

## **CHAPTER 3 PRE-TRIAL CRIMINAL PROCEDURE**

### **I. INTRODUCTION**

The procedure followed in a criminal case is the same throughout Japan. There is only one territorial jurisdiction and it is on a national level. The Code of Criminal Procedure of 1948 (hereinafter CCP) and the Rules of Criminal Procedure of 1949 are the principal sources of law governing criminal procedure.

### **II. CONSTITUTIONAL SAFEGUARDS**

Most of the rights of an individual regarding criminal investigation and court trial are protected by the Constitution. Article 31 provides that “no person shall be deprived of life, or liberty, nor shall any other criminal penalty be imposed, except according to procedure established by law,” while Article 33 states that “no person shall be arrested except upon warrant issued by a competent judicial officer, which specifies offences with which the person is charged, unless he is arrested in the commission of the offences”. Further, as prescribed in Article 34, “no person shall be detained or confined without being at once informed of the charge against him or without the immediate privilege of counsel. Nor shall he be confined 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 provides for the protection of one’s residence and property, stating “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”.

As for the trial proceedings, Article 38 establishes that “no person shall be compelled to testify against himself,” and that a “confession made under compulsion, torture, or threat, or after prolonged detention or confinement shall not be admitted in evidence”. It further provides that “no person shall be convicted or punished in cases where the only proof against him is his own confession”. As for the protection of some of the basic rights of the individual who is facing a criminal trial as an accused, there is Article 37 which provides that “in all criminal cases, the accused shall enjoy the right to speedy and public trial by an impartial tribunal”, and that “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”. It further provides that “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”. According to 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 finally acquitted, nor shall he be placed in double jeopardy”.

Finally, where a person is detained or confined and later found to be not guilty of charges made against him/her, there is Article 40 regarding State indemnity which provides that “any person, in case he is acquitted after he has been detained or confined, may sue the State for redress as provided by law”.

### III. PROCEDURE FROM ARREST TO TRIAL

#### A. Investigative Agencies

In Japan, public prosecutors, as well as the police, are authorized to conduct investigations, although in many cases the police have the first and primary responsibility for criminal investigation. Actually most criminal cases (over 99 percent) are initially investigated by the police and other judicial police officers. Once the police investigate a case, they must refer it to a public prosecutor together with documents and evidence, even when the police believe evidence is insufficient. The police have no power to finalize cases, except for minor types of disposition designated by a public prosecutor.

#### B. Investigation Process

##### 1. Outline

Since the Japanese system is unlike some countries where an arrest is a prerequisite for prosecution, the police and public prosecutors conduct investigation and prosecution on a voluntary basis as much as possible. Although investigators arrest suspects in serious cases, even in such cases, they collect as much information as possible before arresting them and carefully examine the necessity of arrest, considering the suspect's age and surroundings, the probability of flight and destruction of evidence. The procedure after arrest is as follows:

- (1) When the police arrest a suspect, they must refer the suspect with documents and evidence to a public prosecutor within 48 hours otherwise they must release him/her.
- (2) Unless the public prosecutor releases the suspect or prosecutes the suspect, the public prosecutor must ask a judge for a pre-indictment detention order within 24 hours after receiving him/her.
- (3) The pre-indictment detention period is 10 days. The public prosecutor may ask a judge for an extension of the detention for up to 10 days, if necessary.
- (4) The public prosecutor must release the suspect by the termination of the detention period unless prosecution is initiated.

##### 2. Arrest

In principle, no one may be arrested without a warrant issued by a judge. Enough probable cause must exist to believe that the suspect committed the alleged offence. Police officers designated by law as well as public prosecutors are authorized to directly ask a judge to issue an arrest warrant. Japan does not recognize the so-called "cognizable offence" that permits the arrest of a suspect without warrant. However CCP provides two exceptions as follows:

- (1) *Flagrant Offence*: Any person may arrest, without a warrant, an offender who is committing or has just committed an offence; or
- (2) *Emergency Arrest*: "When there are sufficient grounds to suspect the commission of an offence punishable by the death penalty, or imprisonment for life or for a maximum period of three years or more, and if, in addition, because of great urgency a warrant of arrest cannot be obtained beforehand from a judge, a public prosecutor, a public prosecutor's assistant officer or a judicial police official may, upon statement of the reasons therefore, apprehend the suspect." In this case, the procedure for obtaining an arrest warrant from a judge shall be taken immediately thereafter. If the warrant is not issued, the suspect must be released at once.

After arresting a suspect, the police must immediately inform him/her of the alleged offence and the right to hire a defence counsel, as well as give the suspect an opportunity to explain about the alleged offence. The police refer the suspect with documents and evidence to a public prosecutor within 48 hours otherwise they must release him/her.

After receiving the suspects, the public prosecutor must immediately inform them of the alleged offence and the right to hire a defence counsel, as well as give the suspect an opportunity for explanation about the alleged offence. This is a public prosecutor's first and most important interview with a suspect because the prosecutor examines and screens the case, taking into consideration the suspect's viewpoint and decides upon the necessity of pre-indictment detention.



Public Prosecutor's Interview (moot)

### 3. Pre-Indictment Detention

If the public prosecutor deems pre-indictment detention necessary, the public prosecutor must ask a judge for a pre-indictment detention order within 24 hours after receiving the suspect, and within 72 hours after the arrest, otherwise the public prosecutor must release the suspect. The power to ask a judge for a detention order is vested only in a public prosecutor. If a public prosecutor arrests a suspect, the same procedure must be followed within 48 hours after the arrest. The judge asked to provide the detention order reviews all documents and evidence, and interviews the suspect to afford them the opportunity to explain the alleged case. The judge may order the suspect's detention for 10 days if there are reasonable grounds to believe that the suspect has committed the offence, and

- (1) the suspect has no fixed dwelling;
- (2) there are reasonable grounds to believe that the suspect may destroy evidence; or
- (3) there are reasonable grounds to believe that they may attempt to escape.

Otherwise, the judge must dismiss the application. In practice, it is granted for the most part since the police and public prosecutors carefully screen suspects to be arrested or detained.

When an extension of detention is requested by a public prosecutor, a judge examines all the documents and evidence without interviewing the suspect. When there is an indispensable necessity, the detention can be extended up to 10 days, including weekends and national holidays. A suspect's maximum term of custody before indictment is consequently 23 days<sup>15</sup>. By the termination of the detention term, a public prosecutor should decide whether to prosecute or release the suspect.

Furthermore, a suspect is in many cases detained in a police jail, which is substituted by the Prison Law for a detention house, during the above-mentioned period, even after referral to a public prosecutor. It is a judge who orders the detention of a suspect in a police jail during a pre-indictment detention period, taking into consideration the capacity and man powers of a detention house, its location and facilities for travel, necessity of investigation, interests of the suspects etc..

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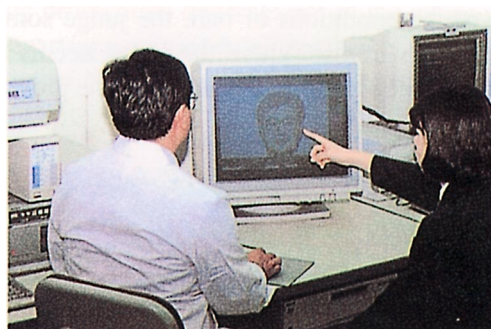
<sup>15</sup> CCP Article 208-2 provides a further 5-day extension for the crimes related to insurrection.

#### 4. Collection of Evidence

Typical investigative measures include scientific investigations, such as examination of blood, fingerprints, hair, voice and handwriting, which are fully utilized for identifying the suspect. Undercover operations, as an investigative measure, is provided for by the law for the investigation of crimes related to drugs and gun trafficking.



Fingerprint Identification



Photographic Identification

Unlike the Common Law countries, “evidence” in Japan sometimes means not only real evidence but written statements taken by investigators, unless the differences between both are intentionally stressed. Although investigators collect as much real evidence as possible, it is indispensable to collect witnesses’ statements (explaining the meaning of such real evidence) to find the truth. Written statements are made in the following way. Investigators interview witnesses or suspects, then they prepare a written statement based on what he/she said. After the investigators precisely read the statement to him/her and he/she agrees with the content, he/she is requested to sign on the line after the last sentence to guarantee the voluntariness and veracity of the statement.

CCP Article 198 is interpreted that a suspect under arrest/detention is obligated to appear before an investigation official to be questioned when requested.

#### 5. Defence Counsel’s Communication with the Suspect

The suspect under physical restraint is allowed to see their defence counsel or the person who is to become their defence counsel, and to receive from and/or hand over to such a person any documents or articles without the presence of a guard.

#### 6. Bail

During the pre-indictment detention period, no suspect is entitled to bail, but they may be bailable after indictment upon request of the defendant, their relatives, or counsel. However, bail may be denied where legitimate reasons can be found in cases where:

- (1) the defendant has been charged with an offence punishable by imprisonment for a minimum period of one year or more,
- (2) the defendant was previously convicted of an offence punishable with death penalty, or imprisonment for life or for maximum period of more than 10 years,
- (3) the defendant has habitually committed an offence punishable with imprisonment for maximum period of 3 years or more,
- (4) there is reasonable ground to believe the defendant may destroy evidence,
- (5) there is reasonable ground enough to believe that the defendant may injure the body or damage the property of the injured party or some other persons who is considered as having knowledge necessary for trial of the case, or may commit a threatening act towards them, or

- (6) the name or dwelling of the defendant is unknown.

Judges may not deny bail simply because they believe the defendant is likely to commit more crimes if released.

Before making the bail decision, the judge commonly hears opinions from both defence counsel and prosecutor, and may also interview persons who will guarantee the appearance of the defendant at the trial. As one of the conditions of bail, the judge sometimes orders the defendant not to contact co-defendants, witnesses, or victims. Where the judge deems bail appropriate, he/she then fixes the conditions of bail, including the amount of bail bond. Both the prosecutor and the defendant may appeal the initial bail decision.

## **C. DISPOSITION OF CASES**

### **1. Initiation of Prosecution**

There are two main forms of prosecution: formal and summary. If the case is serious and the suspect deserves a penalty of imprisonment or death, the prosecutor indicts the suspect for formal trial even if he/she admits his/her guilt. The prosecutor utilizes summary procedures when the suspect deserves a fine not exceeding ¥500,000, admits his/her guilt and accepts a monetary sentence. In general, minor offences, such as traffic violations or bodily injury through professional negligence, are dealt with through this system. However, in cases for example where a suspect accused of assault or bodily injury admits his/her guilt and compensates the victims' damage, summary procedure is also utilized. Alternatively, to indict, a public prosecutor must submit a bill of indictment to the court, identifying the defendant (usually by showing the permanent domicile and present address, their name and date of birth), showing the offence charged and the facts constituting such offence.

### **2. Monopolization of Prosecution**

#### *a) Principle*

Public prosecutors have the exclusive power to decide whether to prosecute. Japan does not have a system of private or police prosecution; nor a grand jury or preliminary hearing system conducted by judges. In other words, the court cannot recognize any crime unless public prosecutors prosecute. This system is called "Monopolization of Prosecution".

#### *b) Exception to the Monopolization of Prosecution*

The sole exception is called the system of "Analogical Institution of Prosecution through Judicial Action" or "Quasi-Prosecution". This system purports to protect the parties injured by crimes involving abuse of authority by public officials. A person, who has made a complaint or accusation and is not satisfied with the public prosecutor's decision not to prosecute, may apply to the court to order the case to be tried. The court, after conducting hearings, must either dismiss the application, or order the case to be tried if well-founded. If the application is granted, then a practicing lawyer is appointed by the court to exercise the functions of the public prosecutor.

### **3. Non-prosecution**

#### *a) Insufficiency of Evidence*

It is natural that public prosecutors should not prosecute a suspect without sufficient evidence. The criterion of whether to prosecute based on "probable cause", "beyond reasonable doubt" or other standards, differs from country to country. Japanese laws do not clearly mention this. However, there exists a burden of proof to be met by public prosecutors, and one of the public prosecutors' functions is to request the proper application of the law by the court. To abide by the laws faithfully, the criterion should be the same as that of the court, that is, "beyond reasonable doubt." In practice, public prosecutors decide non-prosecution based on insufficiency of the evidence under this criterion.

*b) Suspension of Prosecution*

One of the most unique characteristics of Japanese criminal procedure is that public prosecutors can drop cases even when there is enough evidence to secure a conviction. This is called “Suspension of Prosecution”. This wide discretionary power granted to public prosecutors has a significant role in encouraging suspects’ rehabilitation. The concept of discretionary prosecution contrasts with that of compulsory prosecution. The latter concept requires that prosecution always be instituted if there are some objective grounds for the belief that the crime has been committed by the suspect, and if the prerequisites for prosecution exist. This prevents arbitrary decisions by public prosecutors and vagaries in the administration of criminal justice. On the other hand, the system of discretionary prosecution is advantageous in disposing of cases flexibly according to the seriousness of individual offences and the criminal tendency of each suspect, and in giving them the chance to rehabilitate themselves in the society.

Adhering to CCP Article 248, public prosecutors must consider the following factors concerning the suspect and the crime:

- (1) The offender’s character, age, situation, etc. Generally, youths or the aged, having no or insignificant prior previous criminal records, or having had a difficult childhood may be extenuating circumstances for offenders;
- (2) The gravity of the offence;
- (3) The circumstances under which the offence was committed. For example, the motivation of the offence, and whether or not and to what extent the victim had fault in provoking the offence; and
- (4) Conditions subsequent to the commission of the offence. For example, whether or not and to what extent compensation for damages is made; whether or not the victim’s feelings are remedied; settlements between both parties; the influence to the society; and whether or not the offender repents commission of the offence.

Among the above factors, the important factors which a suspect can do after commission of a crime for suspension of prosecution are compensation and remedy of the victim’s feelings. Thus, a suspect’s family, employer, the suspect’s attorney and other related persons try to compensate, in many cases, as much as possible to avoid indictment.

4. Notification Program to Victims

In CCP, a public prosecutor should promptly notify the complainant, accuser or claimant of the result of the disposition. In particular, on request of the complainant, accuser or claimant, a public prosecutor should inform the reasons that the cases were not prosecuted, for instance “suspension of prosecution”, “insufficiency of evidence” etc. In addition, the Notification Program to Victims was launched on 1 April 1999.

When the victims, a bereaved family or witnesses desire the notification, a public prosecutor shall inform in word or writing as follows;

- (1) the disposition of the case (e.g. prosecution for the formal trial, prosecution for the summary proceedings, non-prosecution or referral to the family court),
- (2) in prosecuted cases, the name of the court and the date of the trial,
- (3) the result of the judgement, sentencing, whether to appeal to higher court,
- (4) the summary of the prosecuted offences, the heading and the summary of the non-prosecution, whether to detain, bail etc.

5. Inquest of Prosecution (Prosecution Review Commission)

This system’s purpose is to maintain the proper exercise of the public prosecutors’ power by

subjecting it to popular review. There is an Inquest Committee in each district court, which consists of 11 members selected from among persons eligible to vote for members of the House of Representatives of the Diet. It is empowered to examine the propriety of decisions by public prosecutors not to institute prosecution. The Inquest Committee must conduct an investigation whenever it receives an investigation request from an injured party or a person who made a complaint or accusation. In some instances, the Committee can carry out investigations on its own initiative, and is competent to examine witnesses in the course of the investigation.

The Committee then notifies the Chief Prosecutor of the District Public Prosecutors Office of its conclusion. If the non-prosecution is concluded as improper by the Committee, the Chief Prosecutor orders a public prosecutor of the office to further investigate the case and to re-examine the original disposition. After the re-investigation and re-examination, the public prosecutor in charge must ask for the approval of the Superintending Prosecutor before making the final disposition. Although the Committee's verdict is not binding upon the prosecutor, it is highly respected in the re-investigation process. Since Japan does not have a jury system and private prosecution system, "inquest of prosecution" allows the public to participate in criminal justice administration.

#### 6. Hansoku-kin (Pecuniary Penalty against Traffic Infractions) Procedure

The "Hansoku-kin" (traffic infraction fine) system is a procedure under which a person who commits certain minor offences in violation of the Road Traffic Law is exempted from criminal punishment by paying a sum of money fixed by law as an administrative disposition. Payment is made at a post office or certain other banking institutions when the offender receives a notice (Kokuchi) or notification (Tsuukoku) from a police official about the offence. A person who is in violation of certain minor offences of the Road Traffic Law is first given a violation ticket (notice) by a police official (usually on the spot). This ticket describes the nature of the violation, the police station to which he/she should report at a later date and the sum of money equivalent to "Hansoku-kin", etc. There are two ways of paying "Hansoku-kin":

- (1) Payment at a post office or certain other banking institutions within one week after the date of receipt of the violation ticket (an extra day is added if the last day of the week falls on Sunday or a national holiday). This system is called provisional payment. If the violator follows this procedure, he/she is not required to report to the police station.
- (2) Payment at a post office or certain other banking institutions within the period of time mentioned in the written notification (within 10 days after the date of receipt of the notification), which the violator receives from a senior police official. The above notification is given to the violator when he/she does not make the provisional payment under (1) above but reports to the police station as designated by the violation ticket.

If violators fail to pay "Hansoku-kin", they are to be dealt with under regular criminal procedure and are subject to criminal punishment by the court.