

LEGAL FRAMEWORK AND PRACTICES RELATING TO TRANSPORTATION ACCIDENTS IN JAPAN¹

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I. INTRODUCTION

This paper provides Japan's experience in dealing with transportation accidents which normally involve scientific and technological issues, complicated and controversial issues, as well as accidents that cause great damage to people, property and the environment, from the perspective of Japan's legal system and practices. Identifying the causes of such cases contributes to establishing countermeasures and preventing future accidents. In doing so, there are several approaches: administrative investigation, administrative disciplinary action and criminal punishment.

¹ The views expressed in this paper are solely those of the author, and are neither those of the government of Japan nor other official entities, including UNAFEI.

Before discussing the relevant issues, I would like to point out some characteristics of the Japanese justice system in order to avoid possible misunderstanding. This is because academics and practitioners tend to view legal issues from the perspective of their own legal systems and practices. To some extent, this habit cannot be helped, but it often leads to misunderstanding. In particular, points “A.”, “E.”, “D.” and “I.” below are different from the Korean justice system.

[Appendix, slide No. 2]

- A. Public prosecutors have the authority to conduct investigations in cases referred by the police as well as to initiate investigations by themselves. Prosecutors and the police both have the power to conduct investigation, unlike the Korean system in which prosecutors have the investigative authority and direct police investigation from the perspective of legal theory.
- B. Japan does not have a system of private or police prosecution, nor does it have grand juries or preliminary hearings conducted by judges.
- C. Public prosecutors have discretion to drop cases even when the evidence is sufficient to secure a conviction. Although this disposition is called “suspension of prosecution”, in practice it is identical to non-prosecution. Many factors are taken into account, especially compensation to victims and the possibility of the suspect’s rehabilitation without formal punishment.
- D. Instead of private prosecution, the Prosecution Review Commission, which consists of ordinary citizens, reviews prosecutors’ non-prosecution decisions, and the Commission has the authority to bring such cases to the court under specific conditions.²
- E. All cases (criminal, civil and administrative) are handled by professional judges³; serious cases are tried by a three-judge panel and others by a single judge. One exception is the recent adoption of the lay judge system in 2009, which added lay judges to the panels of judges who handle certain serious “criminal cases”.
- F. No punitive damages in civil cases are allowed because they contradict with the Japanese legal system as a whole, specifically from the perspective of the distinction between criminal liability and civil liability.
- G. Neither immunity nor plea-bargaining is allowed.
- H. The standard of proof at criminal trial is “beyond a reasonable doubt.” “Preponderance of evidence” is not enough to convict. Moreover, prosecutors bear the burden of proving all material elements of the crime, including both *actus reus* and *mens rea*. In practice, prosecutors are very careful to ensure

² See section V.B., below.

³ However, this was not the case for the period from 1928 to 1943.

- that the evidence meets this standard before they decide to prosecute
- I. Hearsay evidence is not admissible in criminal cases in principle. A statement before a prosecutor or a police officer may be admissible under rigid conditions concerning necessity and credibility. In civil cases, the hearsay rule is not applied, so the credibility of any statements and evidence becomes an important issue.
 - J. Each party is entitled to appeal to a higher court to contest fact-finding, the judgement (including acquittal) and sentencing.

II. A BRIEF HISTORY OF LEGAL FRAMEWORK DEVELOPMENT

A country's legal or justice system is rooted in its own culture, tradition and social environment. A Japanese saying from the 1880s, "A legal system in one country is the result from its own history . . .", is correct in this sense. Although many countries have adopted global standards in certain fields, developed unified law enforcement strategies and share many common values, the legal and justice fields still face many challenges in doing so. However, due to the rapid development of transportation, science, technology, information and communications technology, etc., serious cases resulting in significant and unexpected damage take place, and the causes of these tragedies are unprecedented to society, including law enforcement officers, in size and scope. Thus, law enforcement and judicial officers have to manage such cases by considering legal frameworks recognized in the international community. Like other countries, the Japanese legal framework responding to transportation accidents also has gradually developed by learning through past experiences.

[Appendix, slide 3]

A. Marine Accidents

In most countries, technology has resulted in mass transportation, developing from vessels to railways to aircraft. The history of the Japanese legal system relating to transportation accidents started in dealing with marine accidents. In this field, Japan experienced three stages to date.

1. 1897 – 1947

The Act on Disciplinary Action of Seamen was the first law in this field, which stipulated both substantive provisions of seamen's negligence and misconduct and procedural provisions for disciplinary action against seamen. Based on the

provisions of the Act, the Disciplinary Action Tribunal⁴ of Seamen was established in 1897, which was under the Ministry of Communications (*Teishinsho*). Since vessels played a key role in transportation, illegal conduct or misconduct of seamen caused great harm to society. The Act and the tribunal system, however, aimed mainly to reprimand seamen with little attention to the prevention of future accidents. This legal system lasted for 50 years until the end of the World War II. In 1935, the International Convention for the Safety of Life at Sea of 1929 (SOLAS⁵) came into effect in Japan after the enactment of the Ship Safety Act in 1933.

2. 1947 – 2008

Taking advantage of the present Constitution (which entered into force in 1947), the Act and the tribunal system mentioned above were replaced with the Marine Accident Inquiry Act in accordance with related acts such as the National Government Organization Act (1948) and the Department of Transportation Establishment Act. The Japan Marine Accident Inquiry Agency (JMAIA) was established in 1949 as an internal organ of the Ministry of Transportation (MOT, *Unyusho*).

JMAIA had two general functions: an administrative function as a governmental regulatory body, and a quasi-judicial function when administrative action was to be taken against seamen. Its proceedings were similar to criminal court proceedings to some extent. The latter function, in regard of the quasi-judicial function, was tied to the previous act, but its procedures were significantly reformed. The new procedures included prudent reforms such as requiring marine investigators to file documents as a condition for convening a tribunal, securing the right for the accused, that is, the examinee, to hire a counselor, provided for examination of evidence at an open hearing, required the verdict to be based on the evidence, etc. All of these reforms were similar to criminal court proceedings to some extent. This quasi-judicial system was adopted because marine accidents occur for multiple and complicated reasons, such as natural conditions, scientific and technological issues, professional negligence of seamen, etc. The system was designed to ensure careful determination of the causes of marine accidents and to ensure that appropriate administrative action was taken against the examinee.

⁴ The word “tribunal” in this paper is used for quasi-judicial organs other than ordinary courts, adjudicatory bodies deemed as administrative courts. The present Japanese Constitution does not allow any “special courts” established outside of the ordinary court system (the judiciary). Full judicial power is vested in the Supreme Court and in such inferior courts as are established by law.

⁵ See International Maritime Organization (IMO) website:

<http://www.imo.org/en/About/Conventions/ListOfConventions/Pages/International-Convention-for-the-Safety-of-Life-at-Sea-%28SOLAS%29%2c-1974.aspx>

In cases where disciplinary action was taken against an examinee, the examinee was entitled to appeal to the high tribunal in Tokyo. If the examinee disagreed with the ruling of the higher tribunal, the examinee had the right to appeal to the Tokyo High Court of the judiciary, and then to the Supreme Court. This was because Article 76(2) of the Constitution states that “*No extraordinary tribunal shall be established, nor shall any organ or agency of the Executive be given final judicial power*”. JMAIA was an organ of the Executive, meaning that its decision could not be final.

However, the main purpose of inquiring into the causes of marine accidents is to prevent similar accidents in the future by proposing recommendations, irrespective of professional negligence of seamen. A criticism arose in the early 2000s, that is, JMAIA’s authority to impose administrative sanctions might have conflicted with identifying the true causes of marine accidents.

3. 2008 to Date

The JMAIA’s dual nature lasted until the establishment of the Japan Transport Safety Board (JTSB) in 2008, which has taken over the administrative function of JMAIA. At the same time, the Japan Marine Accident Tribunal (JMAT), newly established under the Ministry of Land, Infrastructure, Transport and Tourism (MLIT), has succeeded merely to the quasi-judicial nature of JMAIA. In the same year (2008), the International Maritime Organization (IMO) adopted a resolution (effective in January 2010), as authorized by the SOLAS Convention, to include the Casualty Investigation Code (separating the regulatory function and the disciplinary function). JMAT is now “*to perform a disciplinary action on a marine technician, a small craft operator, or a pilot who causes a marine accident intentionally or negligently in the course of duties, thereby contributing to [the prevention of] occurrences of such accidents*”. (Act on Marine Accident Inquiry article 1).

Under the new system of JMAT, the previous high tribunal was abolished so that in cases where an examinee disagrees with JMAT’s decision, the examinee has the right to appeal to the Tokyo High Court of the judiciary, and then to the Supreme Court.

B. Aircraft and Railway Accidents

Japan experienced several railway accidents involving many victims since 1922, but Japan dealt with such accidents by formulating ad hoc inquiry committees. On the other hand, the legal system dealing with aircraft accidents has developed. Although the legal system responding to marine and aircraft accidents is often discussed in the international community, railway accidents, in contrast, are generally domestic issues. This difference may contribute to the development of

the legal system in dealing with aircraft accidents. In fact, in the marine field, the SOLAS Convention of 1948 contained provisions relating to inquiries into marine accidents; JMAIA was established in the following year. In the aircraft field, Japan joined the International Civil Aviation Organization (ICAO) in 1953, which had its basis in the Convention on International Civil Aviation, known as the “Chicago Convention”.

However, the actual trigger to establish the legal system responding to such accidents was the occurrence of two tragic aircraft accidents in July 1971.⁶ These accidents were investigated by ad hoc committees to probe into the causes. In response to the ad hoc committees' reports and public opinion, which strongly proposed setting up an appropriate system for inquiring into the causes of aircraft accidents and preventing such accidents, the Aircraft Accidents Investigation Commission (AAIC) was established in 1974, following the enactment of the Act on the Establishment of the Aircraft Accidents Investigation Commission of 1973.

In 2001, the AAIC was reorganized as the Aircraft and Railway Accidents Investigation Commission (ARAIC), expanding its scope to include the investigation of railway accidents. This was again because of the occurrence of major railway accidents in 1991, 2000 and 2005.⁷

After the derailment of a JR-West passenger train on the *Fukuchiyama* Line in April 2005, a supplementary Diet resolution in the 2006 amendment of the related laws expanded ARAIC's authority to investigate causes of accidents and propose recommendations for the purpose of mitigating harm caused by aircraft and railway accidents, as well as strengthening the investigative power of business operators. Finally, the JTSB, which merged ARAIC with the cause-identification part of JMAIA, was established in 2008 as mentioned above.⁸

C. An Ideal Accident Investigation Organization

[Appendix, slide No.4]

Apart from transportation accident investigation, an expert group meeting organized by the Consumer Affairs Agency discussed and submitted its final report in May 2011 on the ideal characteristics of an accident investigation organization.

⁶ (1) Crash of a Toa Domestic Airlines aircraft into Mt. *Yokotsudake*, north of *Hakodate*, involving 68 fatalities, and

(2) Mid-air collision between an All Nippon Airways aircraft and a Self-Defense Force aircraft in *Shizukuishi* Town, *Iwate* Prefecture, involving 162 fatalities.

⁷ (1) the collision between a *Shigaraki Kougen* Railway passenger train and a West Japan Railway (JR-West) passenger train, involving 42 fatalities and 628 injuries in May 1991,

(2) Derailment and collision of *Teito* Rapid Transit Authority passenger trains on the *Hibiya* Subway Line, involving five fatalities and 64 injuries in March 2000, and

(3) Derailment of a JR-West passenger train on the *Fukuchiyama* Line, involving 107 fatalities and 562 injuries in April 2005.

⁸ *Supra*, at II.A.3.

The final report⁹ concluded as follows:

1. Purpose of an Accident Investigation

The purpose of an accident investigation is to prevent future accidents. The outcome of an accident investigation is not restricted to solutions and measures for preventing reoccurrence of the accident under investigation. In order to prevent accidents in a broader sense and establish a safer society, the organization should find various ways and means by taking a long-term perspective.

The report of an accident investigation and the investigative organization itself must obtain the public trust. In this regard, the implicit “consent” of society, including the victims, must be respected. Thus, the organization must be “independent”, “fair”, “comprehensive” and must possess “expertise” in order to conduct a reliable accident investigation.

2. Expected Nature

- a. An independent accident investigation is one in which an organization can complete its investigation and make decisions without any influence from the consideration of purposes other than prevention of future accidents. Other typical purposes are to seek legal liability in criminal, administrative and civil proceedings and to regulate and supervise markets and business activities. Since some regulations by agencies concerned may cause or prevent an accident, it is important to exclude any influence from the actions of such agencies. On the other hand, collaborative investigation with other agencies has the advantage of being speedy and efficient in the course of the accident investigation. Thus, with consideration of characteristics in various fields, and of the advantage of the collaboration with concerned agencies, the independence of an accident investigation organization must be upheld and maintained.
- b. Ensuring fairness in an accident investigation requires its system, organization and practices to be impartial from any bias of the parties, other organizations and individuals. It is also important that they appear impartial in the eyes of the public.
- c. Comprehensiveness in accident investigation means that any type of accident should be dealt with by appropriate experts.

⁹ The Japanese version is available at: <http://www.caa.go.jp/safety/pdf/matome.pdf>

- d. Expertise in accident investigation means that an organization must have highly specialized knowledge and skills. In order to do so, legal authorities as well as sufficient human, material and economic resources should be provided. The expertise includes not only specific fields but also those relating to collection and analysis—both quantitative and qualitative—of information or human factors, and the expertise of coordination and management.

III. ORGANIZATION AND DUTIES OF THE JAPAN TRANSPORT SAFETY BORD (JTSB)¹⁰

A. Organization

The previous organs like JMAIA, AAIC and ARAIC were all internal organizations of the MOT or MLIT, but the JTSB is an external organ under MLIT pursuant to paragraph (2) of Article 3 of the National Government Organization Act. As shown in the Act for Establishment of the Japan Transport Safety Board (JTSB Establishment Act¹¹), the JTSB is organizationally affiliated with MLIT, but functionally independent from the influence of MLIT.

1. Appointment of the Chairperson and Members [Appendix, slide No.5]

The JTSB chairperson and members appointed by MLIT with the consent of both Houses of the Diet among persons found to be able to make a scientific and fair judgment to carry out the affairs under the jurisdiction of the JTSB. (Article 8) The JTSB has nearly 180 members in total throughout Japan.

2. Director for Management

A newly established position is the Director for Management, who is responsible for planning and policymaking concerning the implementation of investigations, liaising and coordinating with relevant governmental institutions, training staff, statistical research and analysis of accidents, international cooperation, and providing assistance to victims and their families.

3. Other Authorities Considered as Enhancing Its Independence

First, the JTSB is authorized to promulgate rules to enforce laws or cabinet orders with regard to affairs under its jurisdiction or pursuant to a special delegation by law or cabinet order. (JTSB Establishment Act, article 16). This authority was

¹⁰ JTSB website: <http://www.mlit.go.jp/jtsb/english.html> for section III and part of II.B.

¹¹ Japanese Law Translation website: <http://www.japaneselawtranslation.go.jp/?re=02>

The JTSB Establishment Act is available in English at:

<http://www.japaneselawtranslation.go.jp/law/detail/?printID=&ft=2&re=01&dn=1&yo=%E9%81%8B%E8%BC%B8%E5%AE%89%E5%85%A8%E5%A7%94%E5%93%A1%E4%BC%9A%E8%A8%AD%E7%BD%AE%E6%B3%95&ia=03&x=47&y=19&ky=&page=1&vm=02>

not given to the previous organs like JMAIA, AAIC and ARAIC.

Second, the power of appointing the secretariat personnel has been transferred from the Minister (MLIT) to the Chairperson of the JTSB.

Third, ARAIC merely made recommendations to the Minister (MLIT) because it was an internal organ of MLIT. However, the JTSB can make recommendations not only to the Minister but also directly to parties relevant to the cause¹² of an accident. The JTSB may require the parties relevant to the cause to report measures which have been taken based on the recommendations.

B. The JTSB's Roles

1. Mission

[Appendix, slide No.6]

The JTSB contributes to preventing the occurrence of accidents and mitigating the damage caused by accidents, thus improving transport safety while raising public awareness, and thereby protecting lives. These are to be achieved by accomplishing appropriate accident investigations which thoroughly unveil the causes of accidents, damages and those incidental to them, and urging the implementation of necessary policies and measures through the issuance of safety recommendations and opinions or provision of safety information. Since the main role is to prevent future accidents, it is natural for the JTSB to issue an investigation report covering the causes of accidents, safety recommendations and opinions, etc. to the public.

2. Main Duties

- a. The JTSB conducts investigations to determine the causes of aircraft, railway and marine accidents, serious incidents¹³ and damage caused by the accidents.
- b. Based on the findings of the accident investigations, the JTSB provides recommendations or opinions to heads of relevant administrative organs or parties relevant to the causes, concerning the measures to be taken to prevent the recurrence of accidents and to mitigate damage caused by the accidents.
- c. The JTSB conducts research and studies in order to fulfill the above duties.

3. Characteristics of JTSB Investigations

First, JTSB members and staff are experts familiar with science, technology

¹² The word “persons relevant to the cause” means that the parties related to the accidents or those who caused the damages.

¹³ The word “Serious incidents” (In the case of marine, “Incidents”) are situations deemed to bear the risk of accidents occurring, which do not involve actual victims and damages.

and other relevant professional skills such as aeronautical engineering, mechanical engineering, operation and maintenance of aircraft, maneuvering of aircraft, railway engineering, safety engineering, electrical engineering, maneuvering of ships, marine engineering, naval architecture, ergonomics, railway operation, structural engineering, legislation, etc.

Second, JTSB investigations are expected to thoroughly uncover any causes of a transportation accident in a scientific manner for the purpose of preventing reoccurrence of accidents, so that even “the incidents” (see note 13) are subject to JTSB investigation. The investigations are not conducted for the purpose of imposing any sanction on concerned persons. The JTSB Establishment Act states that the authority of dispositions¹⁴ prescribed in the Act shall not be construed as encompassing criminal investigation. [JTSB Establishment Act article 18(5)]

Criminal investigation of transport accidents if necessary is conducted by relevant authorities, typically the police and public prosecutors. Below, the differences and relations between the JTSB investigation (administrative procedure) and criminal procedure will be addressed.

IV. THE PENAL CODE AND CRIMINAL INVESTIGATION

A. Substantive Penal Law relating to Transportation Accidents

[Appendix, slide No.7]

In cases where transportation accidents result in the death/injury of a victim or certain dangerous transportation situations, criminal investigations start if the accidents are committed through negligence in the pursuit of social activities (The Penal Code, article 211¹⁵). The phrase “pursuit of social activities” is an English

¹⁴ The “dispositions” prescribed in the JTSB Establishment Act article 18(2): The Board may, when it finds it necessary to conduct the investigation of an Accident, etc., take the dispositions listed in the following items:

- (i)-(iii) To take reports from the people concerned with Aircraft Accidents, etc...
- (iv) To enter the site of an Accident, etc., offices of users of the aircraft, and any other place that is deemed necessary and examine any aircraft, ... documents or other articles relevant to the Accident, etc. (hereinafter referred to as " relevant material"), and interrogate any people concerned...
- (v) To request the appearance of the people concerned and question them.
- (vi) To request to produce any relevant material, to the owner, holder or custodian and/or take custody of the produced materials.
- (vii) To order the owner, holder or custodian of any relevant material to preserve it or prohibit him/her from relocating it.
- (viii) To prohibit people from entering the site of the Accident, etc., except for those who enter the site on official duty, or are permitted to enter it by the Board.

¹⁵ The Penal Code was enacted in 1907. The Penal Code article 211: A person who fails to exercise due care required in driving a vehicle and thereby causes the death or injury of another shall be punished by imprisonment with or without work for not more than 5 years or a fine of not more than 1,000,000 yen; provided, however, that the person may be exculpated in the light of

translation of the definition of “*Gyomujo*” (which literally means “business”), which has been legally interpreted as activities which may endanger the life or body of another person and which are continued or intended to continue. In short, this is normally known as professional negligence in other countries. The Japanese Penal Code states that crimes of intent are generally punishable unless a crime of negligence is specifically prescribed in an Act. The Japanese Penal Code prescribes several provisions of criminal negligence, such as

➤ Penal Code, article 211

Causing injury/death through negligence in the pursuit of social activities (meaning professional negligence) is punishable by no more than five years' imprisonment with/without work or 1,000,000 yen (US\$8,330)

➤ Penal Code, article 129(2)

Endangering railway or marine traffic through professional negligence is punishable by no more than three years' imprisonment without work or 300,000 yen (US\$2,500)

➤ Act on Punishment of Acts to Endanger Aviation, article 6

Endangering aviation, etc. through professional negligence is punishable by no more than three years' imprisonment without work or 200,000 yen (US\$1,660).

Causing injury/death through vehicular negligence is punished like professional negligence under the Penal Code, but now it is stipulated in a different act.

Once a marine, railway or aviation transportation accident occurs, the police start an investigation because a crime of negligence by someone is easily suspected. The accident site should be protected and examined, and necessary evidence should be collected immediately and maintained safely until the investigation is complete. The JTSB also needs to start an administrative investigation of the transportation accident and has to collect evidence and maintain a proper chain of custody. Since both investigations need the same or similar examination of the accident site and evidence, determining which investigation should come first, or the relationship between them, is subject to discussion.

The numbers of criminal cases by type of transportation accident which were disposed from 2001 to 2014 and reported to relevant authorities are shown in the [Appendix, slide No.8]. The number is not significant in comparison with the annual average number of prosecutions initiated throughout Japan, which is around 100,000. However, comparing the conviction rate among all contested cases with that of contested transportation accident cases, the former is around three per

circumstances if the injury is minor.

cent¹⁶, but the latter is between 33.3 to 50 per cent. This indicates difficulties in proving criminal liability in transportation accident cases.

B. Friction between Investigations

[Appendix, slides No.9 and 10]

Recently, some experts and academics familiar with scientific and technological issues tend to insist that the administrative investigation be prioritized and naturally come first before starting a criminal investigation. The main reasons are below:

1. Transportation accidents take places because of various, complicated, multiple, scientific and technological causes, which are known as “systemic accidents” or “organizational accidents”. There are various factors mutually influenced, such as management, software, hardware, environment and *liveware* (meaning operators, etc.) relating to transportation systems. The police have insufficient knowledge or skills to identify causes of such a systemic accident in a scientific manner.
2. Although the criminal investigation also needs to identify the causes of a transport accident, its purpose is to identify a suspect for imposing punishment, so that criminal investigation tends to pursue human error in the course of his/her duties. However, administrative investigation pays attention to any causes of an accident as well as all circumstances surrounding the causes and accident to be taken into consideration for the purpose of preventing future accidents. In short, even if a potential or probable cause exists, it is taken into consideration for improving transportation systems, but such a cause is ignored by criminal investigators because it is useless for proving a case at criminal trial.
3. Criminal investigation has a “chilling effect” on administrative investigations because the persons involved in an accident have the right to remain silent; then necessary information will not be discovered during the administrative investigation. As a result, identifying causes and preventing accidents often cannot be achieved.
4. Criminal investigation and punishment for criminal negligence does not prevent the reoccurrence of accidents.

¹⁶ From the “Overview of Criminal Cases” by the Supreme Court, which appeared in the monthly magazine “*Hoso Jiho*”: Acquittal Rate among contested cases tried at first instance.

5. Prioritizing criminal investigation is against the spirit of ICAO Annex 13¹⁷ – 3.1 stating that “*The sole objective of the investigation of an accident or incident shall be the prevention of accidents and incidents*” and ICAO Annex 13 – 5.12 requiring “non-disclosure of records”¹⁸ of the administrative investigation.

6. In the United States, for example administrative investigation conducted by the National Transportation Safety Board (NTSB)¹⁹ is prioritized and almost no criminal investigation or prosecution is undertaken in the case of transportation accidents.

Those who support the prioritization of administrative investigation (hereinafter “AI supporters”) emphasize the significance of preventing accidents for the safety of society, and seem to be prejudiced against and distrust criminal investigation and its effects. In contrast, those who support the prioritization of criminal investigation (hereinafter the “CI supporters”) explain the necessity of criminal investigation from the viewpoint of the Japanese legal system and practices as well as public opinion in general. In Japan, the police are required to conduct investigations if criminal negligence possibly occurred. In fact, the police have been a capable organ to deal with transportation accidents in terms of having the human resources necessary to conduct large-scale investigations. The police have around 280,000 police officers throughout Japan, while the JTSB has nearly 180 staff members. Ordinary Japanese citizens also expect that the police conduct investigations effectively, even after the establishment of the AAIC. However, the expectation seems to come from their belief that the police can reveal the causes of an accident and contribute to preventing accidents.

C. Which Investigation Should Come First?

[Appendix, slide No.11]

ICAO Annex 13–5.1 states in Note 1 that “*The investigation of a serious accident does not exclude other already existing types of investigation of incidents (serious or not) by other organizations.*” So, the next question is which investigation is prioritized. There are three options for solving this issue:

1. Administrative investigation is to be conducted prior to the criminal investigation.

¹⁷ The formal name: Annex 13 to the Convention on International Civil Aviation (the Chicago Convention) “AIRCRAFT ACCIDENT AND INCIDENT INVESTIGATION” Tenth Edition, as International Standards and Recommended Practices (SARPs)

http://www.fzt.haw-hamburg.de/pers/Scholz/dglr/hh/text_2013_11_07_ICAO_Annex13_AircraftAccidentAndIncidentInvestigation.pdf#search='ICAO+Annex+13'

¹⁸ See section V, below, for details.

¹⁹ NTSB website: <http://www.ntsb.gov/Pages/default.aspx>

2. Criminal investigation is to be conducted prior to the administrative investigation.
3. Both investigations are to be conducted concurrently but in a cooperative manner.

Based on my understanding, as far as the NTSB in the United States is concerned, administrative investigation is prioritized, that is, “option 1” is adopted. Once a transportation accident within the jurisdiction of the NTSB occurs, the role of the police is to preserve the accident site and evidence until the NTSB starts its investigation. After a thorough investigation by the NTSB is conducted in a scientific manner, the NTSB issues an accident investigation report that identifies the causes of the accident, considers how to prevent future accidents, and provides recommendations for establishing a safer transportation system. If a person is suspected to have caused the accident deliberately or through gross negligence in the course of his/her duty, there is a possibility for criminal investigation and prosecution.

In contrast, the French system prioritizes criminal investigation, that is, “option 2” is adopted. France has several organs responsible for transportation accidents such as the *BEA*²⁰ for inspecting causes of transportation accidents, which is part of the *IGAC*, and the *DGAC* for deciding administrative action. On the other hand, the *GTA* is a special judicial police unit in charge of conducting criminal investigation in the field of aircraft accidents. Under the French justice system, investigative judges²¹ or prosecutors have the authority to investigate any crime, including those causing injury or death through professional negligence. Once criminal investigation starts at the direction of an investigative judge, administrative investigators need the approval from the investigative judge to conduct their investigation. Since the French criminal justice system is an inquisitorial system, investigative authorities, including investigative judges, play a key role during the investigation stage.²²

²⁰ BEA: Bureau-Enquetes-Accident, IGAC: Inspection Generale de l'Aviation Civile et de la Meteo, DGAC: Direction Generale de l'Aviation Civile, GTA: Gendarmedrie des Transports Aeriens

²¹ The “Investigative judge” and “investigating/examining judge” who preside at a preliminary hearing in court are interchangeably used.

²² Source for this paragraph: “FRENCH LEGAL SYSTEM FOR SAFETY CONCERNING AVIATION ACCIDENT – IMPLICATION FOR JAPAN” by Mr. FUNAKI Takahisa and Mr. MARUYAMA Akio issued in 2004 (only the Japanese version is available) http://shakai-gijutsu.org/vol2/2_303.pdf

In the crash of the German Wings 9525 in March 2015, its cause was released based on the flight and voice recorders and other circumstantial evidence by the *Marceille* Prosecution (France), not by *BEA*, and the release was two days after the crash. This shows that criminal investigators are engaged at the early stage of such accidents.

However, Japan adopts the third approach, which respects both investigative authorities and encourages coordination between the administrative and criminal investigations. Although the criminal investigation is conducted for the purpose of identifying a suspect for punishment at the last stage, if any, which is different from the administrative investigation purpose of securing safe transportation systems, both need to collect material evidence and analyze reports and other documentary evidence, such as witness statements, in order to identify causes of a transportation accident. Considering that the legal framework of Japan gives investigative authority to two organizations from different perspectives, it should be understood that neither of the two is prioritized. It cannot be denied that criminal investigation tends to analyze evidence from the viewpoint of who caused the accident, paying less attention to other systematic causes. Needless to say, conducting two investigations independently is a duplication of effort and a waste of time and human resources. Criminal investigation needs expert witnesses to clarify scientific and technical issues, but there is a high possibility that such experts are members of the JTSB or that they support the process of administrative investigation. As stated above, the Japanese people expect criminal investigation by the police, and the police have responded to this expectation to some extent. Coordination between both investigations is the most effective and efficient, and this has been done on the basis of a Memorandum²³ on the Implementation of the JTSB Establishment Act between the National Police Agency (NPA) and the JTSB, which was originally concluded with the previous organ, the AAIC, in 1972.

D. The Memorandum between the NPA and the JTSB

[Appendix, slide No.12]

The contents of the Memorandum are:

1. The dispositions²⁴ (meaning the means of administrative investigation) by the JTSB authorized in the JTSB Establishment Act shall not be conflict with the activities of the criminal investigative agencies.
2. JTSB officers who perform the above dispositions shall seek the opinion of a criminal investigative agency and shall not interfere with the criminal investigation, except when conducting such dispositions will not conflict with the criminal investigation.
3. In cases where an expert opinion on an aircraft accident is sought from the JTSB by a criminal investigative agency, the JTSB shall cooperate in giving an expert opinion as much as possible unless a certain difficulty exists.
4. In cases where a request is made to the criminal investigation agency from the

²³ The Japanese version of the Memorandum and its details are available on the MLIT website : <http://www.mlit.go.jp/jtsb/fukuchiyama/kensyou/fu04-shiryou6-1-20091207.pdf>

²⁴ See III.B.3, note 14.

- JTSB, the criminal investigative agency shall cooperate in dealing with the request as much as possible unless a certain difficulty exists.
5. Detailed Arrangements of this Memorandum for implementing smooth and harmonious investigations are subject to further discussions by the NPA and the JTSB.

The NPA and the JTSB coordinate in various ways, based on the following principles:

- i. **Preservation of the Accident Site** [Appendix, slide No.13]
- i-a. The police, in principle, shall preserve an accident site. However, in the case where the JTSB arrives at the site prior to the arrival of the police, the JTSB shall preserve the site until the police arrive and hand the duty for the preservation over to the police officer in charge.
 - i-b. The police and the JTSB shall discuss the scope and means of preserving the area at all times and shall make every effort to protect the site.
- ii. **Examination of the Accident Site and Evidence**
- ii-a. With regard to the examination of the accident site and evidence, respective officers in charge of the police and the JTSB shall discuss the date, scope, means and methods of examination in advance. During the examination, both agencies shall make every effort to perform their respective duties through continuous discussions.
 - ii-b. When an accident site is being investigated and evidence is being collected by either of the two agencies, the other agency is entitled to join the investigation.
- iii. **Examination of a Corpse**
- When the police conduct an examination of a corpse and the cause of death is deemed to be related to a transportation accident, the police shall, upon request, allow the JTSB to examine the corpse.
- iv. **Interview or Questioning**
- When witnesses are interviewed at the accident site, respective officers in charge of the police and the JTSB shall discuss the targets and order of the interviews in advance. The police shall provide the JTSB with the immediate opportunity to interview the crew and staff of an aircraft, train or vessel.
- v. **Seizing and Maintaining Evidence**
- v-a. The evidence relating to a transportation accident which should be seized by the police, and the JTSB shall be treated in accordance with the provisions of the Code of Criminal Procedure (CCP) unless both agencies agree otherwise.
 - v-b. The police shall immediately request the JTSB provide an expert opinion about flight and voice recorders etc. and also transfer evidence to the JTSB if the

evidence is necessary or appropriate to be in the custody of the JTSB.

v-c. As for evidence found outside of the accident site, although the police and the JTSB shall discuss and decide the action to be taken, the police shall first seize the evidence pursuant to the CCP and then transfer the evidence to the JTSB if necessary.

vi. Miscellaneous

In cases where the police and the JTSB conduct investigations, each agencies shall immediately inform the other of the names and position of officers in charge as well as the means for contacting each other, unless the accident did not cause death or injury.

AI supporters still criticize the phrases of the Memorandum and detailed Arrangements in which the criminal investigation seems prioritized. Another main criticism addresses CCP article 47, stating that "*No document relating to the trial shall be made public prior to the commencement of the trial; provided however, that this shall not apply when it is necessary for the public interest or other reasons, and when the court believes it to be appropriate*". For that reason, prosecutors who are authorized to maintain the documents and evidence do not share them, even with the JTSB. This is true to some extent. Prosecutors tend not to share the evidence because of the sensitivity of the privacy of the people concerned. However, the latter part of CCP article 47 states that the documents and evidence can be shared if doing so is in the public interest. Since the necessity of administrative investigation normally meets this requirement, prosecutors are expected to disclose the evidence and records to administrative investigators. Nonetheless, the idea of the coordination between the police and the JTSB is well understood among investigators in charge at both agencies, and, in practice, coordination has been done without many problems.

V. ISSUES ON NON-DISCLOSURE OF RECORDS USED FOR ADMINISTRATIVE INVESTIGATION

A. The Chilling Effect of Criminal Liability

[Appendix, slide No.14]

The JTSB is responsible for identifying causes, examining evidence, interviewing persons concerned, etc., and then publishing an investigation report which contains factual determinations and recommendations for preventing accidents and ensuring safe transportation. The next question is whether or not the analysis of causes, the evaluation of evidence, objective records, statements

and the administrative investigation report can be used for other purposes such as criminal investigation, prosecution and trial as well as civil disputes in court or administrative action against an individual.

AI supporters oppose such usage, especially for criminal investigation and trial. For example, Annex 13 of the ICAO prohibits the public release of investigation records, such as witness statements, medical information, cockpit voice recordings and transcripts, etc.²⁵ This is because if the JTSB's analyses, findings and reports are admissible in criminal trials, persons involved in transportation accidents will hesitate to cooperate with administrative investigations. As a result, identifying causes, preventing future accidents and enhancing safe transportation will not be achieved. In short, AI supporters stress that this "chilling effect" must be avoided.

B. Admissibility of Evidence in Criminal Trials

The chilling effect mentioned above not only applies to criminal investigations and trials but also to civil disputes and administrative sanctions. The latter cases are not taken into consideration by AI supporters due to the small number of such cases, the well-developed nature of the insurance system, and the lack of punitive damages in the Japanese civil system. Despite of the small number of criminal cases tried for transportation accidents, criminal cases are deemed as problematic for AI supporters because suspects and defendants are often viewed as criminals by Japanese society (as opposed to the legal system, which respects the presumption of innocence). CI supporters have to be careful about the impact that the chilling effect may have on the administrative investigation, but this does not mean that there is an absolute prohibition against using records and reports made during administrative investigations. Even Annex 13 of the ICAO contains a provision stating that records should not be disclosed "unless the appropriate authority for the administration of justice in that State determines that their disclosure outweighs the adverse domestic and international impact such action may have on that or any future investigations."²⁶ Moreover, eliminating the chilling effect is essentially an offer of blanket immunity from any legal liability. Society is unlikely to consent to such immunity, especially from the perspectives of the victims and their families.

Under the Japanese criminal justice system, victims, their families and even third parties are entitled to make accusations. Upon receiving such accusations, criminal investigation agencies must start investigations. Even if a public

²⁵ ICAO Annex 13 – 5.12; see also [Appendix, slides 15 and 16].

²⁶ Ibid.

prosecutor decides not to prosecute a case, the Prosecution Review Commission²⁷ has the authority to bring such cases to the court under specific conditions.

The Prosecution Review Commission (Inquest of Prosecution) was introduced in 1948, and it is a safeguard against malpractice and inappropriate practices in deciding not to prosecute cases based on both suspension of prosecution and other reasons such as the insufficiency of the evidence.²⁸ The Commission is an independent organ consisting of 11 ordinary citizens selected by lot. The Commission is located in the same building as the district court, and its secretariat normally consists of a court clerk transferred under a periodic rotating system. Under a 2009 amendment to the law establishing the Commission, if the Commission twice rules that a case should be prosecuted, a designated private attorney who exercises the powers of a prosecutor is required to prosecute the case even if prosecutors refuse to do so. However, such cases are extremely rare. Only 11 persons/cases were brought to court, and only two persons/cases resulted in findings of guilt (one of which is on appeal) over the last six years.

Ultimately, complete eradication of the chilling effect is unrealistic. The key point is determining how we can harmonize administrative and criminal investigations. In Japan, in practice, no records or documents other than the final report of the JTSB will be provided to the criminal investigative authorities. Although the Memorandum between the NPA and JTSB states that the JTSB shall provide the police with an expert opinion²⁹, such expert opinions are the same as those expressed in the final report of the JTSB, which is published by the JTSB. So, it is meaningless to prohibit the usage of the final report/expert opinion in the criminal trial, especially concerning the findings of fact. A court precedent concluded that the final report is admissible in a criminal trial and that “ICAO Annex 13 - 5.12 regulates the disclosure of records which are not public; ICAO does not regulate the admissibility of the records already published”, although the reasoning of the court precedents may not be persuasive for AI supporters.

For your reference, Japan submitted a “Notification of Difference”³⁰ to ICAO and its members on Annex 13 – 5.12 when Japan joined ICAO, and again recently in 2008.³¹

²⁷ See section I.D, above.

²⁸ See section II.E, above.

²⁹ See Memorandum No.3 in section IV.D, above.

³⁰ According to the “Foreword” of the ICAO Annex 13, Contracting States are required to notify the Organization of any differences between their national regulations and practices and the International standards contained in this Annex and any members thereto.

³¹ The contents in [Appendix, slides 17]

However, Japan did not submit the Notification of Difference for 14 years before 2008.

C. Admissibility of Evaluations in the Final Report

The final report of the JTSB cites statements of persons interviewed in order to clarify relevant issues. AI supporters are still worried that judges and criminal courts may rely on or be biased by the statements of persons interviewed by administrative investigators as well as the evaluation and analysis in the final report made by experts specialized in a particular field. The final report contains various issues which may contribute to preventing future accidents and safe transportation. From the viewpoint of AI supporters, the final report may affect judges' fact-finding and determinations of criminal liability of a defendant.

However, this comes from a misunderstanding of the rules of evidence, specifically the prohibition of hearsay evidence in criminal cases. The statements in the final report are hearsay evidence. In principle, hearsay evidence is not admissible in criminal cases. A statement before a prosecutor or a police officer may be admissible under rigid conditions concerning necessity and credibility³²; statements before an administrative investigator are also not admissible. Moreover, judges are sufficiently qualified in distinguishing factual matters and analysis so that the anxiety of the AI supporters is not a significant issue. In fact, even the final report of the administrative investigation, which suggested the possibility of professional negligence of a person concerned, was admitted in a criminal trial, and the court found defendants not guilty in some cases in Japan. These cases are direct evidence that judges do not rely on or are not biased by the analyses and statements contained in the final report. On the contrary, in civil and administrative disputes, court procedures do not have the hearsay rule so that the final report of the JTSB will be evidence for the court's judgement. AI supporters do not find significant problems in such situations because the chilling effect is very small.

In the United States, it seems that only the factual conclusions in the reports are admissible as evidence at trial. Based on my understanding, the differences come from whether cases are tried by juries or professional judges. Under the jury system, strict evidence rules must be followed because ordinary citizens tend to rely on or can be easily biased by expert testimony, hearsay statements, etc.

For your reference, in a contested case in Japan, where the defendant (aircraft pilot) and his defense counsel objected to admission into evidence of the final report of the JTSB as a whole, the prosecution and defense counsel agreed to make a document in writing which contained only factual matters as documentary evidence. Then that portion of the report was admitted by the court pursuant to the CCP article 327.³³ As a result, even the final report of the JTSB itself is not

³² See section I. E and I, above.

³³ CCP article 327: The court may, when the public prosecutor and the accused or his/her

submitted at the criminal trial unless the defense stipulates to it as evidence at the criminal trial.

VI. POSSIBLE SOLUTIONS

CI supporters are well aware of the importance of administrative investigation, the purpose of which is to identify causes, analyze records, interview persons and make recommendations to prevent accidents and enhance the safety of transportation. On the other hand, criminal investigators are also required to conduct investigation by law, and they are strongly expected to do so by and on behalf of the victims. Japanese society tends to pursue criminal liability of the accused even for criminal negligence. Criminal professional negligence in a transportation accident is no exception to this.

[Appendix, slide No.18]

The concrete cases that come to mind may be different among those who discuss these issues. But when law is applied in any of these cases, there are three types of negligence.

- A. Misconduct because of the lack of basic professional knowledge
- B. Misconduct or malpractice due to a misunderstanding of how to deal with a particular transportation situation
- C. Misconduct through professional negligence within the scope of regular professional duty.

Categories “A” and “B” (the lack of professional knowledge and misunderstanding) are normally classified as criminal negligence in Japan, and also category “C” (professional negligence within the scope of duty) tends to be considered criminal negligence in Japan. However, the “scope of duty” aspect of type “C” negligence is particularly important because it should provide some measure of protection to persons who act negligently but do so while engaging in activities that are generally within the person’s job description. This is contrast to negligent conduct that is outside the scope of duty, which is less excusable and the law is less willing to protect. When discussing this issue, AI supporters have type “C” in mind, while victims and CI supporters have types “A” and “B” in mind. AI supporters would not insist on protecting such persons from criminal investigation, and then the question becomes whether a criminal investigation is necessary for

counsel have agreed to write down the contents of a statement that contain the contents of a certain document or a certain statement that a witness would testify to at the trial and have submitted such written statement to the court, use it as evidence without examining the original or the witness. However, the probative value of the document may be challenged regardless.

accidents involving professional negligence within the scope of duty.

A possible solution is that prosecutors should only be permitted to prosecute cases in which type “A” and “B” negligence is found. This may mitigate the chilling effect of criminal prosecutions that would discourage witnesses from providing information to investigators. Of course, since such negligence may be found by evaluating all evidence after or during the criminal investigation, criminal investigation must be allowed in transportation accident cases, even if the requisite negligence is not initially found by administrative investigators.

Another possible solution is that the filing of such cases is only made upon the accusation from the administrative investigation agency, which means that the administrative agency must take the initiative to commence prosecution.

Both solutions are ideas for a new legal framework, and are difficult to adopt in the present Japanese legal system. The former measure could be adopted in practice, since Japanese prosecutors have discretionary power to decide whether to prosecute a case or not. However, you may never forget that the Prosecution Review Commission³⁴ can make decisions otherwise.

As victims and their relatives in Japan sometimes have strong desire to pursue criminal and civil liability of a person who allegedly caused an accident, it is important for us to sincerely make every effort to satisfy this retributive emotion in order to promote the prioritization of administrative investigation and avoid legal liability of the person concerned so as to ensure safe public transportation in the future. This is the reason that the JTSB states that its mission is to mitigate the damage caused to the victims by the accident.

The retributive thoughts of the public in Korea seem similar to the victim outrage commonly experienced in Japan. On the other hand, unlike the Japanese legal system, considering that the Korean legal system does not have the Prosecution Review commission, and that the scope of the Korean prosecutorial authority is stronger than the Japanese prosecution in terms of investigative power, which may fall in between the approaches of the Japanese system and the French system, perhaps the Korean legal system can find another solution to these kinds of accidents.

³⁴ See section V. B, above.

VII. CONCLUSION

[Appendix, slide No.19]

Alexander Pope once wrote, “To err is human, to forgive, divine”, meaning that we should try hard to forgive others because all people are human and make mistakes. Drawing on this reasoning, AI supporters would argue that human error cannot be eradicated, and for that reason, we should find solutions by building a safer system even if human beings engaged in misconduct through professional negligence, not by punishing such misconduct and human error.

However, Pope’s saying is also used as an excuse when people make mistakes, even if they were caused through gross negligence. This may be the reason that CI supporters and victims have a different perspective than that of AI supporters.

The latter generally understand the perspective of the former, but if the latter is involved in such an accident, it would be difficult to forgive the person who caused the accident. This phenomenon may BE similar to the “not in my backyard” (NIMBY) mentality, which is also difficult to solve. It is, however, true that people act divinely when they forgive. In addition, East Asian countries embrace the words of Confucius: *“To err and not change one’s ways, this is what it is to err.”* We can see a common idea therein, which is that a simple human error does not deserve blame or punishment.

In order to establish better systems, we should pay attention to all circumstances surrounding the accident including civil compensation, insurance and administrative sanctions, rather than focusing on conflicts between administrative and criminal investigation.