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FAR EASTERN SECTION

REFORMS IN JAPANESE CRIMINAL PROCEDURE UNDER ALLIED OCCUPATION

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In the past, reforms in Japanese criminal procedure would have been of little interest to most Americans, who have never felt it important to understand foreign legal systems. Fortunately, this attitude is beginning to change.¹ Moreover, the United States has been officially committed to encourage a desire for individual liberties and democratic processes on the part of the Japanese people since the Potsdam Declaration of July 26, 1945. Consequently, Americans will be interested in the postwar reforms in Japanese criminal procedure, if only to be fully informed of progress toward fulfillment of the objectives of the Allied Occupation, in which the United States has played the leading role.

I

The need for modernization and humanization of criminal justice in Japan has been obvious and pressing for the past thirty years. The first Code of Criminal Procedure based on Western law was adopted in Japan in 1890, as part of the revolutionary aftermath of the Meiji Restoration.² This Code, which was borrowed from the French legislation, had become antiquated by 1916. See the following

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¹ See Lon L. Fuller, Introduction to *SCHOCH, THE JURISPRUDENCE OF INTERESTS* (1948) at xxv. "There is scarcely any need to stress, at this juncture of history, how vital it has become for us to understand foreign legal systems and the ways of thought they incorporate and presuppose, nor how important it is for the future of the world that Americans should overcome their intellectual provincialism, particularly in legal and political matters."

² Law No. 96 of the 23rd Year of Meiji, adopted in 1890, a year after the promulgation of the Meiji Constitution. During this period four other basic Codes were also adopted—the Civil Code, Commercial Code, Criminal Code, and the Code of Civil Procedure. These four codes, together with the Code of Criminal Procedure, and the Constitution, are the six principal laws of Japan, known as the *Roppo*. They were mainly based upon the laws of Continental Europe, especially Germany. However, at this time the Japanese customary law was reduced to writing to a large extent, and laws from all over the world were ransacked for models for Japanese subsidiary laws and regulations.

passage written in that year by a discerning contemporary observer³

The substantive law itself is neither worse nor better than that of most other countries, but the adjective law is antiquated and needs drastic revision to insure protection and fair-play to accused persons. The system of criminal procedure is calculated to entail undue hardship and a frightful waste of time, and, generally speaking, the present administration of the penal law is not only highly unsatisfactory but positively dangerous to the liberty of the individual. Under the present system of preliminary examination few guilty persons escape when once in the meshes of the law, while innocent people frequently suffer by the process. Witnesses can only appear by consent of the judge and are examined by him and not by the parties or their attorneys. Effective cross-examination is thus practically impossible. Hearsay evidence is admitted to an extent that shocks anyone trained under the Anglo-Saxon rules of evidence. The Minister of Justice, who is a member of the Cabinet, and subject to the uncertainties of party government, has extensive powers of supervision and control over all the courts and their officers, and there is no doubt but that he *can, and does*, at times, interfere with the ordinary course of justice by manipulating the prosecuting officials.

Generally speaking, the administration of criminal law in Japan is a disgraceful and grossly unfair farce, and forms the one foul blot on the Japanese judicial system, but unfortunately, there is no healthy public opinion in the country powerful enough to force the government to effect a drastic reform calculated to render present abuses impossible, although a few leading lawyers have done their best to direct public attention to the matter.

In 1922 Japan adopted another Code of Criminal Procedure,⁴ borrowed this time from German law. However, this Code made little basic change in the pattern of procedure, which remained within the great historical current of the Continental European rather than the Anglo-Saxon system. Investigations prior to the charge⁵ were made by officers known as judicial police; decisions on the soundness of the accusation, after a secret preliminary examination,⁶ were made by

³ Mr. J. E. de Becker, LL.B., British solicitor and legal translator, then Legal Adviser to the Yokohama and Tokyo Foreign Board of Trade, at 16 of his pamphlet entitled *POINTERS ON JAPANESE LAW* (1916).

⁴ Law No. 75 of 1922, promulgated on May 4 of that year.

⁵ To be distinguished from the preliminary examination, properly so called, which came after the charge, and was confided to examining courts or magistrates.

⁶ The preliminary examination was an investigation of the entire case, including the examination of the defendant himself, the hearing of witnesses, and the investigation of any other evidence for the purpose of ascertaining whether there was probable cause for holding the defendant for trial. No limit of time was fixed by the law for the completion of the preliminary examination so that it might extend over a long time, during which the accused person might be kept in confinement. The examining judge was authorized to order domiciliary searches, seizures, and arrests and to hear witnesses and inter-

examining magistrates; and judgments on the issue of the guilt of the accused and pronouncement of his punishment were made by trial courts after a public trial.⁷ The action of these different authorities was invoked and the execution of their duties seen to by the public procurators, the necessary number of whom were attached to each criminal court. The Minister of Justice supervised the courts and procurators' offices and controlled all judicial proceedings. Petty offenses were disposed of summarily by officers in charge of police stations, subject to review by a court.⁸

II

The drastic reform in criminal procedure which had been overdue since 1916 did not materialize until after the promulgation of a new free Constitution for Japan on November 3, 1946. This generated increased interest in public affairs, and an overwhelming demand, encouraged by the Occupation, that the dangers to the freedom of the citizen which existed in the abuse of criminal processes be completely eradicated. The delay is not surprising when one considers that the history of any nation's criminal procedure is closely related to the evolution of its political conditions. The progressive political impulses that led to the Code of 1922, the Jury Law of 1923,⁹ which came into force on October 1, 1928, and the Criminal Compensation Law of 1931,¹⁰ were soon destroyed by the reactionary trend of Japanese politics. A Public Peace Preservation Law, first enacted in 1925 to control subversive activity by radicals, instituted a vicious system of "criminal thought offenses." As revised in 1928 and 1941 it provided a special

rogate the accused in secret. The allowance of bail was discretionary with the examining judge, but in practice the granting of bail was generally very unreasonably delayed under various pretexts. If bail were refused, complaint might be made to the court, but the judges were usually guided in their decision by the views of the procurator. There was no right of habeas corpus nor anything exactly equivalent thereto. See J. E. de Becker, *op. cit.*, *supra* note 3, at 33 *et seq.*

⁷ The trial was not by jury, but was before three or five judges, or in petty cases before a single judge. The accused could appear by an attorney at the trial of petty offenses punishable only by a fine. If he failed to appear at all judgment could be given against him by default.

⁸ To get such review defendant had to give security for his appearance, which, in case of a fine, could be deposit of the amount of the fine.

⁹ This law provided for trial by jury in capital cases or cases where the punishment might be imprisonment or penal servitude for life. Criminal cases in which the punishment might be penal servitude or imprisonment for a term over three years were tried by jury only upon demand of the accused. Certain types of cases involving political crimes were excluded from trial by jury.

¹⁰ This law provided a system of indemnity by the state for detention or wrongful punishment of innocent persons, i.e., persons acquitted by examining judges or found not guilty on trial in first instance or on appeal.

criminal procedure quite apart from the ordinary procedure of the Code and the Jury Law, under which more and more persons were unjustly confined during the war years for expressing political opposition to the imperialistic and militarist leaders who eventually brought Japan to the brink of destruction. By the end of the war the jury system, which had never been popular, was completely abandoned.¹¹ The Criminal Compensation Law, which instituted the French system of state indemnity for detention or wrongful punishment of innocent persons, survived the war, but inflation caused the amount of indemnity provided to become more and more insignificant.¹²

Soon after the surrender on September 2, 1945 the Supreme Commander for the Allied Powers directed the Japanese government to abrogate those laws which were oppressive of civil liberties. As a result the Peace Preservation Law and similar laws were abolished and thousands of political prisoners were released from prison and restored to their civil rights. Sweeping and constructive reforms of the judicial, legal, and police systems were induced by the Occupation¹³ following the passage of the new Constitution. The new liberal charter¹⁴ itself contained many revolutionary provisions directly affecting the administration of criminal justice. For example, Chapter III, which established the equivalent of a Bill of Rights for the Japanese people, contained the following provisions:

¹¹ The new Constitution of Japan, in effect since May 3, 1947, contains no provision regarding trial by jury. However, the new Court Organization Law (Law No. 59 of 1947, OFFICIAL GAZETTE No. 311 of APRIL 16, 1947), which came into force simultaneously with the new Constitution, did provide, in Article 3, par. 3 "The provisions of this law shall in no way prevent the establishment by other statutes of a jury system for criminal cases." No statute re-establishing a jury system has yet been enacted. This is due at least in part to the expenses such a system would entail, a potent consideration for Japanese politicians struggling with the problem of balancing the budget under difficult postwar economic conditions.

¹² Amendments to the Criminal Compensation Law increasing the amount of indemnity were introduced in the Diet in 1948 but were never reported out of committee. However, Article 40 of the new Constitution recognizes the principle that: "Any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law."

It should also be noted that Article 17 of the new Constitution provides: "Every person may sue for redress as provided by law from the State or a public entity, in case he has suffered damage through illegal act of any public official." This Article of the Constitution has been implemented by a new state redress law (Law No. 125 of 1947, OFFICIAL GAZETTE No. 473 of OCTOBER 27, 1947).

¹³ A general survey of the legal and judicial reforms is contained in the article of Alfred C. Oppler, 24 WASH. L. REV. 290 (1949). The reform of the police system was accomplished by the new Police Law (Law No. 196 of 1947, OFFICIAL GAZETTE No. 516 of DECEMBER 17, 1947).

¹⁴ An evaluation of the main features of the new Constitution is contained in the article of Alfred C. Oppler, note 13 *supra*.

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

Article 32. No person shall be denied the right of access to the courts.

Article 33. No person shall be apprehended except upon warrant issued by a competent judicial officer which specifies the offense with which the person is charged, unless he is apprehended, [while] the offense [is] being committed.

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.

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 place to be searched and things to be seized, or except as provided by Article 33.

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

Article 36. The infliction of torture by any public officer and cruel punishments are absolutely forbidden.

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

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

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.

Article 38. No person shall be compelled to testify against himself.

Confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted in evidence.

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

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

When the new constitution came into effect on May 3, 1947 this Bill of Rights had been provisionally implemented by the Law for the Temporary Adjustment of the Code of Criminal Procedure in Consequence of the Enforcement of the Constitution.¹⁵ This temporary law, which was passed on April 19, 1947 was merely intended to

¹⁵ Law No. 76 of 1947, OFFICIAL GAZETTE No. 314 OF APRIL 19 1947

accomplish a provisional amendment of the old Code so as to reform immediately the worst abuses which could not wait the drafting of an entirely new Code.¹⁶ It provided for counsel for the suspect or accused; the right to be informed of the reason for detention, elimination of issuance of warrants of arrest or detention by procurators or police; requirement of judicial warrants for seizure, search or inspection, except in cases where procurators or police arrest a criminal *in flagrante delicto* or execute a warrant of arrest or detention, detailed time limitations and other rules governing the issuance of warrants of arrest and detention and the commencement of public action; abolition of secret preliminary examinations; prohibition of compulsory self-incrimination, or conviction solely on the basis of confessions; direct examination of accused and witnesses by the public procurator and counsel, exclusion of documents recording testimony from evidence unless the accused is afforded an opportunity to examine the witnesses or persons who have drawn up the documents at the public trial; certain changes intended to accelerate appeals; elimination of application of renewal of procedure after a finally binding judgment to the disadvantage of the accused so as not to place him in double jeopardy. For more than a year the operation of this temporary law was carefully scrutinized. Finally, on July 5, 1948, a completely revised new Code of Criminal Procedure was enacted by the Diet, to be enforced on January 1, 1949.¹⁷

The new Code retained the substance of the reforms made by the temporary law, although some of the details, i.e., the time limitations for commencement of public action, the use of documentary evidence, and the method of appeals, were modified; and many further revisions were made in the old Code to ensure effective implementation of the new Constitution. Under its new Constitutional rule-making power¹⁸ the Supreme Court speedily enacted detailed Rules of Criminal Pro-

¹⁶ It is interesting to note that a similar method was adopted by the French Constituent Assembly during the French Revolution when it enacted a law containing Provisional Amendments to the Law on Criminal Procedure in 1789. See ESMEIN, HISTORY OF CONTINENTAL CRIMINAL PROCEDURE 402 (1913).

¹⁷ Law No. 131 of 1948, OFFICIAL GAZETTE EXTRA OF JULY 10, 1948.

¹⁸ Article 77 of the new Constitution provides. "The Supreme Court is vested with the rule-making power under which it determines the rules and procedure and of practice, and of matters relating to attorneys, the internal discipline of the courts and the administration of judicial affairs." "Public procurators shall be subject to the rule-making power of the Supreme Court." "The Supreme Court may delegate the power to make rules for inferior courts to such courts."

cedure¹⁹ to supplement the new Code, which became effective on January 1, 1949, simultaneously with the Code itself.

The same Diet which enacted the new Code also passed several other laws which accomplished related reforms,²⁰ including a new Juvenile Law,²¹ Reformatory Law,²² Habeas Corpus Law,²³ and Law Concerning the Inquest of Prosecution.²⁴ The Inquest Law may be characterized as an embryonic form of Grand Jury Law²⁵ This series of reform laws adopted in 1948 introduced into Japanese criminal procedure for the first time institutions and ideas derived from the Anglo-Saxon rather than the Continental system; a historic development of great significance, since progress in juridical civilization comes frequently by thus mixing the best features of various legal systems.²⁶

III

Turning now to the substance of the procedural revisions, four chief problems raised by any system of criminal procedure had to be considered. They concerned the organization and working of the *investigation*, the *indictment*, the *trial*, and the *appeals*. How have these problems been solved in the new Code of Criminal Procedure of Japan?

1. *The Investigation*

The primary responsibility for the investigation of criminal offenses remains, as formerly, with the so-called judicial police officials.²⁷ These include both the National Rural Police and Police of Autonomous Entities,²⁸ as well as officials who exercise the functions of judicial police in regard to forestry, railways, and other special matters defined by law²⁹ However, a public procurator, or a secretary of his office

¹⁹ Supreme Court Rule No. 32 of 1948, OFFICIAL GAZETTE EXTRA OF DECEMBER 1, 1948.

²⁰ See Oppler, 24 WASH. L. REV. 290 (1949).

²¹ Law No. 168 of 1948, OFFICIAL GAZETTE EXTRA OF JULY 15, 1948.

²² Law No. 169 of 1948, OFFICIAL GAZETTE EXTRA OF JULY 15, 1948.

²³ Law No. 199 of 1948, OFFICIAL GAZETTE No. 699 OF JULY 30, 1948.

²⁴ Law No. 147 of 1948, OFFICIAL GAZETTE EXTRA OF JULY 12, 1948.

²⁵ This inquest law establishes not less than 200 inquests, each composed of eleven voters selected by lot from the district, which hear complaints concerning failure of procurators to indict and other action of procurators. The inquest does not render a true bill of indictment as does a grand jury, but is restricted to making a publicly posted finding of a purely advisory nature, a copy of which is sent to the superior of the procurator complained against, as well as to the Diet Committee charged with examination of the qualifications of procurators every three years.

²⁶ See ESMEIN, *op. cit.*, *supra* note 16, at 11.

²⁷ CODE, ART. 189.

²⁸ Newly established by the 1947 Police Law.

²⁹ CODE, ART. 190.

acting under his instructions, may, if he deem it necessary, investigate an offense himself.³⁰

The relationship between the public procurators and the judicial police in connection with criminal investigations has been changed considerably, in the direction of more independence for the police from procurators' orders. This was an inevitable result of the new decentralized police system, under which the police operations are controlled by locally elected Public Safety Commissions of Prefectures, Cities, Towns, Villages, or Special Wards. Since the procurators remain part of the national government bureaucracy they could not continue to dominate the police without violating the new constitutional principle of local autonomy. The new relationship becomes one of mutual cooperation and coordination instead of control, and its exact definition is being gradually evolved from actual experience rather than prescribed in advance by a priori logic. The new Code does provide authority for the procurators to make general suggestions regarding essential standards for criminal investigations needed to institute and support public action, as well as to issue instructions necessary to ensure cooperation and coordination of investigations.³¹

The authority of police and procurators to make compulsory dispositions in criminal investigations has been strictly limited and surrounded by new safeguards intended among other things to prevent violation of the new Constitutional immunity against compulsory self-incrimination.³² For example, although the police and procurators may ask any person to appear in their offices for questioning in the course of a criminal investigation,³³ the person may, except where he is under arrest or detention, refuse to appear, or withdraw at any time.³⁴ Moreover, a suspect who appears must be notified in advance that he may refuse to answer any question.³⁵ The provisions of the temporary law abolishing issuance of warrants of arrest or detention by procurators and police, and requiring judicial warrants for seizure, search or inspections, except in cases where procurators or police arrest a criminal *in flagrante delicto* or execute a judicial warrant of arrest or detention, are substantially integrated into the procedure under the new Code.

³⁰ CODE, ART. 191.

³¹ CODE, ARTS. 192, 193.

³² CODE, ART. 197.

³³ CODE, ART. 198.

³⁴ *Ibid.*

³⁵ *Ibid.*

The Code expressly provides that any public procurator or judicial police official may arrest a suspect when there exists reasonable cause to suspect that he has committed an offense, upon procuring a warrant of arrest issued in advance by a judge.³⁶ In minor offenses such arrest may be effected only where the suspect has no fixed dwelling, or where he fails to appear without good reason after being called for questioning.³⁷ The warrant of arrest, which must contain the essential facts of the suspected crime and an effective period during which the arrest must be made, must be shown to the suspect when he is arrested.³⁸

When a judicial police officer has made the arrest upon a warrant of arrest he must immediately inform the suspect of the essential facts of the crime and of his right to select defense counsel,³⁹ if he does not already have one. He must then give him an opportunity for explanation, and if there is no need to detain him, immediately release him.⁴⁰ Otherwise, he must transfer him, together with the documents and evidence, to a public procurator within forty-eight hours from the time of his physical apprehension.⁴¹ The procurator then gives him another opportunity for explanation, and either releases him immediately or must request a warrant of detention from a judge within twenty-four hours after he received him,⁴² or seventy-two hours after his arrest.

When a public procurator has made the arrest, the same rules apply, except that the request for a warrant of detention from a judge must be made within forty-eight hours from the time of physical apprehension, instead of seventy-two hours.⁴³ In case unavoidable circumstances have prevented compliance with the foregoing time limitations, a procurator may nevertheless request a judge to detain the suspect, upon offering presumptive proof of the grounds.⁴⁴ The judge shall not issue the warrant in such a case unless he recognizes that the unavoidable

³⁶ CODE, ART. 199.

³⁷ *Ibid.* This relates to offenses punishable by a small fine of a specified amount, or detention (the lightest form of imprisonment, not exceeding thirty days). The fine specified in the Code was 500 yen or less, but this has been subsequently changed by the Law for Temporary Measures Concerning Fines (Law No. 251 of 1948, OFFICIAL GAZETTE No. 817 of DECEMBER 18, 1948) because of inflation. The 500 yen is increased to 25,000 yen for offenses in the Criminal Code, the Law for Punishment of Acts of Violence, and the Law for Adjustment of Penal Regulations Concerning Economic Affairs; it is increased to 2,000 yen for offenses in all other laws. The present official exchange rate is 360 yen to one dollar.

³⁸ CODE, ARTS. 200, 201.

³⁹ CODE, ART. 203.

⁴⁰ *Ibid.*

⁴¹ *Ibid.*

⁴² CODE, ART. 205.

⁴³ CODE, ART. 204.

⁴⁴ CODE, ART. 206

circumstances have justified the delay involved.⁴⁵ Otherwise, warrants shall be promptly issued upon valid requests.⁴⁶

It should be noted that the time limitations in the new Code run from the time of physical apprehension instead of the time of delivery to a police station, as under the old Code. This change, which was first made by the temporary law, was intended to prevent the former practice of transferring suspects from police station to police station without booking them, so as to evade the Code time limitations. Of course, the time limitations under the new Code are now reinforced and rendered far more effective because of the new remedy of the writ of habeas corpus, which is a pillar of strength against illegal detention. Any suspect or accused under detention has a right to interview by his defense counsel without any official watchman being present.⁴⁷ His defense counsel is thus enabled to fully advise him of his rights under the Habeas Corpus Law as well as the Constitution and the new Code itself. Moreover, the new Code provides for the delivery or receipt of documents at such interviews.⁴⁸

In two exceptional cases arrests may be made under the new Code without procuring a warrant from a judge in advance. One is where a judicial police officer or procurator has reasonable grounds to suspect the commission of a felony and there is no time to procure a warrant before making the arrest.⁴⁹ The second is the case where a criminal is caught *in flagrante delicto*, i.e., in the act of or just after committing an offense.⁵⁰ The new Code permits any person whatsoever to make an arrest without a warrant under such circumstances.⁵¹ In the first exceptional case the officer must apply for a warrant of arrest from a judge immediately after making the arrest.⁵² In the second case the criminal must be immediately delivered to a public procurator or judicial police official.⁵³ In both cases the time limitations regarding the request for a warrant of detention and the other rules governing the procedure after arrest upon a warrant of arrest apply.⁵⁴ These pro-

⁴⁵ *Ibid.*

⁴⁶ CODE, ART. 207

⁴⁷ CODE, ART. 39.

⁴⁸ *Ibid.*

⁴⁹ CODE, ART. 210. The word "felony" is not used in Japanese penal law. The Code refers to an offense punishable by death penalty or penal servitude or imprisonment for an indeterminate period or for a maximum period of three years or more.

⁵⁰ CODE, ART. 212.

⁵¹ CODE, ART. 213.

⁵² CODE, ART. 210.

⁵³ CODE, ART. 214.

⁵⁴ CODE, ARTS. 211, 216.

visions permitting arrests without a judicial warrant procured in advance appear necessary for practical law enforcement and justifiable under a reasonably liberal interpretation of Article 33 of the new Constitution. Their constitutionality has not yet been challenged in the Japanese courts.

The new Code also makes provision for the unusual case where public action is instituted within the forty-eight-hour or seventy-two-hour time limitations for requesting a warrant of detention described above. In such a case the procurator need not request a warrant of detention.⁵⁵ Instead a judge must immediately notify the accused of the offense charged, hear his statement thereon, and either issue a warrant of detention or order him released without delay.⁵⁶ In other cases where dispositions relating to detention are required after the institution of public action and before the first date for public trial they are likewise taken charge of by a judge.⁵⁷

Where a warrant of detention is issued before the institution of public action, the public procurator must either institute public action within ten days after the request for detention was made, or release the suspect.⁵⁸ This rule was first stated in the temporary law without exceptions, but experience revealed that extensions were sometimes desirable in complicated cases. The new Code provides that a judge may, if he deems unavoidable circumstances require it, extend the period upon request of a public procurator, but the total period of extension or extensions shall in no event exceed ten days.⁵⁹

As previously stated, the new Code continues the provisions of the temporary law requiring procurators and police to procure warrants from a judge before effecting seizure, search or inspection of evidence during the investigation of an offense.⁶⁰ Exceptions are recognized for entries and searches for suspects in dwellings or buildings without warrant where necessary in the course of making an arrest in accordance with the Code, and for seizures, searches, or inspections on the spot of the arrest.⁶¹ The things seized shall be returned immediately if a warrant of arrest cannot be obtained after the arrest in the case where a suspect is arrested on reasonable suspicion of having com-

⁵⁵ CODE, ART. 205.

⁵⁶ CODE, ART. 280.

⁵⁷ *Ibid.*

⁵⁸ CODE, ART. 208.

⁵⁹ *Ibid.*

⁶⁰ CODE, ART. 218.

⁶¹ CODE, ART. 220.

mitted a felony.⁶² A new warrant from a judge is required for examination of the person.⁶³ This is especially intended to prevent abuse of females by the police in the course of making physical examinations. The judge issuing the warrant may provide reasonable conditions to prevent such abuse.⁶⁴

Two completely new provisions were inserted in the new Code at the request of the public procurators on the ground that they were essential to ensure convictions of guilty persons who might otherwise escape justice because of the new safeguards surrounding the investigation, indictment, and trial under the Code procedure. The first is in the case when a person other than a suspect, who apparently possesses information essential to the investigation of a crime, refuses to appear for questioning by the police or procurators, or to voluntarily disclose such information.⁶⁵ The second is in the case when such a witness did voluntarily furnish such information under examination by the police or procurators, but there is cause to believe he may be subjected to pressure to withdraw or change his statements before he testifies at the public trial, and it appears that his testimony will be absolutely necessary for proving the guilt of the accused.⁶⁶ In either case the new Code permits the public procurator to request a judge to interrogate such persons as witnesses under oath before the first date fixed for the public trial of the case. These provisions were felt necessary by the procurators because of the far stricter requirements of proof needed to convict under the new Code, and the new limitations on their investigatory powers, as well as the absence of the old secret preliminary examination by examining magistrates before the public trial. The rules of evidence embodied in the new Code which are intended to compel proof beyond any reasonable doubt to obtain a conviction, and which are completely new in Japanese history, will be discussed in connection with the trial itself. But a further word of explanation is necessary concerning limitations on the investigation subsequent to the charge, and regarding the significance of the abolition of the secret preliminary examination by examining magistrates. This explanation will be deferred until after the provisions concerning the indictment have been discussed, since the problems involved arise chronologically after the public action has been instituted.

⁶² *Ibid.*

⁶³ CODE, ART. 218.

⁶⁴ *Ibid.*

⁶⁵ CODE, ART. 226.

⁶⁶ CODE, ART. 227

2. *The Indictment*

Public action is instituted, as formerly, by a public procurator.⁶⁷ The new Code specifies that it is instituted by filing a written indictment with a court.⁶⁸ The indictment designates the accused and describes the facts of the offense charged as far as known.⁶⁹ Public action may be withdrawn before the judgment in first instance is rendered.⁷⁰ It may also be dispensed with in a particular case when the procurator deems it unnecessary, after he has considered the character, age, and situation of the offender, the gravity of the offense, the circumstances under which it was committed, and the conditions subsequent to its commission.⁷¹ The failure to prosecute may be complained of to an inquest under the new Inquest Law.⁷² Moreover, the new Code provides that a complainant or accuser who is dissatisfied by a failure to prosecute an offense mentioned in Articles 193 to 196 of the Penal Code (involving abuse of power by public officials while exercising judicial, prosecuting, or police functions; or cruelty or violence in guarding or conveying prisoners) may demand public action be instituted.⁷³ If a court rules in favor of the person making such demand it will commit the case to a competent court for trial and that court will designate an advocate to act as a public procurator in prosecuting the case to final judgment.⁷⁴ This is an important new exception to the rule that prosecution is by public procurators only

The new Code expressly provides that procurators' or police *dossiers* or records of examinations, or other evidentiary documents or things which may prejudice the court before trial, may not be annexed to or referred to in the written indictment when it is filed in court by the procurator.⁷⁵ This provision constitutes a very important change in Japanese criminal procedure, since it was formerly the invariable practice for the public procurator to deliver to the court before trial the entire file of police and procurators' records in the case, including documents containing statements of the accused and of witnesses interrogated by them. The court studied this file and could not help

⁶⁷ CODE, ART. 247

⁶⁸ CODE, ART. 256.

⁶⁹ *Ibid.*

⁷⁰ CODE, ART. 257

⁷¹ CODE, ART. 248.

⁷² See note 25 *supra*.

⁷³ CODE, ART. 262.

⁷⁴ CODE, ART. 268.

⁷⁵ CODE, ART. 256.

forming definite conclusions about the case before the trial began. During the public trial itself the presiding judge would control the witnesses called to testify and their interrogation on the basis of these documents given him in advance by the prosecution. As a result he frequently acted as a prosecutor instead of an impartial umpire between the prosecution and the defense. The procurator will now have to present his evidence in open court on equal terms with the defense. The judge becomes more of an impartial arbiter instead of dominating the examination of witnesses at the public trial.

Another important new provision concerning the indictment under the new Code requires that a copy of the indictment must be personally served on the accused.⁷⁶ If personal service cannot be made within two months after the indictment has been filed in court the institution of public action loses its validity retroactively.⁷⁷ Service by publication in criminal cases is no longer permitted. The Constitutional rights of access to the courts and to a public trial cannot be made a mockery by trials conducted without the knowledge of the accused. Provision is made for tolling of the statute of limitations in case of absence from Japan or concealment making service impossible.⁷⁸

On the institution of public action a court must notify the accused without delay that he may select defense counsel or ask the court to appoint a defense counsel for him, if he cannot procure one for himself because of poverty or other causes.⁷⁹ Similar notification is provided in case the accused has been produced or detained by the court before trial.⁸⁰

It has been already mentioned that after the institution of public action and before the first date for public trial fixed by the presiding judge, dispositions relating to detention shall be arranged by a judge.⁸¹ He has the same power as a court or presiding judge in respect to such dispositions,⁸² that is, he may detain the accused when there is reasonable ground to suspect that he has committed a crime, and, in addition, the accused has no fixed dwelling, or has escaped from custody, or there is reasonable cause to believe he may destroy evidence

⁷⁶ CODE, ART. 271.

⁷⁷ *Ibid.*

⁷⁸ CODE, ARTS. 254, 255.

⁷⁹ CODE, ART. 272.

⁸⁰ CODE, ARTS. 76, 77

⁸¹ CODE, ART. 280.

⁸² *Ibid.*

or escape.⁸³ The right of an accused under detention to interview his counsel has been previously mentioned. The new Code also provides that the term of detention shall not exceed two months after the day of the institution of public action.⁸⁴ In cases involving small fines under a specified amount or imprisonment under thirty days, detention is permitted only where the accused has no fixed dwelling.⁸⁵ Provision is made for renewal of the term of detention by means of a court ruling in cases of special necessity.⁸⁶ The court must make a concrete statement of the reasons for the ruling, and may renew the detention term only once except in specified cases (involving extremely serious charges or habitual criminals, etc.).⁸⁷ Before placing the accused under detention the court must not only inform him concerning his rights to counsel, as already mentioned, but must inform him of the charge and hear his statement regarding it.⁸⁸ In cases where the accused has escaped, of course, he may be so informed immediately after he has been detained.⁸⁹

The new Code also provides that an accused under detention (or his counsel, relatives, etc.) may request a court to indicate the reason for his detention.⁹⁰ The proceedings of indication shall be held in open court in the presence of the accused and his counsel, as required by Article 34 of the new Constitution. When the grounds or necessity for detention have ceased to exist the Code provides that the court shall rescind the detention upon request, or *ex officio*.⁹¹ Provision is also made that when detention upon a warrant of detention has been effected for an unreasonably long period the court shall, by means of a ruling, rescind the detention or allow release on bail upon request or *ex officio*.⁹² For the first time in Japanese history release on bail is granted as a matter of right to an accused under detention, on his request (or that of his counsel, relatives, etc.), except in specified cases (involving extremely serious charges or habitual criminals, etc.).⁹³ Of course, the court may always permit release on bail, *ex*

⁸³ CODE, ART. 60.

⁸⁴ *Ibid.*

⁸⁵ *Ibid.* With regard to the amount of the fine see note 37 *supra*.

⁸⁶ *Ibid.*

⁸⁷ *Ibid.*

⁸⁸ CODE, ART. 61.

⁸⁹ *Ibid.*

⁹⁰ CODE, ARTS. 82-86.

⁹¹ CODE, ART. 87.

⁹² CODE, ART. 91.

⁹³ CODE, ART. 89.

officio, or upon request, if it deems it proper, even in cases where it is not required to be granted as a matter of right.⁹⁴

The foregoing provisions, reinforced by the new writ of habeas corpus, should go a long way towards changing the former lamentable situation in Japan, where it was true more often than not that prosecution was based upon confessions wrung from the accused by means of irresponsible detention and severe grilling lasting for months or even years, during the secret preliminary examination, which resembled a medieval inquisition.⁹⁵ Although the procedure of the preliminary examination had its origin (in the French Code of 1808) in the idea that the individual liberty of the accused would be guaranteed by raising a barrier against prosecution on unsound accusations, which would be eliminated by the examining magistrates before submission to the trial court,⁹⁶ it never worked that way in practice in Japan. It was practically impossible for the examining magistrates to make a conscientious study of the record to test the soundness of the accusation in law and in fact. Instead they acted like inquisitors, seeking to trap the accused into confessions or admissions of guilt. The prosecution was impeded and responsibilities scattered, without any tangible benefit to the accused. The abuses of these secret preliminary examinations became notorious and tended to corrupt the entire judicial process. Secrecy always encourages abuse by magistrates in judicial proceedings, which must be made public if the social restraint of public opinion is to keep violence and passion in check.⁹⁷ Although a strong current of adverse criticism of the institution of the secret preliminary examination set in after 1900 in Europe,⁹⁸ it is still found in the majority of Continental codes. Consequently, the complete abolition of it in Japanese law represents an important shift away from the Continental and towards the Anglo-Saxon system.

3. *The Trial*

Trial remains, as under the old practice (since the abandonment of the jury system during the war), before courts consisting of three or five judges, or in less serious cases, of a single judge.⁹⁹ The pre-

⁹⁴ CODE, ARTS. 89, 90.

⁹⁵ See note 6 *supra*.

⁹⁶ See ESMEIN, *op. cit. supra* note 16, at 599-600.

⁹⁷ See BECCARIA, TREATISE ON CRIMES AND PENALTIES (1766), cited with approval by Esmein to this effect.

⁹⁸ See ESMEIN, 599, 600.

⁹⁹ See Oppler, 24 WASH. L. REV. 290 (1949).

siding judge fixes the date for public trial,¹⁰⁰ and the accused is summoned by a writ of summons,¹⁰¹ or, if necessary, by a warrant of production.¹⁰² Under the old Code repeated summons of the accused was required before the court could issue a bench warrant for his production. This frequently caused delay. The new Code permits the court to produce the accused if he has no fixed dwelling, or if he fails to appear when summoned without good reason, or when there is apprehension that he may fail to comply with the summons without good reason.¹⁰³ An accused who has been produced must be released within twenty-four hours from the time when he was brought to court, unless a warrant of detention was issued in said period.¹⁰⁴

Hearing on the date for public trial is conducted in a courtroom in the presence of the judges and court clerk and with the public procurator in attendance.¹⁰⁵ The trial of a particular case is not held continuously day after day until it is finished as in the United States, but is usually held every other day, or even less frequently. The court hears other cases on the intervening days. This tends to delay the trials, but is probably necessary due to the greatly overcrowded calendars and the shortage of judges, procurators, and defense counsel in Japan. The court may examine witnesses on dates other than those fixed for public trial, when it deems it necessary,¹⁰⁶ or commission one of its own judges or requisition a judge of another court¹⁰⁷ to examine witnesses outside the court, taking into consideration the importance of the witness, his age, vocation, health, other special circumstances, and the gravity of the case.¹⁰⁸ Where witnesses are examined at a place outside the court, the procurator and the accused or his defense counsel may be present and participate in the examination,¹⁰⁹ or they shall be informed in advance of the questions to be asked and given an opportunity to add their own questions if they do not choose to be present.¹¹⁰ If the accused or his counsel were not present at such an examination they shall be informed of the testi-

¹⁰⁰ CODE, ART. 273.

¹⁰¹ *Ibid.* See also CODE, ART. 62.

¹⁰² CODE, ARTS. 62, 63.

¹⁰³ CODE, ART. 58.

¹⁰⁴ CODE, ART. 59.

¹⁰⁵ CODE, ART. 282.

¹⁰⁶ CODE, ART. 281.

¹⁰⁷ CODE, ART. 163.

¹⁰⁸ CODE, ART. 158.

¹⁰⁹ *Ibid.*

¹¹⁰ *Ibid.*

mony given by the witness, and if it contains matter which is unexpected and of serious disadvantage to the accused, they may request the court to re-examine the witness regarding matters which they deem necessary for the defense.¹¹¹ Of course, the court may dismiss such a request if it deems it unreasonable.¹¹² These new provisions are intended to provide for examination of sick or distant witnesses in a convenient manner without prejudicing the right of the accused under Article 37 of the new Constitution to be permitted a full opportunity to examine all witnesses.

The court may change the fixed date for public trial, either *ex officio* or upon request of the prosecution or the defense.¹¹³ However, since this power was frequently abused in the past by judges granting postponements on the request of one side without the knowledge or consent of the other, the new Code requires that the court shall hear the opinion of both sides before changing the date, or, in urgent cases, shall at least afford both sides an opportunity to make objections at the commencement of the public trial on the new date.¹¹⁴ Moreover, provision is made for administrative control proceedings whereby persons concerned in the case may protest the changing of the date as an abuse of authority to a higher court which has supervisory control over the judges complained against.¹¹⁵ The new Code also requires that where an individual who has been summoned for public trial cannot appear on the fixed date because of sickness or other causes, he shall submit a medical certificate or other evidential materials to the court.¹¹⁶ Details to implement both the judicial control proceedings and the requirement of medical certificates are provided in the Supreme Court Rules.¹¹⁷

Far more emphasis is placed under the Code than formerly upon the question of the presence of the accused at the public trial. Of course, where the accused is a juridical person, it may always appear by proxy.¹¹⁸ The accused may also appear by proxy where the offense charged is punishable only by a petty fine not exceeding a specified

¹¹¹ CODE, ART. 159.

¹¹² *Ibid.*

¹¹³ CODE, ART. 276.

¹¹⁴ *Ibid.*

¹¹⁵ CODE, ART. 277.

¹¹⁶ CODE, ART. 278.

¹¹⁷ Supreme Court Rule No. 32 of 1948, Arts. 182-186.

¹¹⁸ CODE, ART. 283.

amount.¹¹⁹ This is intended to permit speedy disposition of such cases without undue inconvenience to the accused. Of course, such cases are normally disposed of in Japan by so-called Summary Procedure without any public trial.¹²⁰

This Summary Procedure, which is extremely important, is not to be confused with the summary disposition of petty offenses by officers in charge of police stations,¹²¹ since such police courts have now been abolished in Japan and that former practice no longer continues. Summary Procedure, properly so-called, is a method by which a judge convicts the accused by a summary order without hearing him and without prior proceedings. It has no analogy in Anglo-Saxon or French law but was derived from the Austrian or Germanic institution of penal orders ("Mandatsverfahren"), also used in several cantons of Switzerland and adopted in Hungarian and Norwegian Codes.¹²² Since the privilege of recourse to the ordinary procedure is reserved to the convicted person it has been held constitutional by the Japanese Supreme Court. Under the old Code the convicted person could demand a public trial within seven days after the summary order was issued. Under the new Code the suspect is notified in advance that the public procurator has demanded the summary order and the order may be issued only if seven days have passed without any objection on the part of the suspect.¹²³ This change further protects the constitutional right to public trial. Summary procedure is of great importance in Japan today, because the procurator may demand it in any case coming within the jurisdiction of a Summary Court (the lowest court of first instance)¹²⁴ where he is satisfied that a fine under the specified amount¹²⁵ is sufficient punishment. In February, 1949, for example, the procurators demanded summary orders for 24,306 persons or 69 per cent of those indicted. The courts and procurators in Japan would probably find it impossible to keep up with the ever-

¹¹⁹ CODE, ART. 284. The amount provided in the Code was 5000 yen or less. This has been increased to 50,000 yen for offenses in the Criminal Code, the Law for Punishment of Acts of Violence, and the Law for Adjustment of Penal Regulations Concerning Economic Affairs. See note 37 *supra*.

¹²⁰ See Book VI of the Code, entitled Summary Procedure.

¹²¹ See text p. 2 *supra*.

¹²² See ESMEIN, 605 *et seq.*

¹²³ CODE, ART. 461.

¹²⁴ See Oppler, 24 WASH. L. REV. 290 (1949).

¹²⁵ CODE, ART. 461. The amount provided in the Code was 5000 yen. This has been increased to 50,000 yen. See footnote 37 Under the 1922 Code the amount of fines in Summary Procedure was unlimited.

increasing work load of criminal cases¹²⁶ without using Summary Procedure.

To return to the problem of the presence of the accused at the trial under the ordinary procedure, with the exceptions already mentioned, the trial cannot be held under the new Code if the accused is not present. However, in cases where the offense charged is punishable with detention¹²⁷ (the lightest form of imprisonment, not exceeding thirty days), or punishable with a maximum term not exceeding three years or a fine exceeding a small specified amount,¹²⁸ the presence of the accused is only required at certain stages of the trial. In the first category of cases he must be present on the date for public trial when the judgment is rendered.¹²⁹ In the second category of cases he must be present at the rendition of judgment and also at the opening of the trial,¹³⁰ when the indictment is read aloud by the public procurator and the accused (or his counsel) is afforded an opportunity to make a statement concerning the case, after having been warned by the presiding judge of his right to remain silent or refuse to answer any question and of other necessary matters for protection of his rights.¹³¹ He may be permitted to be absent at any other stage of the public trial in these minor cases, when the court finds that his attendance is not essential for protection of his rights.¹³²

After the reading of the indictment at the opening of the trial, and the statement of the accused or his counsel, the examination of evidence is commenced.¹³³ The new Code leaves great discretion to the court in determining the scope, order, and method of examination of evidence, but it requires that the court must first hear the opinion and suggestions of the procurator, and the accused or his defense counsel.¹³⁴ Under the Supreme Court Rules implementing the Code the normal order of proof is for the prosecution to present its case first, after an opening statement, and then for the defense to present its

¹²⁶ At the end of February, 1949, there were 187,511 criminal cases on the court dockets, to be tried by a total of 1,649 judges, assistant judges and summary court judges, and a total of 841 procurators and 506 assistant procurators. At the same time 195,850 cases were awaiting investigation.

¹²⁷ CODE, ARTS. 285, 286.

¹²⁸ *Ibid.* The amount provided in the Code was 5000 yen or more. This has been increased to 50,000 yen or more, for offenses mentioned in note 119. See also note 37 *supra*.

¹²⁹ CODE, ART. 285.

¹³⁰ *Ibid.*

¹³¹ CODE, ART. 291.

¹³² CODE, ART. 285.

¹³³ CODE, ARTS. 291, 292.

¹³⁴ CODE, ART. 297

case, but the court is left free to depart from this order at its discretion.¹³⁵ Both the procurator and the accused or his counsel may request the examination of evidence, and the court may, if it deems it necessary, examine evidence *ex officio*.¹³⁶ Where either side desires to request examination of a witness it must give in advance the opposing party the name and address of the person.¹³⁷ The opposing party must also be given an opportunity in advance to inspect documentary or real evidence produced for examination.¹³⁸ However, the opponent may waive these provisions by failure to object.¹³⁹ Before deciding to examine evidence *ex officio* the court must hear the opinion of the procurator and the accused or his defense counsel.¹⁴⁰ The court must examine in the public trial all documents regarding the results of examination of witnesses, inspection of evidence, and search and seizure and all objects seized in the course of preparation for public trial.¹⁴¹ Confessions shall not be requested to be examined until after the other evidence for proving facts constituting the offense.¹⁴² Documents which are part of the police or procurators' investigation records may be offered in evidence by the procurators only in exceptional cases specified in the section on evidence and must be separated from other inadmissible matter in the case file.¹⁴³ Witnesses shall, as a general rule, be examined first by the presiding judge or an associate judge and then by the parties, the side that requested the examination of a particular witness examining him before the opposing party.¹⁴⁴ But here again the court is given discretion to change the order of examination after hearing the opinion of both sides.¹⁴⁵ Since they no longer have the investigation records presented to them before the trial, many courts will undoubtedly prefer to adopt the American practice of allowing the parties to start, and in most cases to monopolize completely, the examination of the witnesses.¹⁴⁶ However, in cases where a judge conducts the first examination of a witness requested by one of the parties, the Supreme Court rules provide that the party shall

¹³⁵ Supreme Court Rule No. 32 of 1948, Arts. 193, 199.

¹³⁶ CODE, ART. 298.

¹³⁷ CODE, ART. 299.

¹³⁸ *Ibid.*

¹³⁹ *Ibid.*

¹⁴⁰ *Ibid.*

¹⁴¹ CODE, ART. 303.

¹⁴² CODE, ART. 301.

¹⁴³ CODE, ART. 302.

¹⁴⁴ CODE, ART. 304.

¹⁴⁵ *Ibid.*

¹⁴⁶ This has already occurred in some of the first cases tried under the new Code.

file a document to assist the judge, which shall contain information about the proposed testimony of the witness or suggested questions.¹⁴⁷ In any case, although the word "cross-examination" is not used, it is in effect provided for, since each side is granted the full opportunity to examine not only his own witnesses, but those called by his opponent, or called by the court *ex officio*, at some time during the trial. Of course, a presiding judge may reject any questions asked (or any statements during the trial), if they are unnecessarily repetitive, irrelevant to the issue of the case, or inadmissible in any way, so long as he does not injure the essential rights of the parties or persons concerned.¹⁴⁸

The general effect of the foregoing provisions is to move substantially in the direction of a trial procedure in which the initiative and responsibility for the introduction of the proof is granted to the parties. The judge still retains great powers to control the trial, but it is much less likely that he will completely dominate it than in the past. The procurator no longer has the advantage of being able to present his investigation records to the court before trial. He is placed on an equal footing with the defense counsel in that both must place their evidence before an impartial court; the court starts the trial with no previous knowledge or opinion about the case, and the procurator is limited by a set of rules of evidence prescribed by law, something unknown before in Japanese procedure. Both the procurators and the defense counsel are given a far greater role in the public trial itself than they previously possessed. In the past the procurators concentrated on obtaining a confession before trial, and after presenting it at the trial, rested their case. The defense lawyers waited until the end of the trial and then made an eloquent final argument, appealing to the mercy of the court. The calling and questioning of witnesses during the trial itself was largely left to the discretion of the presiding judge. Now both sides are given numerous opportunities to speak up and influence the court during the public trial. Not only may they request the examination of evidence and examine and cross-examine the witnesses, but they may raise objections regarding the examination of evidence and concerning any dispositions effected by the presiding judge.¹⁴⁹ The court is required to afford both sides a proper opportu-

¹⁴⁷ Supreme Court Rule No. 32 of 1948, Art. 106.

¹⁴⁸ CODE, ART. 295.

¹⁴⁹ CODE, ART. 309.

nity to challenge the probative value of evidence,¹⁵⁰ by presenting counterevidence or impeaching the credibility of witnesses or by other means.

It is explicitly provided that the accused shall not be convicted in a case where his own confession, whether made in open court or not, is the only proof against him.¹⁵¹ This reverses the effect of a dictum of the Supreme Court to the effect that a confession made in open court could support a conviction without other proof (on the analogy of a plea of guilty in Anglo-American law)¹⁵² without violating Article 38 of the new Constitution. The change increases the burden on the procurators to find and bring witnesses into court, especially since investigation records and other hearsay are now excluded (with certain exceptions) and the principle of the best evidence rule is written into the new Code.¹⁵³ This new emphasis on bringing available witnesses into court to testify where they can be cross-examined is reinforced by requiring all witnesses to testify under oath,¹⁵⁴ if they are able to understand the nature and meaning of an oath,¹⁵⁵ and by providing criminal penalties¹⁵⁶ as well as non-criminal fines¹⁵⁷ for witnesses who fail to appear or refuse to be sworn or to testify without good reason.¹⁵⁸ The new provision for criminal prosecution of witnesses who unreasonably obstruct justice was badly needed since the power of punishment for contempt of court is not yet recognized in Japanese law, and in the past numerous delays were caused by obstreperous witnesses.

Many categories of witnesses, such as the remote relatives and employees of the accused, who were formerly permitted to refuse testimony or to testify unsworn are now compelled to testify under oath at his trial. However, not only is the constitutional immunity from compulsory self-incrimination implemented in regard to the accused, by provisions granting him the right to remain silent throughout the

¹⁵⁰ CODE, ART. 308.

¹⁵¹ CODE, ART. 319.

¹⁵² There is no arraignment or pleading to the indictment under the new Code, although the indictment is read aloud in court and the accused or his counsel are afforded an opportunity thereafter to make any statement they desire concerning the case. See CODE, ART. 291.

¹⁵³ CODE, ART. 320.

¹⁵⁴ CODE, ART. 154.

¹⁵⁵ CODE, ART. 155.

¹⁵⁶ CODE, ARTS. 151, 161 provide for a fine not exceeding 5000 yen or detention (thirty days imprisonment) or both.

¹⁵⁷ CODE, ARTS. 150, 160 provide for a non-penal fine not exceeding 5000 yen.

¹⁵⁸ CODE, ARTS. 150, 160 also provide that the witness may be ordered to compensate for the expenses arising from such failure or refusal.

trial¹⁵⁹ and excluding from evidence confessions or admissions made under compulsion, torture, or threat, or after prolonged arrest or detention, or whose voluntary character are in any way suspect,¹⁶⁰ but it is also extended to witnesses at the trial. A witness may refuse to answer any question which tends to incriminate himself;¹⁶¹ or his spouse; a relative by blood within the third degree of relationship or a relative by affinity within the second degree of relationship, of the witness, or a person in any such relationship to the witness; or a guardian or ward of the witness.¹⁶² Although these categories were considerably broader under the old Code they still go much further than Anglo-American doctrine because of the far greater respect for the unity of the family group which still exists in the Japanese mores. A somewhat related problem, in which there is also a characteristic difference of approach, is that of the professional privilege arising out of the confidential lawyer-client, doctor-patient, or priest-communicant type of relationship. In Anglo-American law today the privilege is personal to the client. This is not so in Japan. The new Code provides that a person who is, or was, a doctor, dentist, midwife, nurse, advocate, patent agent, notary public, or a religious functionary may refuse testimony in respect to facts of which he has obtained knowledge in consequence of a mandate he has received in the course of his professional functions and which relate to secrets of other persons.¹⁶³ However, this does not apply if the principal (client) has consented.¹⁶⁴

4. *The Appeals*

The appeals system in Japan is a rather complicated one, and is particularly difficult for Anglo-American lawyers to understand because it involves concepts for which there are no exact equivalents in Anglo-American law. For a long time there was no right of appeal in criminal causes recognized in Anglo-American law, even by the accused. Eventually the accused was granted the right of appeal, but the possibility of extension of this right to the state has been viewed with great suspicion and reluctance in the light of the common law doctrine against double jeopardy, which has become embodied in the constitutions of most American states as well as in our federal Con-

¹⁵⁹ CODE, ART. 311.

¹⁶⁰ CODE, ART. 319.

¹⁶¹ CODE, ART. 146.

¹⁶² CODE, ART. 147.

¹⁶³ CODE, ART. 149.

¹⁶⁴ *Ibid.*

stitution.¹⁶⁵ In Japan, on the other hand, the Continental type of appeals system established at the time of the Meiji Revolution and continued ever since has permitted appeals by the state as well as by the accused, not only on interlocutory rulings, but on the facts and law of the case and the appropriateness of the penalty. Under the 1922 Code there were *Kokoku* appeals against rulings; *Koso* appeals against judgments in first (and sometimes second) instance, which forced a trial *de novo* of both the law and the facts in the appellate court; *Jokoku* appeals against judgments in second (and sometimes third) instance, which were confined to questions of law only; *Saishin*, or request for re-opening of procedure against a finally binding judgment in certain specifically defined categories of cases where definite proof of a grave miscarriage of justice was shown, such as proof by a finally binding judgment of forgery of evidence, false testimony, or false accusation, or official corruption by a procurator or judge who had participated in the case, or clear proof of newly discovered evidence, or a change in the law, which materially affected the basis of the verdict or the penalty. All these were permitted to either the state or the accused. There was also a so-called Extraordinary Appeal by the Procurator-General when it was discovered after the judgment had become finally binding that the trial or judgment of the case was in violation of law.

The new Code retains in most respects the fundamentals of the former system.¹⁶⁶ However, certain changes were inspired by the adoption in Article 39 of the new Constitution of a prohibition against double jeopardy as well as the new emphasis throughout the Constitution on protecting the rights of the accused. Other revisions were adopted in the hope of expediting the trial of criminal appeals and relieving the tremendous burdens of the criminal appeals courts.

The provision of the temporary law that *saishin* or requests for re-opening of procedure after a finally binding judgment could not be used to the disadvantage of the accused, was obviously required by the constitutional prohibition of double jeopardy (since this procedure was used after the time to appeal had expired or all appeals had been exhausted, and really constituted a completely new trial for the same offense), and this change was therefore permanently integrated into the new Code.¹⁶⁷ The question of whether Article 39 of the new Con-

¹⁶⁵ See ORFIELD CRIMINAL APPEALS IN AMERICA Chapter 3 (1939).

¹⁶⁶ See Book III of the new Code.

¹⁶⁷ CODE, ARTS. 435, 436, 439, 452.

stitution required complete elimination of all appeals by the state was earnestly considered at the time the temporary law was passed and again during the drafting of the new Code. It was finally decided that there was no double jeopardy in an appeal by the state, even against an acquittal below, because an appeal is regarded as a continuation of the original proceedings. However, in the case of the Extraordinary Appeal by the Procurator-General, which is after a finally binding judgment, the new Code provides that except in the case of an original judgment disadvantageous to the accused, the effect of a judgment in extraordinary appeal shall not extend to the accused.¹⁶⁸ In such a case of extraordinary appeal from an acquittal, the acquittal would remain in force, but the judgment in the extraordinary appeal would correct the error of law so that it would no longer be a binding precedent in future cases.

The Japanese view that an appeal is a continuation of the original proceeding, and hence may be brought by the state without placing the accused in double jeopardy, is a logical one which had great merit and many arguments in its favor. Although the state's appeal does not exist in law anywhere in the United States except in Connecticut and Vermont, there is a substantial weight of authoritative American opinion to the effect that the state should be given the right to appeal.¹⁶⁹ Apart from the purpose of attaining the truth in criminal cases, which is a praiseworthy objective; and the logic of the arguments that an appeal is a continuation of the original proceeding, and an accused has not been in jeopardy until he has been tried in a legally proper way, the American doctrine that jeopardy attaches with the swearing in of the jury has no application in Japan today, since there are no juries. Moreover, from an historical point of view, since the common law doctrine of double jeopardy grew up at a time when there was no right of appeal in criminal causes, it has no necessary application to criminal appeals.¹⁷⁰ Of course, the validity of these arguments will only be finally settled in Japanese law by decisions of the Japa-

¹⁶⁸ CODE, ART. 459.

¹⁶⁹ See ORFIELD, *op. cit.*, *supra* note 165, at 55 "A proposal frequently reiterated in any statement of the reform of criminal appellate procedure is that the State be given the right to appeal. There is an almost overwhelming unanimity of opinion to that effect." Cf. also *State v. Lee*, 65 Conn. 265 (1894), Holmes, J. dissenting in *Kepler v. US*, 195 US 100 (1904), and numerous authorities cited by Orfield defending state's appeal, including the American Law Institute, several state crime commissions, and Dean Pound of Harvard Law School, as well as the United States Supreme Court in *Palko v. Connecticut*, 302 US 319 (1937). See ORFIELD, at 61.

¹⁷⁰ See ORFIELD at 61.

nese Supreme Court. But discussion of the problem during the drafting of the new Code did lead to two important changes designed to relieve somewhat the harshness of the former system of state's appeal to the accused. The first change was the elimination of the incidental or cross-appeal by the state, which could be filed after the defendant had appealed, even though the state did not appeal originally on its own initiative. This limitation on appeal by the state also exists in Connecticut. The second change was a provision that in case an appeal by the state is dismissed or withdrawn the state shall compensate the accused for the expenses he incurred because of the appeal.¹⁷¹

The other revisions made in the appeals system by the new Code (and also by amendments to the Court Organization Law regarding the appellate jurisdiction of the courts in criminal cases) relate to the number of appeal instances, and the nature of the appeal proceedings themselves, and were intended to speed up criminal appeals and relieve the terrifically overcrowded appellate court calendars. Since this article is concerned with criminal procedure, discussion of the composition and jurisdiction of the courts has been avoided wherever possible. However, the changes in appeal instances cannot be understood without some discussion of these matters. Formerly, there were local and district courts of first instance, intermediate courts of appeal, and a Supreme Court of last resort. A case which started in first instance in the local court could be tried *de novo* on *koso* appeal in the district court, and again in the court of appeal; and a final *jokoku* appeal on the law could be brought to the Supreme Court. There no longer are local courts, but they have been replaced in part by the new summary courts. Even under the temporary law in effect with the enforcement of the new Constitution, *koso* appeals in criminal procedure could be taken from the summary court to the district court and then to the high courts (which replaced the courts of appeal), thus providing three appeal instances on the law and facts and a fourth appeal instance to the Supreme Court on the law alone. The new Code eliminates *koso* appeals to the district court. All *koso* appeals from judgments in first instance of summary or district courts are taken to the high courts.¹⁷²

Moreover, the nature of the *koso* appeal is changed so that it no longer means a trial *de novo* by the appellate court. It has become, instead, primarily a re-examination of the record below to determine

¹⁷¹ CODE, ART. 368-371.

¹⁷² CODE, ART. 372.

whether errors alleged by the appellant were committed which warrant reversing the judgment, changing the penalty, or sending the case back for retrial below¹⁷³ Any evidence which was admitted or used as evidence in the court of first instance may be used as evidence also in the court of *koso* appeal.¹⁷⁴ Evidence which could not be offered for examination in first instance will be examined by the court of *koso* appeal only where essential to the proof of improper determination of penalty or of errors in fact-finding material to the judgment.¹⁷⁵ The nature of the *jokoku* appeal to the Supreme Court is also carefully defined in the new Code¹⁷⁶ so as to relieve that court of as much unnecessary work as possible.

Jokoku appeals may be lodged against a judgment rendered in first or second instance by a high court, only on the grounds of violation of the Constitution, or error in its construction or application, or where there is a judgment incompatible with judicial precedents formerly established by the present or former Supreme Court or by the high courts as courts of *koso* appeal.¹⁷⁷ There is also a new provision, very similar to *certiorari* to the the United States Supreme Court, whereby the Japanese Supreme Court, as the court of *jokoku* appeal, may admit cases which it deems involve an important problem of construction of law, only before the original judgments become finally binding, even though there is no constitutional question and no conflict with Supreme Court or High Court precedents.¹⁷⁸ The court of *jokoku* appeal may dismiss the appeal, by means of a judgment, without holding oral proceedings, where it finds, after examining the statement of reasons for appeal and other documents, that the appeal is not sustainable.¹⁷⁹ The court of *jokoku* appeal is not required to summon the accused on the date for public trial.¹⁸⁰ If the court finds the original judgment does conflict with the Constitution or a Supreme or High Court precedent it may quash the original judgment, or, when it deems proper, break or change the judicial precedent in question.¹⁸¹ Provision is also made that even if the court finds no conflict with the Constitution or Supreme or High Court precedents, as the appellant

¹⁷³ CODE, ARTS. 379-382, 392, 397-400.

¹⁷⁴ CODE, ART. 394.

¹⁷⁵ CODE, ART. 393.

¹⁷⁶ Chapter III of Book III of the new Code.

¹⁷⁷ CODE, ART. 405.

¹⁷⁸ CODE, ART. 406.

¹⁷⁹ CODE, ART. 408.

¹⁸⁰ CODE, ART. 409.

¹⁸¹ CODE, ART. 410.

alleged, it may still quash the original judgment, if it deems it incompatible with justice because of a mistake of construction, interpretation or application of law material to the judgment, a penalty unjustly and improperly imposed, a gross error in finding facts which is material to the judgment, the existence of any reason which would support *sarshin* (re-opening of procedure), or when the penalty has been abolished or changed or a general amnesty has been proclaimed after the rendition of the original judgment.¹⁸² When the original judgment is quashed because of lack of competence of the court, the Supreme Court will transfer the case to a competent court.¹⁸³ When the original judgment is quashed on any other grounds, the case may be sent back to the original court or the court of first instance, or the Supreme Court may immediately render a judgment for the case on the basis of the record and the evidence already examined by the original court or court of first instance.¹⁸⁴

These changes in the appeals system should greatly accelerate and simplify the trial of criminal appeals in Japan. They were hotly debated among the members of the Japanese bar associations, however, on the ground that the accused would lose the protection afforded by the old system of repeated trials *de novo*. The courts and procurators and most legislators decided in favor of the changes not only because of the great saving of time and expense and work in the appellate courts, but because they felt the old system of retrials was completely unnecessary and wasteful in the light of the greatly increased safeguards of the rights of the accused in the first instance trials under the new Code.

CONCLUSION

It is too soon to judge how effective the new Code has been in achieving its stated purpose—namely, the establishment of a procedure which would clarify the true facts of criminal cases and apply and execute criminal laws fairly and speedily, so as to maintain the public welfare and secure the fundamental human rights of the individual.¹⁸⁵ Certainly the first months of its operation have proved far more successful, and the difficulties of the transition period far less formidable, than the drafters themselves anticipated. Time will no

¹⁸² CODE, ART. 411.

¹⁸³ CODE, ART. 412.

¹⁸⁴ CODE, ART. 413.

¹⁸⁵ CODE, ART. 1.

doubt reveal mistakes and faults in the details of the revision, which under the circumstances had to be conceived and carried out in great haste. Such basic social problems as the drastic reform of an antiquated system of criminal procedure, however pressing they may become, cannot be perfectly solved at one stroke. But at least the spirit of the new Code is bold and its purpose lofty. Its reforms are based upon the needs revealed by Japanese history as well as upon legal ideas developed through centuries of experience in other lands, which have been adapted and integrated into the Japanese legal system. There is no doubt that its passage was a momentous step in the direction of human freedom and the rule of law in Japan.
