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## PARTICIPANTS' PAPERS

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### JAPAN'S CRIMINAL JUSTICE SYSTEM IN RELATION TO CRIMES OF GIVING AND ACCEPTING BRIBES

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#### I. INTRODUCTION

My paper focuses on the crimes of giving and accepting bribes, which are typical examples of corruption. It illustrates how the criminal justice system of Japan dealt with recent cases of large scale corruption. It also outlines the *Assen Ritoku Shobatsu Hou* or the Law Punishing a Person who Gains Profit through Mediation.

#### II. HISTORY OF THE LAWS IMPOSING PUNISHMENT UPON *ZOOSHUWAIZAI* OR THE CRIME OF GIVING AND ACCEPTING A BRIBE

##### A. Laws Punishing the Crime of Giving and Accepting a Bribe up to the End of World War II

The Penal Code of Japan was proclaimed in April 1907 (the 40<sup>th</sup> year of Meiji) and became effective in October 1908. At that time, only Article 197 of the Penal Code regulated all kinds of corruption.

Subsequently, the Penal Code was revised in March 1941 (the 16<sup>th</sup> year of Showa) and its enforcement was systematized by penalizing *jutakushuuwaizai* (the crime of accepting a bribe for a dishonest act), *jizenn shuuwaizai* (the crime of advance acceptance of a bribe), *daisannshakyouwaizai* (the crime of giving a bribe to a third person) and *jigo shuuwaizai* (the crime of subsequent bribery).

##### 1. *Jutakushuuwaizai* or the Crime of Accepting a Bribe for a Dishonest Act Committed Pursuant to an Entreaty

To begin with, the act of accepting a bribe as a reward for a dishonest act committed pursuant to an entreaty was distinguished and penalized separately from the simple crime of accepting a bribe for a dishonest act. Prior to the revision, all kinds of corruption were punished similarly whether or not they were performed in response to an entreaty. Following the revision, the law now makes a distinction between the act of accepting a bribe without an entreaty, which is the simple crime of accepting a bribe for a dishonest act and which is treated in the first part of paragraph 1 of Article 197, and the act of accepting a bribe pursuant to an entreaty, which is known as *jutakushuuwaizai* and is dealt with in the second part of paragraph 1 of Article 197.<sup>1</sup>

##### 2. *Jizenn Shuuwaizai* or the Crime of Advance Acceptance of a Bribe

Paragraph 1 of Article 197 punishes only public officials who commit the simple crime of accepting a bribe for a dishonest act or for accepting a bribe for a dishonest act committed pursuant to an entreaty. In order to penalize such criminal acts committed by electoral candidates or by winning candidates who have not yet been sworn into office, the crime of advance acceptance of a bribe was included in paragraph 2 of Article 197.<sup>2</sup>

##### 3. *Daisannshakyouwaizai* or the Crime of Giving a Bribe to a Third Person

Instead of accepting a bribe personally, a public official may employ another method of accepting it by causing the bribe to be offered to a third person or by demanding that the bribe be offered to a third person or by agreeing to the bribe being offered to a third person.<sup>3</sup> Such an act endangers the integrity of the public

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<sup>1</sup> Article 197 (*Acceptance of a Bribe*). A public officer or an arbitrator who receives, demands or contracts to receive a bribe in connection with his or her duties shall be punished with imprisonment with labour for not more than five years; and when he or she agrees, at the same time, to do an act in response to an entreaty, he or she shall be punished with imprisonment with labour for not more than seven years.

<sup>2</sup> Article 197 (*Acceptance of a Bribe; Its Advance Acceptance*), (2) When a person who is to become a public officer or an arbitrator receives, demands or promises to receive a bribe, agreeing, in response to an entreaty, to do an act relating to the duties which he or she is to assume, imprisonment with labour for not more than five years shall be imposed upon him or her becoming such public officer or arbitrator.

<sup>3</sup> Article 197-2 (*Bribe to a Third Person*). When a public officer or arbitrator, agreeing, in response to an entreaty, to do an act in connection with his or her duties, causes a bribe to be offered to a third person or demands or promises it to be offered to such a person, imprisonment with labour for not more than five years shall be imposed.

office and jeopardizes the public trust. Article 197 did not cover cases such as these and so the law was revised to make up for the deficiency.

4. Kajushuuwaizai or the Crime of Bribery for a Dishonest Act (Paragraph 1 and 2 of Article 197-3) and Jigo Shuuwaizai or the Crime of Subsequent Bribery (Paragraph 3 of Article 197-3)

Paragraph 1 of Article 197-3 retained the second part of the first paragraph of Article 197 prior to its revision. However, the revision broadened the scope of the provision by also penalizing bribery of a third person in paragraph 2 of Article 197-3. It also increased the punishment laid down by law.

Before the revision, a public officer could only be punished if he or she committed an illegal act or if he or she failed to perform his or her duties after having accepted, demanded or agreed to a bribe. After the revision, however, a public official may also be punished if he or she commits an illegal act or fails to perform his or her duties even before he or she accepts, demands or agrees to a bribe.

Paragraph 3 of Article 197-3 imposes punishment upon a former public official who accepts a bribe for the improper performance of his or her duties or for the failure to perform such duties during his or her term of office even if the acceptance takes place after the term of office. No provision punishing such acts previously existed. This deficiency was cured by the revision.

5. Zoowaizai or the Crime of Giving a Bribe

Similar to the crime of accepting a bribe, the scope of the crime of giving a bribe was likewise expanded and its statutory punishment increased.

**B. Post-war Revisions of the Laws Dealing with the Crimes of Giving and Accepting Bribes**

1. Revision of 1958 (33<sup>rd</sup> year of Showa): Penalizing *Assenshuuwaizai* or the Crime of Accepting a Bribe for the Exertion of Influence

i) *Shoden Gigoku Case (Scandal of Showa Electric and Industrial Company)*

Since the 1940s, there have been some proposals for the enactment of a law that would punish the act of accepting a bribe for the exertion of influence. However, no such revision was carried out.

In 1948 (23<sup>rd</sup> year of Showa), however, an important case known as the Shoden Scandal occurred. It involved the President of the Showa Electric and Industrial Company and severely affected not only government offices but also political and business circles. This case led to the arrest and indictment of the former Prime Minister Ashida Hitoshi. This scandal was said to have caused the collapse of the Ashida cabinet. Ashida had been Foreign Minister prior to becoming Prime Minister, and it was during his tenure as Foreign Minister that the crime for which he was indicted took place.

On 22 October 1952 (27<sup>th</sup> year of Showa), the Tokyo District Court handed down its decision on the case and made the following statement: “the Defendant Ashida used his strategic position as the Foreign Minister and took advantage of the office’s status and prestige to influence other public officials in the performance of their official duties...Therefore, his acts constitute the crime of accepting a bribe for the exertion of influence.” In spite of opinions urgently pushing for the punishment of accepting bribes for the exertion of influence, the law in place during that time did not penalize such acts and so there was no way to impose any penalty. Hence, the defendants were found not guilty of the crime of accepting bribes and the reason given by the court for the verdict was as follows: “even if the present conditions call for the punishment of the act of accepting a bribe for the exertion of influence, the legal interpretation of the provision punishing the simple crime of giving and accepting a bribe could not be expanded so as to include acts of accepting bribes for the exertion of influence.” It then concluded by stating: “To correct the situation, there is nothing that can be done except to wait for the enactment of the appropriate law.”

The verdict by the Tokyo District Court drew much public attention because it implied the need for a law that would penalize the act of accepting a bribe for the exertion of influence. It provided the momentum necessary for the expression of public concern over acts of accepting bribes for the exertion of influence.

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<sup>4</sup> Article 197-4 (*Receiving a Bribe for the Exertion of Influence*). A public officer who receives, demands or agrees to receive a bribe in compensation for the influence which he or she exerted or is to exert, in response to an entreaty, upon another public officer so as to cause him or her improperly to perform or fail to perform his or her duties, shall be punished with imprisonment with labour for not more than five years.

After much debate, the crime of accepting a bribe for the exertion of influence was included as Article 197-4<sup>4</sup> of the Penal Code in 1958 (33<sup>rd</sup> year of Showa). At the same time, the corresponding crime of giving a bribe was also included as Article 198-2.

*ii) The Criminalization of the Act of Accepting a Bribe for the Exertion of Influence*

The crime of accepting a bribe for the exertion of influence is committed by a public official who accepts a bribe as a reward for responding to an entreaty for him or her to cause another public official to perform illegal acts.

The main element of this crime is the act of the public official who accepts a bribe to cause another public official to commit improper acts. This element is not present in the other crimes related to the act of accepting a bribe.

2. The Revision of 1980 (55<sup>th</sup> year of Showa)

*i) The Lockheed Case*

One of the most well-known corruption scandals in Japan is the Lockheed Case which occurred in 1976 and which involved the crime of accepting a bribe for a dishonest act. In this case, the Lockheed Corporation employed the services of the Marubeni Corporation as its official agent in marketing its aircraft to All Nippon Airways (ANA). The senior officers of the Marubeni Corporation sought to further the interests of Marubeni and Lockheed by approaching the then Prime Minister Tanaka Kakue. They requested the Prime Minister to instruct the Minister of Transportation to issue an administrative guidance that would encourage ANA to purchase the aircraft of the Lockheed Corporation. They also asked the Prime Minister to approach ANA directly. As a reward, he was given five hundred million yen.

On October 12, 1983, the Tokyo District Court handed down its decision and stated that: “the Prime Minister must exercise utmost fairness in executing his official duties by virtue of the fact that he is occupying the highest position in public office. But he has gravely betrayed the nation’s trust in the administration of the national government by taking advantage of his authority in order to influence the exercise of a Minister’s power to give official sanction. The pathological impact of his act on society is immense. Taking these together with the fact that the case involved an unprecedented amount of bribe money and absent special circumstances, he must be made to suffer a severe penalty for the crime of accepting a bribe for a dishonest act.” The maximum punishment for the crime of accepting a bribe for a dishonest act was, at that time, five years imprisonment with labour. The defendant Tanaka was given a prison sentence of four years with labour. On 29 July 1987, the Tokyo High Court dismissed his appeal and upheld the judgment handed down by the District Court.

*ii) Revision of the Penal Code: Increase in the Statutory Punishment*

The *Housei Shingi Kai*, or the National Council for the Legal System was considering the overall revision of the Penal Code to keep up with the changing times when the Lockheed Case was uncovered in February 1976. In August of the same year, former Prime Minister Tanaka was indicted for the crime of accepting a bribe for a dishonest act, which involved an unprecedented amount of money. Various groups around the nation severely criticized the close ties between political and business circles which gave rise to such kind of systemic corruption. The public demanded that discipline be strictly enforced among the officials and that a repetition of such crimes be restrained.

Revision became urgent in order to respond to the public’s demand and to impose appropriate punishment in bribery cases. Thus:

- (a) the maximum penalty was raised to five years of imprisonment from the original three years for the following crimes: the simple crime of accepting a bribe, advance acceptance of a bribe, bribe to a third person, subsequent bribery and accepting a bribe for the exertion of influence;
- (b) from the previous five years, the maximum statutory punishment for the crime of accepting a bribe for a dishonest act was raised to seven years of imprisonment; and
- (c) the maximum statutory punishment for the crime of giving a bribe for the exertion of influence was raised to three years from the previous two years of imprisonment and the fine was raised to ¥1,000,000 from the previous amount of ¥600,000.

Except for the crime of bribery for a dishonest act, the revision raised the maximum penalties for all crimes involving bribery. Furthermore, it made the investigation and examination of cases involving bribery easier by extending the prescriptive period for filing an indictment to five years from the original three years.

### **III. ASSEN RITOKU SHOBATSU HOU OR THE LAW PUNISHING A PERSON WHO GAINS PROFITS THROUGH MEDIATION**

#### **A. Background of the Law and its Legislation**

##### **1. Case of Nakamura Kishiro: Accepting a Bribe for the Exertion of Influence**

After the Lockheed Scandal, a number of corruption cases involving national government offices and politicians, as well as large-scale financial and economic crimes were exposed. From the latter half of the 1980s until the 1990s, the mass media reported large-scale scandals which involved high-ranking government officials and prefectural governors, among others. Such cases drew much public attention.

In May 1991, a case of giving and accepting a bribe for the exertion of influence occurred. A vice-president of Kajima, a leading general construction company, approached the incumbent Member of Parliament and former Cabinet Minister Nakamura Kishiro and asked him to speak to the chairperson of the Commission on Fair Trade to preclude criminal prosecution in a case being investigated by the Commission. The criminal prosecution was against a *dango* or group organized by construction companies for the purpose of bid-rigging, which is a violation of the Anti-Monopoly Law. Nakamura Kishiro received a bribe of ten million yen for complying with the entreaty. Thus, the crime of giving and accepting a bribe for the exertion of influence was committed. The case attracted much public attention because the said Member of Parliament was arrested when parliament was in session.

On 1 October 1997, the Tokyo District Court sentenced Nakamura Kishiro to one year and six months of imprisonment with labour. His appeal was dismissed by the Tokyo High Court on 25 April 2001 and by the Supreme Court of Japan on 14 January 2003. The sentence of the District Court was, thus, upheld.

After this case, many opined that a politician who gains pecuniary benefit for unduly influencing a bureaucrat should be held criminally liable. Due to the political situation, however, no such law was enacted.

##### **2. A Case Involving the Crime of Accepting a Bribe for a Dishonest Act Committed by the Former Construction Minister Nakao Eiichi**

At the end of June 2000, the former Construction Minister Nakao Eiichi was found to have committed the crime of accepting a bribe for a dishonest act. According to the facts of the case, Minister Nakao accepted a bribe of 60 million yen from construction companies in connection with certain public works ordered by the former Minister of Construction and was thus charged for the crime of accepting a bribe for a dishonest act.

On 16 October 2002, the Tokyo District Court handed down a prison sentence of two years with labour. However, the Tokyo High Court reduced the sentence to one year and ten months of imprisonment with labour.

This case gave rise to a great public demand for the criminalization of the act of gaining profit through mediation. Thus, the Law Punishing a Person who Gains Profit through Mediation was enacted in 2000 and became effective on 1 March 2001.

#### **B. An Outline of the Law Punishing a Person who Gains Profit through Mediation**

This law covers members of the National Diet, heads of local governments and members of local assemblies who respond to entreaties regarding sales and other contracts entered into by the national or local governments or regarding administrative action against a particular individual. The law punishes these public officials for accepting pecuniary benefits as a reward for using the power of their office to influence the performance of official duties of another public servant. Publicly-paid secretaries of National Diet members are also subject to the provisions of the law. The law was subsequently revised in August 2002 to add private secretaries to the list of those subject to punishment under the law. This occurred because some

scandals involving private secretaries of members of the National Diet have been reported, which incidents have resulted in political distrust by the public.

1. Elements of the Crime of Gaining Profit through Mediation Committed by Public Officials (Article 1, Section 1)
  - a. A person in public office;
  - b. Effected in connection with a contract entered into by the national or local government or in relation to an administrative action taken against a particular person;
  - c. Effected in response to an entreaty;
  - d. Exertion of power or influence based on the authority of the person in public office;
  - e. Influencing a public officer in the performance of his or her official duties or preventing such public officer from performing his or her duties or influencing a public officer with regard to an official task that was previously completed;
  - f. Accepting pecuniary benefits as a reward for carrying out the above acts.

2. Concrete Examples of Cases Involving the Exertion of Influence that are Subject to Punishment

Case 1: Mr. A is a member of the National Diet and belongs to Committee Y, which deals with Ministry X. He accepts an entreaty from a certain Businessman B regarding a contract for the procurement of supplies for Ministry X. He then tells Mr. C who is in charge of the supplies procurement of Ministry X to secure supplies from Businessman B or else he might oppose bills related to Ministry X.

Case 2: Mr. A, who is a member of the National Diet, was requested by Businessman B to mediate in a contract regarding the delivery of supplies to the Tokyo Metropolitan Government. Mr. A responds to the request by threatening Employee C of the Tokyo Metropolitan Government that he will question the excessive amount of subsidies being given to the Tokyo Metropolitan Government in the Committee to which he belongs and which is in charge of subsidies given by the National Government for public works, unless the contract is given to Businessman B.

Case 3: Mr. A, who is a member of the National Diet, accedes to the entreaty of Businessman B and tells Officer C of Nagano Prefecture to allow Businessman B to qualify as a participant in competitive bidding. Otherwise, he will oppose the bill partially revising the law providing special measures for the development and promotion of the Nagano area.

Case 4: Member A of the Aichi Prefectural Assembly receives an entreaty from Businessman B for mediation in a contract for the delivery of supplies to Nagoya City. Member A responds to the entreaty by informing the officials of Nagoya City that, unless a contract for the delivery of supplies is entered into with Businessman B, he will question the excessive amount being given by the Prefectural Government to Nagoya City for public works in the Committee to which he belongs and which is in charge of the subsidies.

Case 5: Member A of the Nagano Prefectural Assembly was requested by Businessman B to mediate in a contract for the delivery of supplies to a hospital run by the national government. Member A accedes to the request and threatens that, unless a contract for the delivery of supplies is entered into with Businessman B, he might pose a question to the Prefectural Assembly to inquire into the existence of any irregularity in the inspection by the Nagano mayor of the structural facility of that hospital.

Case 6: The City Mayor A of Osaka City grants the request of his personal friend Mr. B to help him get a job at the Post Office and tells Post Office Director C that the office of the mayor would possibly make an unfavourable decision regarding the application for the construction of a new Post Office building unless Mr. B is given employment in the Post Office.

These cases are concrete examples of instances where the power and authority of a public office is misused for the purpose of gaining an advantage. In Case 1, influence was exerted by a member of the National Diet over an officer of the national government. In Cases 2 and 3, influence was wielded by a member of the National Diet over a local government official. In Case 4, influence was used by a member of a prefectural assembly over a city government official. In Cases 5 and 6, influence was exercised by a member of the local assembly and the head of the local government over a national government official.

3. Punishments Imposed in Actual Cases upon Persons who Gained Profit through Mediation

*i) Decision of the Wakayama District Court dated 6 November 2002*

In this case, the defendant was a member of the city council who responded to an entreaty made by his friend who was a civil works contractor and recommended to the city that his friend be chosen in the competitive bidding for public works in the city. As a reward, he was given ¥500,000 in cash.

The defendant did not dispute the facts presented in the case. The court concluded that the criminal responsibility of the defendant was serious because: (1) his acts constituted an unconscionable privatization of public duties; (2) he exerted his influence harshly by directly going to the office in charge of the bidding and furiously protesting to the senior officers in a loud voice; (3) his recommendation to the city was unjust because it was made in favour of a construction company whose ability to engage in business was questionable, and; (4) the amount of ¥500,000 which he received is no small amount and had severely damaged the integrity of the public office and the public trust therein.

*ii) Decision of the Nagoya District Court dated 9 August 2004*

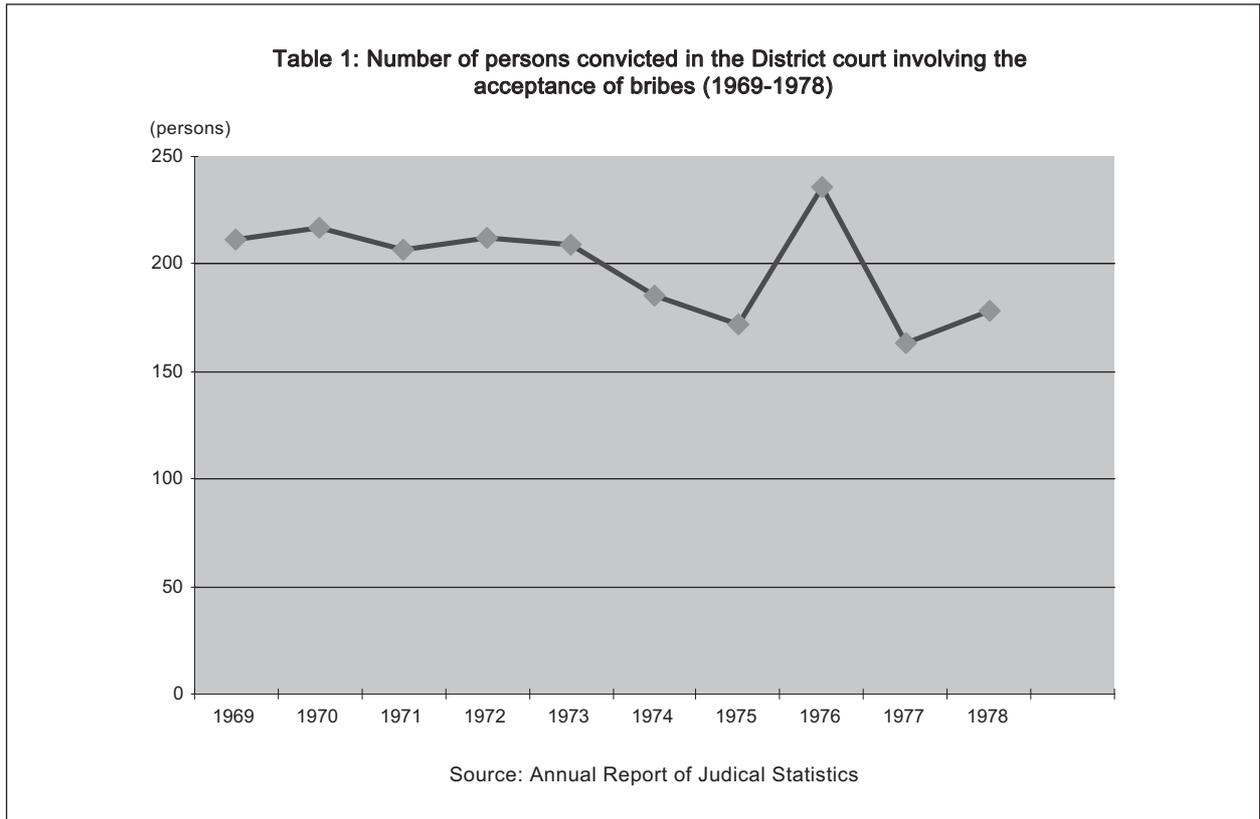
The defendant in this case was a member of the council of Bisai City, Aichi Prefecture. In response to the entreaty of a civil works contractor, he used his authority to exert influence over the city employee who was in charge of the competitive bidding for the public works in the city and obtained information regarding the cost of designing these public works projects. After the failure of the competitive bidding, the defendant used his influence to ask the aforesaid city officer to enter into a contract with the contractor even without any bidding, in contravention of the mayor's orders. The defendant received a reward of ¥500,000. Later, he again exerted influence over the same city officer and instructed him to contract with the contractor without any bidding, again in contravention of the orders of the mayor. He again received a reward of ¥500,000. It was, thus, established that he committed the crime of accepting a bribe for the exertion of influence.

The court stated that the defendant's criminal responsibility was serious because: (1) he colluded with a contractor and used his position as member of the city council to make a city officer commit an act of injustice, in exchange for a cash reward; (2) the amount of cash he received was huge, being a total of ¥1,000,000 and; (3) his acts destroyed the public's trust in the office of a member of the city council and in the duties of public servants.

#### IV. CONCLUSION

Cases of giving and accepting bribes are often committed covertly with knowledge being shared only by the parties involved and, thus, are extremely concealed. For this reason, it is necessary to observe the trend of such cases over a long period of time. In Japan, cases of giving and accepting bribes have exhibited some marked tendencies over the decades.

In the ten years prior to the revision of 1980, there was an increase in the number of persons involved in the giving and accepting of bribes. This tendency is clearly seen in Table 1.



The number of persons convicted after the revision of 1980 is seen in Table 2. (1981-1998)



Trends of bribery cases cannot be seen simply by looking at this table because of the heightened concealment of these cases. However, since the statutory punishments became more severe, it was observed that both the public servants who accept bribes and the business people who give bribes tried to abstain from committing these crimes after a comparison of the benefits of committing the crime and the losses by way of punishment and social sanctions in case of apprehension. The revision thus achieved the preventive effect desired.

We could therefore conclude that prevention of the repeated commission of the crimes of giving and accepting bribes is not merely a legal issue. It is also a social problem. Thus, public servants should be reminded of the importance and value of their official duties. We should look to the Penal Code only as a last resort.

However, as a judge, I would like to make sure that appropriate punishments are imposed in these cases. I also expect that the National Diet would be able to enact laws that would cover other cases of corruption that might crop up in the future.