical grounds, something the Court is notorious for doing. This case presented the Court with the golden opportunity to grant juvenile offenders in Japan the basic due process protections similar to those enjoyed by juvenile offenders in the U.S.

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7 . 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.

8 . In re Gault, 387 U.S. 1, 18 L.Ed.2d 527, 87 S.Ct.1428 (1967); wherein the U. S. Supreme Court held that juvenile offenders are entitle to adequate notice of the charges, the right to counsel, the right of confrontation and cross-examination, and the privilege against self-incrimination.

14.04. New Trial

In a 1982 case, the Supreme Court was faced with a serious dilemma. A youth had placed in a reformatory for a crime he didn't commit, yet there was no explicit statutory provision which could be applied to rectify this gross injustice. The case involved a youth who had been placed in a reformatory for committing a murder[9]. A young girl had been stabbed in the chest with a fruit knife on school grounds. The accused was arrested when the police discovered that he had recently bought a knife exactly like the one left in the victim's body. He also was seen loitering near the scene of the crime on the same day. After being interrogated by the police he confessed to the crime. However, there was no finger prints found on the knife, and no blood found on the defendant's clothes or bandage which he had on his right hand at the time the murder occurred.

The youth had been in the reformatory for eight months when it was discovered that he had not committed the offense. His mother had found the knife the defendant had bought rolled up in some bedding which had been stored in a closet. The attorney for the youth petition the court for the release of the boy pursuant to Article 27(2)(1) of the Juvenile Law[10]. That provision provides that when the family court discovers that it had no authority over a trial wherein a youth was sent to a reformatory, is must revoke its prior decision.

This provision refers to evidence that the court lacked authority for its decision. There is no reference of a youth serving time in a

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9. Supreme Court Judgment, September 5, 1982, 37 Keishu 901, 1091 Hanrei Jiho 3.10.

10. The Juvenile Law:
Article 27 (2)(1). When, in the course of the execution of protective disposition, the Family Court which has imposed protective disposition to an individual, newly discovers data clear enough to prove that it had no authority of the trial over the individual or it has imposed such disposition to a juvenile under 14 years of age notwithstanding that he has not been referred to it by the governor of a prefecture or the head of the child welfare station, it shall, by means of a ruling, revoke such protective disposition.

reformatory. For this reason the Tokyo High Court denied relief to the boy even though he was innocence. The High Court held that Article 27 (2)(1) could not be used in this case, and that due to the lack of any other provision dealing with this type of situation, the Court was forced to dismiss the appeal, and the boy was destined to spend more time in the reformatory.

Luckily for the youth, the Supreme Court reversed this decision and held that the youth was entitle to some form of relief. In what can be considered a common law approach to the interpretation of statute, the Court held that Article 27 (2)(1) could be applied to this case. It held that where there is a serious wrong committed by the judicial system, the courts must find some way of providing appropriate relief. The court rejected the argument that serving time in a reformatory is for the benefit of the youth. It held that a juvenile cannot be allowed to remain in reformatory after his or her innocence has been discovered by new evidence. Commitment to a reformatory is based on a finding of juvenile delinquency, and when it is discovered that there is no delinquency, the commitment must be revoked.

Article 27 (2)(1) does not apply only to cases where the court erred in determining the correct age of the youth, but can also be used in cases of this nature.

This case is considered a leading case in Japan in the area of juvenile justice. However, it can also be used to demonstrate that even civil law jurisdictions must sometimes resort to common law approaches in order to correct a grave injustice which would otherwise remain. The Tokyo High Court was right in its interpretation of Article 27 (2) (1), and the decision by the Supreme Court expanding its application is a clear example of judicial legislation. This is rarely seen in Japan, and this case is definitely an exception.

14.05. Double Jeopardy

Under Article 39 of the Constitution no person can be subjected to double jeopardy[11]. This principle was carried forward into the new Juvenile Law[12], and the dimensions of its force and affect were tested in a 1965 landmark decision by the Grand Bench of the Supreme Court[13].

The defendant, a nineteen year old boy, was employed as a truck

driver. One day while he was backing up a three axle truck he ran over a fellow employee who sustained injuries requiring one month of treatment. The accident resulted from the defendant's negligence when he failed to make sure the area behind the truck was clear before backing up. Under article 211 of the Penal Code, the defendant was guilty of criminal negligence[14]. In addition to this, he was also guilty of failing to report the incident to the police as required by law[15].

The prosecutor sent the case to the family court. The family court decided that the charge of criminal negligence should be tried as an adult case and sent the case back to the authorities for prosecution[16]. As to the failure to report an accident allegation, the family court

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11. The Constitution of Japan:
Article 39. No person shall be held criminally liable for an act which was lawful at the time it was committed, or of which he has been acquitted, nor shall he be placed in double jeopardy.

12. The Juvenile Law:
Article 45. When the protective dispositions provided in paragraph 1 of Article 24 have been made with respect to a juvenile who has committed a crime, he shall neither be prosecuted nor brought to trial in a Family Court for a case in which he has already been tried. Provided that, the same shall not apply when the protective disposition has been revoked in accordance with the provision of Article 27-(2).

13. Supreme Court Judgment, April 28, 1965, 19 Keishu 240, 406 Hanrei Jiho 15.

14. 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 injuries another, shall be punished with penal sevitude or imprisonment for not more than five years or a fine of not more than ¥200,000. The same shall apply to a person who, by gross negligence, injures or causes the death of another.

15. Article 24 of the old Traffic Law.

16. The Juvenile Law:
Article 20. (See note 3 above).

decided not to hear the matter because it felt that the provision of traffic code was unconstitutional in that it required someone involved in an accident to incriminate themselves[17].

Thereafter, the Supreme Court declared that the reporting requirement was constitutional. Due to this change, the prosecutor decided to indict the defendant for both the charge of criminal negligence and for the traffic law violation. After the family court decision, and before the Supreme Court's ruling, the defendant had reached the age of majority.

The defendant didn't object to being prosecuted for criminal negligence, but did object to being charge with the same offense which the family court had decided not to prosecute. In other words, the defendant felt it was a violation of double jeopardy to allow the prosecution to bring a charge on an issue that had already been ruled on by the family court.

Both the district court and high court agreed with the defense, and ruled that the prosecution was prohibited from prosecuting on a charge that the family court had decided not to pursue. The Supreme Court reversed and held that there was no violation of double jeopardy. It reasoned that the decision by the family court not to take action against the juvenile did not amount to an acquittal. An Article 19 (1) decision by the family court could be based on a variety of reasons other than the guilt or innocence of the individual. Another factor the Court considered was the fact that there was no provision in the Juvenile Law which would allow the prosecution to appeal a 19 (1) decision not to take action. In Japan the prosecution usually enjoys the same right to appeal as the defendant, however under the Juvenile Law such a right was not afforded.

The court recognized that the purpose of juvenile proceedings was the rehabilitation of a mislead youth rather that the punishment of a criminal. However, a decision not to impose sanctions on a youth guilty of a crime has no affect on the ability of the prosecution to bring

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17. The Juvenile Law:
Article 19 (1). The Family Court shall, when it deems it impossible or improper to bring a case to trial as a result of investigation, render a ruling not to try it.

criminal charges against the individual once he or she has reached the age of majority.

This case was severely criticized by the scholars in Japan as being a step in the wrong direction in the juvenile justice system. The juvenile justice system was designed to give primary jurisdiction and responsibility to the family court for cases involving juveniles. By allowing the prosecution to override a family court decision, this principle would be eroded and the youth would be threatened with criminal action in both courts.