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CRIMINAL PROCEDURE IN JAPAN

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The present article was prepared after the model of Professor Fred E. Inbau's "Criminal Procedure in the United States" which had been translated and published in Germany as, *Das Strafverfahren in den Vereinigten Staaten von Amerika*, Juristenzeitung, Heft 19, S. 581-584 (1952). The author acknowledges the advice and assistance of Professor Inbau, Mr. Thomas L. Blakemore, Mr. Alexander D. Calhoun, Jr., Judge Tsugio Nakano, Judge Fumio Kurimoto, and Public Prosecutor Hisakazu Suzuki, in preparing this article for publication.—EDITOR.

I. INTRODUCTION

The procedure followed in a criminal case is the same for all of Japan. There is only one territorial jurisdiction and it is on a national level. The Code of Criminal Procedure of 1948 and the Rules of Criminal Procedure of 1949 are the principal sources of law governing criminal procedure. Since Japan is one of the civil law countries, case law has only a secondary significance.

As of 1957, criminal cases are handled by 570 summary courts, 49 district courts, eight high courts (courts of appeals), and the Supreme Court. There are also 49 juvenile courts whose special jurisdiction and procedure are provided for in the Juvenile Law of 1948.

Historically the Japanese law of criminal procedure is the result of a mixture of European and Anglo-American traditions of law. The so-called Old Code of Criminal Procedure of 1922 was based in its entirety on German law. The new code of criminal procedure of 1948 which was adopted under the New Constitution of 1946, is still based on the old law in its general scheme, but it also has largely and abruptly adopted Anglo-American devices to protect human rights.

In this article an effort has been made to describe briefly and simply Japanese criminal procedure with specific reference to those aspects of its functioning which should be of most interest to the lawyers, jurists, prosecuting attorneys, and police of other countries who have little or no knowledge of the criminal procedure of Japan.

II. PROCEDURE FROM ARREST TO TRIAL

(a) INVESTIGATING ORGANS:

The principal investigating organs are the police and public prosecutors. They cooperate and divide the work of investigation between them; the former collect

evidence in a crude form, whereas the latter refine and reinforce it from a legal standpoint. The public prosecutors also may give necessary general advice to the police or ask them to assist in their investigations. The police and the public prosecutors usually start their investigation on their own initiative, although private victims may file complaints with them. Investigation will be made with or without force depending upon the cooperation of the subject. Exercise of power upon persons or things of evidentiary value is generally subject to judicial control in the form of warrants for arrest or search and seizure.

(b) ARREST:

Generally, a warrant issued by a judge is necessary for an arrest. However, any person may arrest without warrant an offender who is committing or has just committed a crime in his presence. An investigating official also may arrest the suspect without warrant if he has sufficient grounds to believe that the latter has committed certain types of serious crimes and if, in addition, there is no time to procure a warrant. In this case a warrant must be procured soon after.

(c) PROCEDURE SUBSEQUENT TO ARREST:

If the police need to detain an arrested suspect, they must take him to a public prosecutor within 48 hours together with evidence showing reasonable grounds to support their suspicion of guilt. The public prosecutor who receives the suspect shall immediately inform him of the charges against him and of his right to the aid of counsel and shall give him an opportunity for explanation. The prosecutor will also make investigation to obtain further evidence supporting the suspicion of guilt. If the prosecutor finds that the detention of the suspect is both necessary and supported by reasonable grounds, he shall within 24 hours request a judge to issue a warrant for detention.

(d) TAKING BEFORE A DETENTION JUDGE

The public prosecutor then takes the suspect before a judge who is in charge of detaining arrested suspects. After giving the suspect an opportunity for explanation, the detention judge considers the evidence submitted by the public prosecutor and interrogates the suspect if necessary to decide whether or not there are reasonable grounds to support a suspicion of guilt. This procedure is closed to the public, and the suspect has no right to a public hearing. The suspect does have the right to the aid of counsel, if he can afford to obtain one. If the judge finds the detention both necessary and supported by reasonable grounds, he shall issue a warrant for detention. The detained suspect may request the judge to disclose the grounds for detention in open court.

(e) PUBLIC PROSECUTORS' INVESTIGATION AND ITS CONCLUSION

Ordinarily the maximum term of detention at this stage is 10 or 20 days. Public prosecutors are required to carry out their investigations within this period and to decide whether or not there is sufficient evidence to support the prosecution of the detained suspects. If they are convinced of the guilt of their suspects, they may file

an information with the court to open their prosecution. However even though they are convinced of the guilt of their suspects, they may nevertheless drop the prosecution by refraining from filing an information, if they find that such a course of action is called for by reason of the nature and circumstances of the crime, the environmental background of the suspect, or the possibility of his rehabilitation. A statistical survey of the Ministry of Justice revealed that as of 1955 (from January to Dec) in all of Japan in about 61% of all major cases in which the public prosecutors could properly open their formal¹ prosecution they exercised this discretionary power and refrained from prosecuting an information for one or more of the foregoing reasons.

Japan does not have any such system as the grand jury. Since 1948, however, she has had the *Kensatsu Shinsakai*, the Prosecution Investigation Committee or Inquest of Prosecution,² consisting of lay people chosen by lot from among ordinary citizens. The function of this body is to investigate and control in a democratic and advisory way the discretionary right of nonprosecution which has been given to the public prosecutors.

(f) INFORMAL PROCEEDINGS FOR MINOR CASES.

Public prosecutors may institute relatively informal criminal actions in the summary courts for minor crimes, provided that the defendants make no objection to these informal proceedings. The courts will consider and decide these cases summarily on documentary and real evidence submitted by the public prosecutors without opening public hearings and without receiving any evidence from the accused. In these proceedings, however, sentences heavier than a fine of 50,000 yen (approximately \$139) shall not be imposed. If the parties who are not content with the sentences summarily imposed demand formal trials within two weeks of receipt of notice of the sentences, the summary sentence will be set aside and the case will be prosecuted in ordinary proceedings.

Similarly, minor criminal cases involving traffic offences which shall be punished with fine of not more than 50,000 yen may be tried quickly in summary courts with the consent of the defendants. The courts will open public trials and render summary sentences pursuant to a simple and speedy procedure. The parties who are not content with the sentences imposed may demand formal trials within two weeks of the date of sentence.

III. SOME CONSTITUTIONAL GUARANTEES—COUNSEL, BAIL, AND PRIVILEGE AGAINST SELF-INCRIMINATION

Article 37 of the Japanese Constitution and Article 1 of the Code of Criminal Procedure guarantees a fair and speedy trial. Among the instruments for the implementation of this ideal the right to counsel, bail, and the privilege against self-incrimination are the most important.

Any suspect or defendant is entitled to the assistance of competent counsel. If defendant is unable to obtain counsel by reason of poverty or for some other reason,

¹ For informal proceedings in minor cases see the following section (f).

² See HOWARD MEYERS, *Comment: The Japanese Inquest of Prosecution*, 64 HARV. L. REV. 279 (1950).

the court shall assign counsel to him upon his request. An arrested suspect must be notified of his right to counsel. During investigation the suspect always has the right to counsel, although his voluntary waiver of this right does not impair the regularity of procedure. However, a court shall not open trial of a defendant prosecuted for certain serious offences which are punishable by a maximum penalty of death, life imprisonment, or imprisonment for not less than three years, without affording him competent counsel. In such a case the court sometimes must assign counsel on its own initiative.

A defendant is also entitled to be released on bail at his own request or at that of certain other persons specified by law except in certain special cases prescribed by law. A court may, if it deems proper, release a defendant on bail on its own initiative. There are no bail bonds or bondsmen in Japan and the defendant must deposit the required security with the court before obtaining his release. The defendant may also be released upon the personal guaranty of his friends or relatives and their promise to pay the amount which would otherwise be required to be deposited should the defendant violate his bail.

In a criminal trial no person shall be compelled to testify against himself. A defendant is incompetent as a witness, which means that he cannot be sworn as a witness even though he may be willing. He also has an absolute privilege of silence and the court may not consider his mere failure to answer some or all questions against him by invoking this privilege. The defendant may testify without taking an oath and this testimony will be considered by the court. Since he is not sworn, his false statement in court does not constitute the crime of perjury. (In this connection it may surprise Anglo-American lawyers to learn that in civil actions, while the parties can be sworn, should they give false testimony it would not constitute perjury since that crime is limited to apply only to witnesses.) However, the judge or the public prosecutor may, in a sense, cross-examine his statement, if he is willing to answer.

IV. TRIAL

(a) TRIAL COURTS AND THEIR ORGANIZATION:

Japan has had a jury trial law since 1923, although it has been suspended since 1943 for some practical reasons. Even prior to its suspension the right to jury trial was waived by defendants in 99% of the cases. They apparently valued the right to a review of the facts by the court of second instance which would be lost if jury trial were had. Moreover, in most cases the judge has been thought less strict than the jury. Thus, there is no jury system in operation to-day.

In minor cases the summary courts are trial courts of first instance. In relatively serious cases the district courts are trial courts of first instance. The high courts or the courts of appeals usually are trial courts of second instance; in cases concerning civil wars, however, they function as trial courts of first instance. A summary court consists of one trial judge, whereas a district court consists of one or three trial judges according to the gravity of the case it handles. A high court consists of three judges except in civil war cases where five judges constitute the court.

(b) PROCEDURE AT THE BEGINNING OF A TRIAL:

After the identification of the defendant by the court the public prosecutor reads a written information (indictment) which contains counts constituting the criminal charges made against the defendant. After being advised of the privilege against self-incrimination, the defendant is given an opportunity to state his opinion about the charge levied against him. He usually admits or denies the charge. His admission of guilt, however, does not enable the court to skip the fact finding process, although it will somewhat simplify its procedure.

(c) OPENING STATEMENT:

After the defendant and his counsel have stated their opinion with regard to the charge made against the defendant, the public prosecutor makes a kind of opening statement in which he outlines what he intends to prove. The purpose of this is to acquaint the court, the defence lawyer, and the defendant with the prosecution's allegation and its plan of proof so that they may follow the evidence as it is presented. However, in minor cases the prosecution usually skips this stage of procedure.

(d) INTRODUCTION OF EVIDENCE:

After the opening statement the prosecuting attorney produces the prosecution's evidence in the form of testimonial, documentary, or real evidence. The defendant is entitled to cross-examine witnesses against him. For this reason hearsay evidence will be excluded with some exceptions prescribed by law. At the early part of this stage the prosecution is prohibited from introducing into evidence the written confession of the defendant in order that the court may not be biased against him by an early introduction of his self-incriminating statement.

At the close of the prosecution's evidence the defendant may, if he wishes, present evidence to refute the prosecution's case. At the end of this process the prosecution usually presents official records showing prior convictions of the defendant, if he has any criminal history and the defence counsel usually presents testimonial or documentary evidence tending to prove that the defendant is a person of good character and background, or that a settlement has been made between the defendant and his victim by making restitution or reparation. Then, if both the prosecution and the defendant do not present any further evidence, the court will give each side an opportunity to make a closing argument.

(e) CLOSING ARGUMENTS:

In the closing arguments the prosecutor and the defence counsel each reviews and analyzes the evidence and attempts to persuade the court to render a favorable judgement. The prosecution must make a closing argument first. The prosecutor is specifically required to state his opinion about the facts to be found and the law to be applied to them. He also makes his recommendation of a proper punishment to be fixed by the court. After the closing arguments are completed, the defendant is given a final opportunity to state his opinion about his case. Then the court declares the fact finding process to be closed and fixes the date when judgement shall be pronounced.

(f) THE JUDGEMENT AND SENTENCE OF THE COURT:

Since Japan has no jury system in operation, the court consisting of a judge or judges is the sole trier of fact as well as being responsible for the application of the law to the facts as found by it. Rendering a judgement of conviction or acquittal and fixing the type and amount of punishment in a sentence are also the functions of the judge or judges constituting the court. Except in juvenile cases, sentences ordinarily will be pronounced in terms of a specified length of time or of a specified amount of money. Take, for instance, the example of a homicide case. The Penal Code of Japan provides that "a person who kills another shall be punished with death or imprisonment at forced labor for life or for not less than three years." Therefore, in a homicide case the judge has the discretion to fix the sentence at death or imprisonment for life or for any specific term of not less than three years. Within these limits the judge may impose a sentence of imprisonment at forced labor, for instance, for five years. And if there are any grounds for mitigation the judge may, for instance, pronounce a sentence that the defendant shall be punished with imprisonment at forced labor for three years and be put on probation for a certain period. When a fine is imposed the period of work-house detention, as substitute penalty in default of paying out the fine shall be fixed and pronounced in the same sentence. In such a case the wording of the sentence will be for example as follows: "The defendant shall pay a fine of 10,000 yen. If the defendant is unable to pay the fine in full he shall be detained in a work-house at the rate of one day for each 200 yen of the unpaid part of the fine".

When the court is convinced that there is sufficient proof against the defendant, the court will render a judgement of "guilty" by pronouncing a written sentence of a fixed punishment. In pronouncing the sentence the court is also required to indicate the facts constituting the offence, to enumerate the pieces of evidence supporting the guilty facts, and to explain the application of law justifying the judgement of "guilty". If the case is not punishable for some reason or if there is no sufficient proof of guilt, the defendant shall be pronounced "not guilty". Since the prosecution carries the burden of proof, if a prosecution fails to persuade the court to believe that the defendant has committed the offence, the principle "in dubio pro reo" requires the court to find the defendant "not guilty".

Even if it is mostly probable that the prosecution would be able to prove its case, the defendant may still be acquitted by a final judgement in the following instances: for example, when a final judgement has already been rendered on the same case, or when the provision of criminal law on which the defendant's alleged crime is based has been abolished by a law which becomes effective subsequent to the commission of the offence, etc. . . A criminal action also shall be dismissed by a final judgement in the following instances: for example, when a court has no jurisdiction over the defendant, or when another criminal action has been brought on the same case, etc. . . Furthermore a criminal action shall be dismissed by a ruling of the court in some instances as when a criminal charge, even if true, does not contain any facts constituting an offence, or when the defendant has died, or being a corporation, has ceased to exist, etc. . .

IV. THE APPEAL

After final judgement has been pronounced by a trial court of first instance, the party who is not content with it may, within the period prescribed by law, appeal to a high court as the reviewing court. It must be noted that the prosecution may take an appeal from a judgement of the trial court which the prosecution finds too lenient or from a judgement pronouncing the defendant not guilty. In this sense it may be said that there is no constitutional protection from "double jeopardy". The reviewing court will examine the written record of what happened at the trial court, and will consider the written and oral arguments of both the defense attorney and the prosecutor. The court may, or sometimes must, hear additional evidence in order to make a better decision. After reviewing the judgement below with respect to both its factual and legal conclusions, the court will render a written decision and opinion, which will either reverse or affirm the judgement below and state the reasons for whichever it does. The court affirms the judgement below by dismissing the appeal which has been taken from it.

A decision reversing the judgement below ordinarily means that some procedural or substantial irregularities constituting reversible error were found in the procedure below, or that there was no sufficient evidentiary basis to support the original judgement. Sometimes the reviewing court will reverse the original judgement and remand the case to another trial court of first instance; sometimes it will reverse the judgement and make a decision of its own. In the latter case no penalty heavier than that imposed by the original sentence shall be pronounced, if the appeal was taken by, or for the benefit of the defendant only. If a case has been remanded to a new court of first instance, that court will conduct a new trial and render a new decision. However, since the decision of the reviewing court binds the trial court to which the case has been remanded, the trial court cannot render a decision inconsistent with the decision of the reviewing court.

A decision of the reviewing court reversing or affirming a judgement below is not, however, a final disposition of the case. Under certain conditions as prescribed by law an appeal may be taken to the Supreme Court. For instance, if the judgement of a high court is alleged to violate the principles of the constitution or to be inconsistent with precedents established by the Supreme Court or its predecessors it may be appealed to the Supreme Court.

Generally, judgements must be final judgements in order that an appeal may be taken from them. Errors in the procedure below can be pointed out only by challenging the final judgement based upon those errors. Under certain conditions, however, a minor appeal or "kokoku" can be taken to a reviewing court from a ruling made by a trial court of first instance. In such cases no further appeal is permitted from the ruling made by the reviewing court. A special minor appeal may be taken even from those rulings or orders from which no appeal is ordinarily permitted, but only if it is made on the grounds that the rulings or orders violate the principles of the constitution or are inconsistent with precedents of the Supreme Court or its predecessors.

A decision of the Supreme Court or that of a high court from which no appeal is made or permitted is a final disposition of the case and puts an end to the controversy

between the parties. If a judgement has not been finally reversed, after a certain time it becomes "binding" and the parties must submit to it, unless recourse can be had to one of the extraordinary remedies outlined in the following section.

V. EXTRAORDINARY REMEDIES

Even after the decision of a court has become finally binding, it is possible to have it revised or set aside by means of some extraordinary remedies. One of these extraordinary remedies is called an extraordinary new trial or "Sai Shin". A public prosecutor, or the defendant who has been pronounced "guilty", or his relatives within a certain degree may request an extraordinary new trial for the benefit of the defendant against whom a judgement of "guilty" or a judgement dismissing an appeal has become finally binding, in certain cases prescribed by law, as, for instance, when documentary or real evidence or oral testimony, on which the original judgement was based, have been proved by another finally binding judgement to have been forged or altered, or when clear evidence on which the defendant should have been found "not guilty" or acquitted is newly found. Request for an extraordinary new trial shall be made to the court which rendered the original judgement. If the court finds good cause shown for the request, it shall render a ruling for commencing an extraordinary new trial. When the ruling for a new trial has become finally binding, the court shall open a trial anew or reopen a reviewing procedure according to the nature of the original procedure. In the extraordinary new trial no penalty heavier than that pronounced in the original sentence shall be imposed.

Another extraordinary remedy is called the extraordinary appeal or "Hijo Jokoku." When, after a judgement has become finally binding, it is discovered that the procedure or judgement of the case was in violation of law, the Procurator-General may file an application for an extraordinary appeal with the Supreme Court. When an extraordinary appeal is considered to be well-founded, judgement shall be rendered in accordance with the following: (1) When the original judgement was in violation of law the part in violation of law shall be quashed; however, if the original judgement was disadvantageous to the defendant, it shall be quashed and a new judgement shall be rendered; (2) When any procedure was in violation of law, the procedure in violation shall be quashed. The effect of the judgement in an extraordinary appeal, except for the judgement quashing the original judgement disadvantageous to the defendant, is as it were academic and does not change the status of the defendant in any way but merely sets the court's record straight.

VI. PROBATION

Whereas probation in Anglo-American tradition takes the form of a suspended sentence, i.e. the suspension of the imposition of the sentence itself; probation under the Japanese system takes the form of a suspension of the execution of the sentence. The Code of Criminal Law provides, in the main, the following prerequisites for suspending the execution of a sentence: (1) the sentence shall not exceed imprisonment for three years or a fine of 50,000 yen; (2) favorable circumstances for the defendant; (3) no prior sentence of imprisonment in the last five years, or (4) a sentence

of imprisonment for not more than one year whose execution has been suspended, plus especially extenuating circumstances. As a condition to the granting of probation the court will often ask the defendant to make restitution of money stolen or to make other reparation to the injured person. When a defendant is allowed probation for a second time as under item (4) above, the probation will be granted only on the condition that the probationer be placed under the supervision of a probation officer. It should be noted here that in ordinary adult probation no supervision by the probation officer is required, although the court may order supervision if it deems such a step proper. This differs from the Anglo-American system in which the concept of probation generally implies the supervision by a probation officer. However, juvenile probation, which is a protective device under the Juvenile Law, requires the protection and supervision of a probation officer.

In granting probation the court must fix the period during which the defendant is required to remain on good behavior. If he is convicted of another crime during this period, the suspension of execution of the sentence may or must be revoked and the sentence will be carried out. When the period of probation has elapsed without being revoked, the pronouncement of sentence will lose its effect.

VII. RELEASE ON PAROLE

A sentence of imprisonment for a specified term or number of years does not necessarily mean that the convicted person will remain in the prison for the whole of that particular period of time. Under certain conditions and circumstances he may be released on parole, by which is meant a provisional release under supervision until the expiration of the period fixed by the sentence. If the person sentenced to imprisonment appears to have learned his lesson, a parole commission may release him on parole under certain conditions and circumstances. A convicted person is entitled to be released on parole, after he has served one third of the specified number of years of imprisonment, or after ten years if he was sentenced to life imprisonment. A juvenile who has been given an indeterminate minimum-maximum sentence under the Juvenile Law is eligible for parole after he has served one-third of the minimum term. A violation of the conditions of the parole will subject the parolee to possible return to prison for the remainder of his unexpired sentence.

VIII. CRIMINAL PROCEDURE FOR JUVENILES

The "Juvenile Law" of Japan established the procedure for the juvenile court as a section of the family court apart from the system of regular criminal courts. Juvenile delinquents under twenty years of age, including any juvenile "of whom there is apprehension that he may commit a crime or violate a criminal law or ordinance in view of his character or environment" and who shows such symptoms as disobedience to his parents; frequently staying away from home without good reason; mixing with delinquent or immoral persons; frequenting immoral places; or showing a disposition to engage in morally harmful behavior, shall be sent by the public prosecutor to the juvenile court, and investigated and tried there. Investigation and trial by the court shall be carried out entirely on a diagnostic and therapeutic basis. The court is equipped with a staff of juvenile investigators who are trained as social

workers. "In making investigations . . . every effort is required to make efficient use of medical, psychological, pedagogical, sociological and other technical knowledge, especially the result of classification conducted by the Juvenile Detention and Classification Home in regard to their conduct, life history, disposition, and environment. . . ." The trial shall be conducted in a mild atmosphere with warm consideration for the welfare of the juvenile delinquent. It is closed to the public. Newspapers or other publications for social communication are prohibited from reporting the cases of juvenile delinquents in such a manner as to allow the public to identify them.

According to the philosophy underlying the Juvenile Law, juvenile delinquents should not be punished, but educated and rehabilitated as sound citizens. Therefore the primary purposes of the investigation and trial by the juvenile court are (1) placement of the juvenile delinquents on probation under the supervision and protection of probation officers, (2) commitment of them to an educational or medical institute, (3) and commitment of them to reformatories. Theoretically, it is expected that criminal disposition will be exceptional. The court may refer the case of a juvenile delinquent to the public prosecutor only if it finds it reasonable to punish the youthful offender. When the case is sent back, the public prosecutor will prosecute the offender in an ordinary criminal court, in the same manner as he prosecutes ordinary adult offenders. However, even in such cases juveniles are generally punishable only by indeterminate sentences, and no juvenile offender under 18 years of age when committing a crime shall be punished with the death penalty. It must be noted, also, that no juvenile offender under 16 years of age shall be sent to the public prosecutor for criminal prosecution.