

## **CHAPTER 4 PRE-TRIAL CRIMINAL PROCEDURE**

### **I. INTRODUCTION**

Japan is a unitary state, and the same criminal procedure applies throughout the nation. The Code of Criminal Procedure of 1948 [hereinafter CCP], the Act on Criminal Trials Examined under the Lay Judge System, and the Rules of Criminal Procedure of 1949 are the principal sources of law.

### **II. CONSTITUTIONAL SAFEGUARDS**

The Constitution of Japan has an extensive list of constitutional guarantees that relate to the criminal process. 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 apprehended except upon warrant issued by a competent judicial officer which specifies the offence with which the person is charged, unless he is apprehended, the offence being committed.” Further, as prescribed in Article 34, “no person shall be arrested or detained without being at once informed of the charges against him or without the immediate privilege of counsel; nor shall he be detained without adequate cause; and upon demand of any person such cause must be immediately shown in open court in his presence and the presence of his counsel.” Article 35 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, or except as provided by Article 33.”

As for the trial proceedings, Article 38 provides that “no person shall be compelled to testify against himself,” and that a “confession made under compulsion, torture or threat, or after prolonged arrest or detention 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, Article 37 provides that “in all criminal cases, the accused shall enjoy the right to a speedy and public trial by an impartial tribunal; he shall be permitted full opportunity to examine all witnesses, and he shall have the right of compulsory process for obtaining witnesses on his behalf at public expense; at all times the accused shall have the assistance of competent counsel who shall, if the accused is unable to secure the same by his own efforts, be assigned to his use by the State.” 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 acquitted, nor shall he be placed in double jeopardy.”

Finally, Article 40 provides that “any person, in case he is acquitted after he has been arrested or detained, may sue the State for redress as provided by law.”

### **III. INVESTIGATIVE AGENCIES**

The police are the primary investigative agency in Japan. Officers of certain other administrative bodies, such as narcotics agents and coast guard officers, have limited jurisdiction to investigate certain type of offences, whereas police officers have general jurisdiction.

The vast majority of criminal cases are investigated by the police and referred to public prosecutors. As the police do not have the power to make charging decisions, all cases investigated by the police, except for very minor offences prescribed by prosecutorial guidelines, must be sent to public prosecutors for disposition.

Japanese law does not permit private prosecutions, and public prosecutors have exclusive power to

decide whether or not to prosecute. Besides, they are fully authorized to conduct criminal investigations, and they actively supplement police investigation by directly interviewing witnesses and interrogating suspects. Prosecutors may also instruct police officers as they consider necessary during an investigation. Prosecutors can also initiate their own investigations; delicate or complicated cases such as bribery or large-scale financial crime involving politicians, high-ranking government officials, or corporate executives are often investigated entirely by prosecutors without any police involvement.

#### **IV. INVESTIGATION PROCESS**

##### **A. Overview**

Japanese police and public prosecutors, to the extent possible, conduct criminal investigations without resorting to compulsive measures such as arrest, searches, and seizures. Even for serious offences, they gather as much information as possible on a voluntary basis and carefully evaluate whether an arrest is necessary or if the investigation should continue without arresting the suspect. In 2009, 69.7% of suspects of non-traffic offences were investigated and processed without arrest.<sup>8</sup>

The procedure after arrest is as follows:

- (1) When the police arrest a suspect, they must refer the suspect, along with supporting documents and evidence, to a public prosecutor within 48 hours; otherwise the suspect must be released.
- (2) Within 24 hours after receiving the suspect, the prosecutor must do either one of the following: apply to a judge for a pre-indictment detention; prosecute the case; or release the suspect.
- (3) If an application for pre-indictment detention is granted, a judge will issue a warrant, and the suspect will be taken into detention. Its duration is ten days, which may be extended for up to another ten days.
- (4) The public prosecutor must prosecute the case within the authorized pre-indictment detention period. Otherwise, the suspect must be released. If the case is prosecuted, the pre-indictment detention is automatically converted to pre-trial detention.

##### **B. Arrest**

As a general rule, a judicially issued warrant is required to arrest a suspect. Police officers designated by law and all public prosecutors are authorized to apply to a judge for an arrest warrant, and a warrant shall be issued if a judge deems that there exists sufficient probable cause to suspect that the person has committed an offence.

Japanese law does not recognize a class of offence, such as felonies, for which warrantless arrests are generally permitted. There are two exceptions to the judicial warrant requirement under the CCP, which are the following;

- (1) *Flagrant Offenders:*  
A flagrant offender (an offender who is in the very act of committing or has just committed an offence) may be arrested by any person without a warrant. When it appears evident that a person has committed an offence shortly before, and one of the prescribed legal criteria is met, such a person is also treated as a flagrant offender.<sup>9</sup>
- (2) *Emergency Arrests:*  
“When there are sufficient grounds to suspect the commission of an offence punishable by

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<sup>8</sup> White Paper on Crime 2010, Ministry of Justice, Japan.

<sup>9</sup> CCP Articles 212 and 213.

the death penalty, or imprisonment for life or for a maximum period of three years or more, and in addition, because of great urgency an arrest warrant from a judge cannot be obtained, a public prosecutor, a public prosecutor's assistant officer, or a judicial police official may arrest the suspect after notifying the suspect of the reasons therefor."<sup>10</sup>

When an offender is taken into emergency arrest, an application for an arrest warrant must be filed immediately. If the warrant is not issued, the suspect must be released.

### **C. Post-Arrest Procedure**

Following an arrest, a police officer or a public prosecutor must immediately notify the suspect of the essential facts of the suspected crime, inform him or her of the right to counsel, and then offer an opportunity to present his or her explanation.

If the arrest was made by the police, the suspect, along with supporting evidence, must be referred to a public prosecutor within 48 hours, or the suspect must be released. After receiving the suspect, the public prosecutor must immediately inform the suspect of the essential facts of the suspected crime and offer further opportunity to present his or her explanation. This is an important step in the early stage of investigation as it is the public prosecutor's initial opportunity to interrogate the suspect.

Within 24 hours of receiving the suspect, the public prosecutor must either apply to a judge for a pre-indictment detention; prosecute the case; or release the suspect. The police are not authorized to apply for pre-indictment detention: the application must be made by a public prosecutor. If the suspect was arrested by a public prosecutor and not by the police, the application for pre-indictment detention must be made within 48 hours after the arrest.

A judge will then review the file, take a statement from the suspect, and decide on the prosecutor's application. A pre-indictment detention warrant shall issue if a judge deems that there exists probable cause to suspect that the suspect has committed the offence, one of the following conditions is met, and the judge does not consider it unnecessary.

- (1) The suspect has no fixed residence;
- (2) There is probable cause to suspect that the suspect may conceal or destroy evidence; or
- (3) The suspect has fled or there is probable cause to suspect that the suspect may flee.

If these conditions are not met, the judge will deny the prosecutor's application and order the immediate release of the suspect. In practice, applications for pre-indictment detention are granted in most of the cases because public prosecutors carefully screen suspects to be detained.<sup>11</sup>

The duration of pre-indictment detention is ten days and, upon application by a public prosecutor, a judge may grant an extension for up to another ten days. Thus, the maximum length of pre-indictment custody is 23 days, including the initial 72 hours following the arrest. The public prosecutor must prosecute the case within the authorized period, or the suspect must be released.

During pre-indictment detention, many suspects are detained in police jails instead of detention houses. The Act on Penal Detention Facilities and Treatment of Inmates and Detainees allows such substitutions when approved by a judge.

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<sup>10</sup> CCP Article 210.

<sup>11</sup> Only 0.93% applications for detention were dismissed in 2009. (White Paper on Crime 2010, Ministry of Justice, Japan)

## D. Collection of Evidence

Evidence can be either one of two categories: statements and non-statements.

### 1. Taking Statements

When investigators take statements from witnesses and suspects, they will prepare a detailed summary of what has been said during the interview or interrogation. The summary will be read to or read by the interviewee for confirmation, and if agreed, it will be signed. Such written statements are admissible as evidence if the defendant consents to their use, or they fit in one of the hearsay exceptions provided for in the CCP. See page 28 for more details on the hearsay rule.

### 2. Interrogation of Suspects

Police officers and public prosecutors may ask suspects to appear in their offices for interrogation, and suspects under arrest or detention are obligated to comply. However, Article 38-1 of the Constitution guarantees the right against self-incrimination, and Article 198-2 of the CCP requires investigators to notify the suspect, in advance of the questioning, that he or she is not required to make any statement against his or her will. In order to be admissible at trial, confessions must be voluntarily made. In this regard, CCP Article 319-1 provides that “confession made under compulsion, torture or threat, or after prolonged arrest or detention, or which is suspected not to have been made voluntarily shall not be admitted in evidence.”



Public Prosecutor's Interrogation (moot)

### 3. Searches and Seizures

In order to lawfully search for and seize evidence, a judicially issued warrant is required. The only exception to this requirement is for searches and seizures incident to arrest. According to Supreme Court precedents, a serious violation of search and seizure rules may result in the inadmissibility of evidence so acquired.

## E. The Right to Counsel

The right to counsel is guaranteed by the Constitution and the CCP. Suspects may retain a counsel at any time at their own expense. Confidential communication is guaranteed, and suspects under arrest or detention are entitled to meet with their counsel and to exchange documents or articles without any officials being present.

Previously, court-appointed counsel was available only after indictment. However, a CCP amendment, effective 2006, expanded the rule: now, suspects held in pre-indictment detention for certain

serious offences are entitled to ask for court-appointed counsel if they are unable to appoint one because of indigence or other reasons.

Furthermore, the Bar Associations operate the *Toban-Bengoshi* system, which was introduced in 1990. *Toban-Bengoshi* means “an attorney on duty,” and when requested by an arrested person or his or her family, a *Toban-Bengoshi* will immediately visit the arrested person at the police station to provide legal advice. This first visit is provided free of charge.

## **F. Bail**

Suspects under pre-indictment detention are not bailable. When they are indicted, their legal status changes from a suspect to a defendant, and from that point on, they become eligible for bail. Bail must be granted except when:

- (1) the defendant is charged with an offence punishable by death, life, or a minimum term of one year’s imprisonment;
- (2) the defendant was previously convicted of an offence punishable by death, life, or a maximum term of more than ten years’ imprisonment;
- (3) the defendant has habitually committed an offence for which a maximum term of imprisonment of three years or more is prescribed;
- (4) there is probable cause to suspect that the defendant may conceal or destroy evidence;
- (5) there is probable cause to suspect that the defendant may harm or threaten the body or property of the victim or any other person who is deemed to have essential knowledge for the trial of the case or the relatives of such persons; or
- (6) the defendant’s name or residence is unknown.

Likelihood of reoffending is not a valid ground for denying bail. When granting bail, the court is required to set the amount of the bail bond. The court may also add other appropriate conditions, and in practice, bail is often subject to the condition that the defendant not contact co-defendants, witnesses, or victims.

## **V. DISPOSITION OF CASES**

### **A. Monopolization of Prosecution**

#### 1. Principle

Japan does not have a system of private prosecution or police prosecution, and there is no grand jury. Public prosecutors have the exclusive power to decide whether to prosecute,<sup>12</sup> and this system is called “monopolization of prosecution.” A court cannot try a case unless it is prosecuted by a public prosecutor.

#### 2. Exception

There are two exceptions to the monopolization of prosecution: quasi-prosecution<sup>13</sup> and compulsory prosecution following a recommendation by the Committee for Inquest of Prosecution.

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<sup>12</sup> CCP Article 247.

<sup>13</sup> In other words, “Analogical Institution of Prosecution through Judicial Action.” (CCP Articles 262 to 269).

Quasi-prosecution applies to offences of “abuse of authority” by certain government officials.<sup>14</sup> A person who has filed a complaint or accusation for applicable offences, if dissatisfied with the public prosecutor’s decision not to prosecute, may apply to a district court to commit the case to trial. In practice, cases committed to trial are very few. See page 23 for more details.

Committees for Inquest of Prosecution are lay advisory bodies, consisting of eleven randomly chosen citizens, that review non-prosecution decisions by the prosecutors. A Committee’s recommendation was formerly purely advisory, but since May 2009, it has been given stronger legal effect under limited circumstances. See page 23 for more details.

## **B. Forms of Prosecution**

There are two forms of prosecution: formal and summary.<sup>15</sup>

### 1. Formal Prosecution (Indictment)

Formal prosecution is a request to hold a formal trial, and it is made by filing of a charging instrument called a *Kiso-Jo*.<sup>16</sup> The charging instrument must contain a clear description of the facts constituting the offence charged. In order not to prejudice the court before trial, no evidentiary materials may be attached to a *Kiso-Jo*.

(Speedy Trial Procedure)

At the time of the filing of a *Kiso-Jo*, with the consent of the defendant, the prosecutor may ask the court to try the case by the Speedy Trial Procedure. The Speedy Trial Procedure is applicable when the following conditions are met:

- (1) The offence is not punishable by death, life, or a minimum of one year’s imprisonment;
- (2) The case is clear and minor; and
- (3) The examination of evidence is expected to be completed promptly.

When the application is granted, the case will be tried by a simplified and expedited procedure. The court is required to set an early trial date and, to the extent possible, render its judgement within one day. When sentencing the defendant to a term of imprisonment, the court has to suspend the execution of the sentence. See page 31 for an explanation of suspension of execution of the sentence. The defendant may not appeal a judgment entered following a Speedy Trial on the ground that fact-finding was erroneous.

The Speedy Trial Procedure was introduced in October 2006 in order to enable prompt disposition of minor cases and early release of defendants. In 2009, a total of 4,470 defendants were sent for Speedy Trials, and the majority of the cases were for violations of the Stimulant Control Act, Immigration Control Act, and Road Traffic Act.

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<sup>14</sup> See, e.g. Penal Code Article 193 (Abuse of authority by public officers).

<sup>15</sup> The traffic infraction fine system (Pecuniary Penalty against Traffic Infractions) 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. However, if violators fail to pay that fine, they are to be dealt with under a regular criminal procedure and are subject to criminal punishment by the court.

<sup>16</sup> CCP Article 256.

An example of a *Kiso-Jo* (translated into English) is included below:

Kiso-Jo (Charging Instrument)

The following case is hereby prosecuted.

14 May 2009

Tokyo District Public Prosecutors Office  
Public Prosecutor, KOUNO, Ichirou (his seal)

To Tokyo District Court:

**Defendant**

Permanent Domicile: Yoshida 823, Kawami-cho, Tama-gun, Fukuoka Prefecture

Present Address: Room Number 303, 1-2-3, Akihabara, Chiyoda-ku, Tokyo

Occupation: None

Under Detention

HIGASHIYAMA, Haruo (The defendant's name)

17 April 1957 (The defendant's birth date)

**Charged Fact**

At around 11 p.m. on 23 April 2009, on a street located in 2-4-7, Minami, Shibuya-ku, Tokyo, the defendant, with intent to kill, stabbed MORITA Toshikazu (24 years of age) in the chest with a knife, of which blade was about ten centimeters long, thereby causing the death of Morita, who died from blood loss attributable to the stab wound in the chest, at around 11:58 p.m. on the same day, at YAMADA Hospital located in 3-1-23, Takao, Meguro-ku, Tokyo

**Charged Offence and Applicable Penal Statutes**

Murder

Penal Code Article 199

## 2. Summary Prosecution (Request for a Summary Order)

A public prosecutor may prosecute a case in the Summary Court and ask for a summary order, which is an order by a Summary Court sentencing the defendant to a fine not exceeding one million yen, or a petty fine. In order to file a summary prosecution, a written consent by the defendant is required. There will be no oral hearing or trial: a Summary Court judge will examine the case file sent from the prosecutor, and issue an order on that basis. A party dissatisfied with the order may, within 14 days, apply for a formal trial.

Summary proceeding is an important part of the Japanese criminal process. A vast majority of minor cases are disposed of by summary orders. In 2009, out of 1,648,700 suspects (including juveniles) disposed of by prosecutors, 441,047 (26.8%) were summarily prosecuted, whereas 118,547 (7.2%) were indicted for formal trials.<sup>17</sup>

### C. **Non-prosecution of Cases**

#### 1. No Offence Committed

A public prosecutor will naturally decline to prosecute if, after investigation, there are sufficient reasons to believe that no crime has been committed by the suspect.

#### 2. Insufficiency of Evidence

Even if there is some evidence of guilt, public prosecutors will not prosecute unless conviction is very likely. The threshold varies among countries, and Japanese prosecutors are very careful and selective in screening cases. It is long established practice not to prosecute unless the prosecutor is almost 100% certain of a conviction. In Japan, it is considered an irresponsible exercise of the prosecutorial powers, entrusted by the people to the public prosecutors, to compel a citizen to defend him or herself against criminal charges without the prosecutor being convinced that the evidence is sufficient to establish guilt. As a result, the actual conviction rate is 99.89%.

#### 3. Suspension of Prosecution

Japanese prosecutors have broad discretion whether or not to prosecute, and they are authorized to drop cases even when there is enough evidence to secure a conviction. This disposition is called “suspension of prosecution” and is provided for in Article 248 of the CCP, which reads “Where prosecution is deemed unnecessary owing to the character, age, environment, gravity of the offence, circumstances or situation after the offence, prosecution need not be instituted.”

The concept of discretionary prosecution contrasts with that of compulsory prosecution, which requires prosecution to be instituted whenever a certain quantum of evidence exists. Discretionary prosecution enables flexible dispositions in line with the specifics of each case such as the nature and seriousness of the offence committed, characteristics of the offender, and the victim’s feelings about the case. It is also a form of diversion that offers offenders an early opportunity to return to society and rehabilitate themselves.

The following is an illustrative list of factors considered by prosecutors in making charging decisions.

- (1) The gravity of the offence and the harm caused thereby;
- (2) The offender’s character, age, criminal history, and risk of reoffending;
- (3) The circumstances relating to the commission of the offence: for example, motive, provocation by the victim, existence of accomplices and the role played by the suspect; and

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<sup>17</sup> White Paper on Crime 2010, Ministry of Justice, Japan.

- (4) Conditions subsequent to the commission of the offence: for example, whether the suspect assumes criminal responsibility, whether and to what extent restitution has been made, whether apologies have been made and the victim's feelings have been restored, whether civil settlements have been made between parties.

Suspension of prosecution is broadly utilized in practice: of the 1,648,700 suspects processed by public prosecutors in 2009, 859,768 (52.1%) were disposed of by this method.<sup>18</sup>

## **D. Safeguards against Arbitrary Disposition**

### **1. Internal Administrative Review**

While public prosecutors exercise a quasi-judicial function, as officers belonging to the executive branch of government, they are required to consult with and obtain approval from their supervisors when making important decisions. This internal administrative review is called *Kessai* in Japanese. Depending on the gravity and/or the difficulty of the issues involved, multiple layers of *Kessai*, sometimes up to the Prosecutor General, may be required. This process ensures the reasonableness and consistency of the exercise of prosecutorial authority, and it provides an important learning opportunity for young prosecutors.

### **2. Committee for Inquest of Prosecution**

Committees for Inquest of Prosecution are lay advisory bodies that review non-prosecution decisions by prosecutors. Every district has one or more Committees, and they consist of eleven lay people randomly selected from among the district's voters. Their purpose is to reflect popular will in the charging process.

Victims and certain qualified parties dissatisfied with a prosecutor's decision not to prosecute may request a review by the Committee. The Committee will make one of the following three recommendations: (i) non-prosecution is proper; (ii) non-prosecution is improper; or (iii) prosecution is proper. The last recommendation requires a special majority vote of eight out of eleven Committee members. Prosecutors generally have good reasons when they decline to prosecute, and during the five-year period of 2005-09, out of 10,513 cases decided on the merits, 9,860 (93.8%) have resulted in a recommendation of "non-prosecution is proper."<sup>19</sup>

The recommendation will be notified to the prosecution, and when the latter two recommendations are made, the prosecutors will reopen the case. Upon reinvestigation, they may reconsider their position and prosecute, or maintain their initial decision and not prosecute.

The Committee's recommendations were formerly purely advisory, but from May 2009, if the prosecutor's decision not to prosecute a particular case twice receives a recommendation of "prosecution is proper," a court will appoint an attorney, who will undertake the role of the prosecutor and file charges in accordance with the Committee's recommendation. The system is called "compulsory prosecution." According to past statistics, a recommendation of "prosecution is proper" is not very common: during the five year period of 2005-09, 53 (0.5%) out of 10,513 cases reviewed by the Committee resulted in this recommendation. As of January 2011, there have been four instances of compulsory prosecution.

### **3. Quasi-Prosecution**

Quasi-prosecution is a procedure applicable to offences of "abuse of authority" by certain government officials. If a person who has filed a complaint or accusation of such offences is dissatisfied with the public prosecutor's decision not to prosecute, the person may apply to a District Court to commit

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<sup>18</sup> White Paper on Crime 2010, Ministry of Justice, Japan.

<sup>19</sup> Ibid.

the case to trial. This system is intended as a safeguard against unreasonable non-prosecution decisions by prosecutors. However, in practice, prosecutors do prosecute if the offence is serious enough and there is sufficient evidence. Accordingly, the number of cases committed to trial has been few. During the last 15 years, 4,724 applications for quasi-prosecution were filed, but only three were granted.

#### **E. Victim Notification Programme**

Victims of crime have legitimate interest in knowing the outcomes of their cases. In 1999, the prosecutors office introduced the Victim Notification Programme to keep victims informed of the progress and outcomes of their cases. Notification is not automatic. As some victims prefer not to be contacted, notice is given to only those who have asked for it.

Information notified under the programme includes the following:

- (1) Disposition of the case (e.g. prosecution for formal trial, summary prosecution, non-prosecution or referral to the Family Court);
- (2) Venue and time of the trial;
- (3) The results of the trial (conclusion section of the judgment, status on appeal);
- (4) The perpetrator's custody details, the indicted facts, summary of the reasons for non-prosecution, and other matters similar to those listed in (1) to (3); and
- (5) The matters concerning the perpetrator after conviction is finalized:
  - Name and location of the prison where the perpetrator is imprisoned.
  - The possible schedule for release from prison (the scheduled date of release on completion of the sentence, parole) after the prison sentence becomes final.
  - Treatment of the perpetrator in prison (updates are given around once every six months).
  - The date when the perpetrator was actually released (release on completion of the sentence, parole).
  - The date when suspension of execution of the sentence was revoked.
  - The date when a decision was made for granting parole.
  - The date when probation was commenced and the scheduled end thereof.
  - Treatment during probation (updates are given around once every six months).
  - The date when probation ended.