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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

October 1948

LEGAL COMMENTS

On the 28th of September, 1948 the Habeas Corpus Act and the Supreme Court Habeas Corpus Rule went into effect. This Act and Rule introduce to the Japanese legal system the well-known Common Law principle which provides an immediate remedy for those whose physical freedom is restrained by illegal procedures.

It must be remembered however, that the Japanese legal system is based on Continental Law rather than on the Common Law of England and the United States, The adoption of a principle entirely foreign to the Japanese will, therefore, raise many questions as to the historical background of Habeas Corpus and in regard to its application.

The attached paper contains a brief history of Habeas Corpus in the Common Law, its application in the United States, its source in Japanese law and lastly a detailed description of the procedures for relief as contained in the Habeas Corpus Act (Law No. 199 of 1948) and the Supreme Court Habeas Corpus Rule.

Military Government Teams will be called upon to provide information and aid to the Japanese officials who are entrusted with the task of enforcing this new safeguard of civil liberties. One important point must be emphasized. Habeas Corpus cannot replace the ordinary proceedings of a trial court (the r does not apply where any other procedure for relief is available). The prime purpose of the Habeas Corpus order or warrant (the word "writ" is not employed in Japan) is to test the legal processes under which a prisoner is detained. If the prisoner is being restrained by a procedure not established by law, in contravention of Article 31 of the Constitution, the court to which the application for relief has been submitted will release or order the release of the prisoner.

The responsibility of Military Government Teams in the application of these new procedures cannot be over-emphasized. Unless closely supervised, such a revolutionary legal concept is apt to be misunderstood and misused. Only through a continuous educational program will the Japanese people learn to regard Habeas Corpus as a right which provides for them the same safeguards that Habeas Corpus in the Common Law guarantees the people in the United States and in the British Commonwealth.

Prepared by:

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HABEAS CORPUS

I. HABEAS CORPUS IN THE COMMON LAW

A. What is Habeas Corpus: Habeas Corpus is a powerful means for contesting unlawful detention. In the common law, Habeas Corpus is a writ used to effect the release from custody of persons illegally deprived of their liberty or illegally detained.

Translated literally from the Latin, Habeas Corpus means "You have the body." This phrase, directed against an individual who is alleged to detain another illegally, is coupled with a judicial command that the imprisoned person be produced immediately and the reason for detention be made known.

B. Historical Background:

1. In England - The writ existed in English history even prior to the Magna Carta of 1215. The objectives of Habeas Corpus, however, were not immediately realized because the crown influenced judges to neglect or refuse issuance of the writ. The general disregard of the right of Habeas Corpus resulted in the enactment of a new Habeas Corpus Act of 1679 to remedy these defects. Subsequent statutes were enacted to make the system more effective until now Habeas Corpus is regarded in England as well as in America as an effective legal weapon of the citizen.

2. In the United States - When the colonists came to the United States they preserved this right of the citizen to invoke Habeas Corpus as a remedy in cases of unlawful detention and included it in the Constitution.

The suspension of the writ is forbidden by the Constitution except when cases of rebellion or invasion require it for public safety. Court action may be delayed during the emergency. While it is a general rule that the legislature may regulate the procedure relating to Habeas Corpus and even the purpose for which it may be used, the writ may not be abrogated or its efficiency curtailed by legislative action.

C. Scope: The writ of Habeas Corpus is not designed to interrupt the orderly administration of criminal justice by a competent court acting within its jurisdiction or as a substitute for the ordinary proceedings of a trial court. The writ is granted to test a right under which a person is detained or the right to the custody of infants, incompetents, or insane persons, the final objective being the determination of the legality of the restraint under which a person is held. It is not used to determine the innocence of the prisoner detained for criminal prosecution.

The scope of a writ of Habeas Corpus extends to questions affecting: jurisdictional authority of the person or agency which committed the prisoner, validity of the judgment under which he is restrained, and sometimes the lawfulness of the arrest of one who claims immunity from arrest.

Irregularities and disregard of established rules governing trial procedure, irregularities in docket entries, error in the modification of an erroneous order, and error or irregularities in the sentence itself, are permitted to be reviewed only if they are defects of a jurisdictional character.

The weight of authority is that a court may determine in a Habeas Corpus proceeding the constitutionality of the statute under which the prisoner is held, and if it proves to be unconstitutional, discharge him irrespective of the stage of prosecution against him under the statute, even though other relief may be available to him.

D. Proceedings: Habeas Corpus is a summary procedure to recover the freedom of a person held under illegal restraint. It is separate from the legal proceeding under which the detention is sought to be justified.

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E. Construction: A liberal construction should be given to Habeas Corpus legislation, even disregarding the technical language if it can be construed in favor of the liberty of the citizen.

II. HABEAS CORPUS IN JAPAN

A. Source in Japanese Law: The Japanese Constitution states in Article 31 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." The Habeas Corpus Act, implementing this constitutional provision, contains the procedure by which a person illegally detained, i.e., a person whose physical freedom has been restrained other than by the proper legal procedures, may apply for relief and obtain rapid recovery of his freedom.

The Habeas Corpus Rule, issued by the Supreme Court on the same day the Act came into effect, contains, in detail, the procedures relating to the application for relief from an illegal restraint. The Rule defines "restraint" as any act depriving or restricting the freedom of action of another person such as apprehension, arrest, detention, etc. and "restrainer" as the superintendent of an institution when restraint is made in public offices, hospitals, institutions and a person who is restraining another in other institutions.

B. Interpretation: Since Habeas Corpus represents a complete innovation in the Japanese system it remains to be seen how the Japanese Courts will interpret the new legislation. It might very well be that this interpretation will not strictly follow along the lines of Anglo-Saxon jurisprudence.

III. PROCEEDINGS AND RELIEF UNDER HABEAS CORPUS ACT AND RULE

A. Application for Habeas Corpus Order:

1. Who May Apply - Any person whose freedom of action is restrained without the proper legal procedure may apply for its recovery. Also anyone may apply for the release of a person under restraint but the written or oral application must be made by an attorney. In extraordinary circumstances which must be proven presumptively, the applicant himself may make the application. (Law, Articles 2, 3, 4; Rule, Article 6.)

2. Place of Application: Application should be made to the High or District Court having jurisdiction over the person being restrained, the person effecting the restraint or the applicant. (Law, Article 4)

3. Requisites of Application: The application, which must have the freely expressed consent of the prisoner, may be made only if it is obvious and conspicuous that the restraint, judgment, order or other disposition relating to the restraint of a person has been made without jurisdiction or authority or has conflicted remarkably with formalities or proceedings prescribed by laws, orders or rules. (Rule, Articles 4,5)

A stamp costing 33 yen (computed according to Articles 2 and 3 of the Law of Stamps for Civil Procedure) must be affixed to the written application or to the document drawn up by the court clerk when the application is oral. (Rule, Article 9)

4. Procedure for Application: The proceedings for the application for relief under the Habeas Corpus Law are governed by the provisions governing civil procedure, unless inapplicable, as well as those prescribed in the Habeas Corpus Law and Rules of the Supreme Court. (Law, Article 23; Rule, Articles 1, 46.)

5. Contents of Application: An application must contain the following:

a. Name and residence of applicant, his attorney or legal representative.

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b. Purpose of application.

c. Reason why restraint is not made through proper legal process.

d. Residence or other description of the person effecting the restraint.

e. Name of the prisoner

f. Facts of restraint such as date, place, method, etc.

g. Facts and reasons why application is made in instances when it is claimed that relief cannot be obtained within a reasonable time although means by which relief may be obtained do exist. (Law, Article 5; Rule, Article 7)

Materials for presumptive proof in the form of written statements certificates or other documents of interested parties or witnesses must accompany items d, e, f, and g. In lieu of this presumptive proof the court may require either the applicant or his attorney to deposit money for security or swear to the assertions made. (Law, Article 5; Rule, Articles 7, 8)

6. Allowance and Dismissal of Application: The court must make a decision without delay on the request contained in the application. A Habeas Corpus Order shall not be issued if another remedy is available. If other adequate means exist whereby relief may be obtained, an application may be made only when it is evident that relief cannot be obtained within a reasonable time. (Law, Article 6; Rule, Article 4)

If preliminary investigation by a judge shows that no grounds exist for a release, the court may dismiss, by means of a ruling, an application without conducting a hearing. An appeal may be made from this ruling to the Supreme Court within three days. (Law, Articles 11, 21; Rule, Article 21)

If the application or court clerk's document lacks the prescribed data or a stamp and is not corrected on direction of the court within three days, it shall be dismissed by a ruling of the court. (Rule, Articles 8,9,21)

Thus, an application may be dismissed by a decision when the application is illegal and its defects cannot be corrected, when the application is made against the freely expressed consent of the prisoner, when restrainer or his residence is uncertain, when the prisoner has died, when the prisoner has been freed, when no ground exists to justify the application, or when the application lacks the required justification or necessary presumptive proof. Only if the restrainer has been examined in a preliminary examination is he notified of the dismissal of the application. (Law, Articles 7, 11, 16; Rule, Article 21)

B. Court Action:

1. Notification to the Supreme Court: The court receiving the application or the court to which an application has been forwarded, must immediately notify the Supreme Court of the case and report on its progress and result. (Law, Article 20)

2. Provisional Release: The court may temporarily release by a decision the person being restrained, subject to his reappearance whenever summoned, either on his own oath or upon the guarantee of an attorney and/or with or without the posting of a monetary bond, or may take other appropriate action prior to the trial and issuance of a judgment. (Law, Article 10)

3. Notification of Provisional Release: If the court releases the prisoner pending an investigation and trial or rescinds his release, the court which issued the warrant originally and the public procurator of the public procurator's office attached to the court must be notified. (Rule, Articles 19, 22)

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4. Remandation of Released: When the court has temporarily released a prisoner and has subsequently dismissed his application as being without grounds, the Court shall, by a ruling, rescind this disposal and direct the restrained person to present himself for delivery to the restrainer. This rescission ruling is notified to the applicant, the restrainer and the prisoner. (Law, Articles 10, 11, 16; Rule, Articles 19, 22, 35)

5. Production of the Accused: If the prisoner during a provisional release does not present himself when summoned by the court, he may be arrested. Rules relating to the production of the accused contained in the Code of Criminal Procedure also apply with necessary modifications. (Law, Article 10, Rule, Articles 20, 39)

6. Preliminary Examination: The court may immediately make the necessary investigation into the reasons for restraint and related matters by conducting a hearing on the application and by examining the applicant, the prisoner, their attorneys, and other interested parties. The members of the collegiate body (a body comprised of several judges) may conduct this investigation. (Law Article 9; Rule, Article 17)

When a preliminary examination is deemed unnecessary the court may either dismiss an application when it is evident that no grounds exist to ju it or take steps to summon the persons concerned and issue a Habeas Corpus Order (warrant). (Law, Articles 11, 12; Rule, Article 18)

When it is evident from the preliminary examination that there exists no ground justifying the application, the court may dismiss the application without any further procedure for trial. (Law, Article 11)

C. Habeas Corpus Order:

1. Definition of Habeas Corpus Order: The Habeas Corpus Order (or Warrant as it is sometimes translated) is the relief provided by the Habeas Corpus Act to persons held under illegal restraint. The Order is a ruling by which the person holding the prisoner is commanded to produce the body of the prisoner at a certain time and place and to submit a written reply explaining the restraint. (Law, Article 1; Rule, Article 2)

2. Service of Habeas Corpus Order: The Order is served to the person in whose custody a person is detained but the method of service by publication prescribed in Articles 178 - 180 of the Code of Civil Procedure shall not be followed. (Rule, Articles 24, 25)

3. Notification of Order: If the court issues or rescinds the Habeas Corpus Order it must notify the court which issued the warrant of restraint and the public procurator of the public procurator's office which corresponds to this court. (Law, Article 13; Rule, Article 28)

4. Reply to Order: A written reply to the Habeas Corpus Order must be made by the day of trial. In addition it must be signed and sealed by the restrainer, his procurator or attorney. (Law, Article 12; Rule, Articles 2, 27

5. Requisites of the Written Reply: The written reply must contain the following information:

a. Name and address of restrainer, his procurator or attorney.

b. Purpose of reply to the Order

c. Date, place and cause of restraint.

d. If the body of the prisoner cannot be produced, the reason therefor.

e. If the restraint is carried out pursuant to a judgment or order, a copy of or extract from the warrant, judgment or order must be annexed to the written reply. (The restrainer may apply for such copies to the proper authorities.) (Law, Article 12; Rule Article 27)

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6. Disobedience of Habeas Corpus Order: If the restrainer does not obey the Order, he may be placed under arrest or taken into custody until he does obey it. He is liable to a fine not exceeding 500 yen for each day's delay which must be stated in the Order. (Law, Articles 12, 18; Rule, Article 39)

7. Custody of Restrained: The court issuing a Habeas Corpus Order assumes jurisdiction over the person being restrained at the place of his restraint and may commit the prisoner to any detention institute, jail, police station or other suitable place. In these cases the person to whose care the prisoner has been committed assumes the custody (Rule, Article 25).

8. Actions Delaying Relief: If, after the issuance of the Habeas Corpus Order, any public official or other person wishes to do anything which might delay the proceedings for relief under the Habeas Corpus Law, the court which has issued the Order must give its consent. (Rule, Article 26)

D. Hearing and Trial:

1. Priority of Habeas Corpus Trials and Judgments: Trials and judgments upon these applications for relief from illegal restraint have priority over all other cases irrespective of the order in which the cases have been accepted. No application may be annexed to other actions. (Law, Article 6, Rule, Articles 11, 15)

2. Transfer of Case: Either on request of the applicant or on its own authority, the court may transfer the case to another court of competent jurisdiction. (Law, Article 8)

Moreover, the Supreme Court may require the lower court to transfer a pending case, irrespective of the stage of itsproceedings for consideration and review by the Supreme Court. In this event the Supreme Court must issue an order of transfer to the lower court and must notify the applicant of the transfer order. The restrainer is notified of the transfer after the Habeas Corpus Order has been issued. (Law, Article 22; Rule, Article 43)

On re eipt of the transfer order, the court clerk of the lower court forwards the record of the case to the Supreme Court promptly. When the case has been transferred, the Supreme Court may review it directly and may nullify or alter the decision or verdict of the lower court. After the transfer order has been issued, the case is deemed to have been pending in the Supreme Court from the beginning. (Rule, Article 44)

No objection may be raised to a judgment of transfer or to a judgment dismissing a motion for transfer. If the judgment is contrary to any law, order or rule, such violation shall be reviewed by the court of jokoku appeal. (Rule, Article 14)

3. Trial:

a. Date and Place of Trial: The court designates a date and p for trial. A period of three days must be allowed between the forwarding of the Habeas Corpus Order and the day of trial. The trial must be held within one week from the date the application for relief was made. This period may be shortened or lengthened by the court. (Law, Article 12; Rule, Article 32)

b. Notification and Summons: The court which issued the warrant of restraint and the public procurator of the public procurator's office corresponding to this court shall be notified of the trial and may attend and express their opinions. (Law, Article 13; Rule, Article 32)

The applicant or his attorney, the prisoner, and the restrainer may be summoned for trial. The procedure for summoning as outlined in the Code of Civil Procedure is followed. (Law, Article 12; Rule, Article 23)

c. Conduct of trial: The trial is conducted in open court and is carried out according to provisions of oral proceedings as contained in the

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Code of Civil Procedure. (Law, Article 14; Rule, Article 33)

The judge who made the judgment or order against which the application for relief is made is excluded from further participation in this particular case. (Rule, Article 10)

When it is evident that a motion for exclusion or refusal has been made merely for the purpose of delaying the proceedings or has been made in contravention to the proper legal procedures, the court shall dismiss the motion by a ruling. (Rule, Article 12)

The judge against whom a motion for exclusion or refusal has been made is not prohbitied from participating in the judgment for the motion.

Proceedings are not suspended when a motion for exclusion or refusal has been made. However, when a motion for exclusion or refusal has been made against a judge of the collegiate court or a District Court judge who sits alone, if the judge admits the motion to be well founded, the proceedings will be suspended. (Rule, Article 13)

d. Attendance at Trial: The prisoner, his attorney, restrainer, and the applicant or their attorneys or procurators are required to attend on the first day of the trial with the following exceptions:

(1) If the prisoner, unable to attend because of unavoidable circumstances, consents to his own absence on the stipulation that his attorney will attend.

(2) If the prisoner consents to the absence of his attorney but he himself attends.

(3) If the court considers that the particulars stated in a written application have been orally stated, neither the applicant nor his attorney are required to attend.

After the restrained has stated the reason for his restraining the prisoner and the prisoner has answered these statements, the court may carry on the trial without anyone's attendance. (Law, Article 14; Rule, Articles 30, 32)

e. Attorneys: The prisoner may request the restrainer to appoint an attorney of his choice if an attorney has not already been appointed. If two or more lawyers have been nominated, only one needs to be notified. In this case, the restrainer must notify the attorney immediately. If there is already a counsel for the prisoner, who is suspected of committing a crime, that counsel shall be deemed as the attorney (except in the case where the counsel has been appointed by the court) in the Habeas Corpus proceedings. (Law Article 19; Rule, Articles 31, 40)

The prisoner's attorney must be a lawyer and if the prisoner has not appointed a lawyer, the court must do so from among qualified lawyers. The lawyers appointed by the court may request travelling expenses, daily allowances, hotel expenses and compensation. (Law, Article 14; Rule, Articles 31, 38)

The superintendent of a public office, charged with restraining a person illegally, may designate a subordinate to carry out all judicial acts except the appointment of attorneys. (Rule, Article 16)

4. Hearing:

a. Statement of Cause of Restraint: The restrainer, his procurator or attorney states the fact and cause of restraint as contained in the reply to the Habeas Corpus Order. The prisoner or the applicant, their attorneys or procurators, who are required to attend this first day of trial, may deny

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or affirm these statements and may produce evidence, raise objections to the application, lodge an appeal, withdraw the application and the prisoner may do all other acts of procedure that he wishes. If the procedural acts of the prisoner are inconsistent with those of the applicant, the latter's acts are void to the extent that they are inconsistent. (Rule, Articles 29,34)

b. Presumptive Proof: After hearing the statements and grounds for the application, the court investigates materials for presumptive proof and hears the restrainer who is required to prove presumptively the cause of the restraint. Any restraint carried out on the authority of a judgment or order is presumed to be legal. (Law, Article 15; Rule, Article 29)

5. Withdrawal of Application: Up until a decision is rendered an application may be withdrawn without the consent of the restrainer. Withdrawal must be made in writing except that an oral withdrawal may be made on the day of trial. (Rule, Articles 34, 35)

When an application has been withdrawn, the court shall, by a ruling, rescind the Habeas Corpus Order and render a judgment rescinding the provisional release of the prisoner and direct the prisoner to present himself for delivery to the restrainer. (Rule, Article 35)

E. Judgment:

1. Date of Judgment: Judgment shall be pronounced within five days from the day when the trial ends unless there are special circumstances preventing it. (Rule, Article 36)

2. Disposition of Restrained:

a. Application based on Insufficient Grounds: If the application is found to be without grounds, the court shall dismiss the application by a decision and return the restrained to the restrainer by rescinding the provisional release. (Law, Article 16)

b. Application based on Sufficient Grounds: If the court finds the application to be based on sufficient grounds, it may, by a decision, release the prisoner. If the prisoner is a child or a lunatic or if there are special circumstances surrounding the prisoner, the court may make any other disposition it considers suitable on behalf of the prisoner. (Law, Article 16; Rule, Articles 2, 37)

3. Invalidity of Judgments and Orders Rendered in Accordance with Other Laws: When a Habeas Corpus Order or a ruling relating to the provisional release of a prisoner has been forwarded to the restrainer or when a judgment releasing the prisoner or making other suitable disposition of the prisoner has been pronounced, judgments or orders relating to the restraint which were rendered in accordance with other laws but which are unfavorable to the prisoner shall be invalid to the extent that they are inconsistent with the above order, ruling or judgment or with the Habeas Corpus Law. (Law, Article 24; Rule, Article 45)

4. Revival of Judgments and Orders Rendered in Accordance with Other Laws: When a ruling revoking a Habeas Corpus Order or a provisional release of a prisoner has been notified to the restrainer, or where a judgment dismissing the application is pronounced, judgments or orders relating to restraint which were rendered in accordance with other laws but which are unfavorable to the prisoner shall be revived. (Rule, Article 45)

5. Validity of Judgments and Orders re. Restraint Rendered in Accordance with an Execution of Judgment or Warrant of Detention: When a restraint has been carried out in accordance with the execution of a judgment or a warrant of detention, the Habeas Corpus Order is deemed never to have been issued and the granting or recission of a provisional release shall be deemed to be a disposition of parole or revocation thereof so far as it counts in the term of penal servitude or of detention while awaiting trial or the compensation under the Criminal Indemnity Law. (Rule, Article 45)

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6. Restraint After Relief Under Habeas Corpus: A person who has been released under Habeas Corpus proceedings shall not be restrained again on the same ground without a judgment of the Court. (Law, Article 25)

F. Costs:

If an application has been dismissed because it lacked the required justification and necessary presumptive proof or because it was found in a preliminary investigation or trial to be groundless, the restrainer may demand that the applicant pay either the entire costs of the proceedings or a part of the costs. (Law, Article 17)

Costs of proceedings are defined as travelling expenses, daily allowances and charges for lodging of the prisoner and travelling expenses, daily allowances, hotel expenses and compensation paid to the attorney who is appointed by the court to be counsel for the prisoner in addition to the costs under the Code of Civil Procedure. (Rule, Article 38)

The amounts of these expenses are equivalent to those of a party in civil procedure. (Rule, Article 38)

G. Appeals:

1. Appeal from a Ruling Based on Preliminary Investigation: An appeal from the judgment of a court dismissing an application without conducting a hearing on the basis that no grounds exist for the prisoner's release, may be made to the Supreme Court within three days after such judgment has been given. (Law, Articles 11, 21; Rule, Article 18)

2. Appeal from an Inferior Court Decision: A jokoku appeal from a decision rendered by the inferior court may be lodged to the Supreme Court within three days from the day the decision has been pronounced, but a koso appeal may not. (Law, Article 21; Rule, Article 41)

The period for filing the written statement of grounds for jokoku appeal is fifteen days. The Supreme Court may dismiss a jokoku appeal without a trial if it finds the appeal groundless after investigation into the petition of jokoku appeal, the written statement of grounds for jokoku appeal, the written answer or other documents. (Rule, Articles 41, 42)

H. Penalties:

Any person who removes or conceals the restrained person, or who contrives his escape or who commits any other act interfering with or nullifying the relief provided by the Habeas Corpus Law, or who deliberately makes a false statement in his written answer to the court's demand for information concerning the restraint of an individual, is liable to punishment by penal servitude of not more than two years or to a fine of not more than 50,000 yen. (Law, Article 26)

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

LEGAL COMMENTS

December, 1950

A recent decision of the Kyoto District Court in connection with the case of six college students who filed suit against Yoshitaka Katsu, President of Kyoto Prefectural Medical College, for cancellation of his official expulsion from school of the six students is of wide interest: (a) because the Court in finding the expulsion an abuse of the discretionary power of the College President concludes that such abuse amounts to illegality; (b) because for the first time since the Administrative Litigation Law, Public Law 81 of 1948, came into effect, the Prime Minister made use of the power conferred upon him by Article 10 Paragraph 2 of this Law. According to this provision the Court may in order to prevent the irreparable damage which may be caused by the execution of an administration act by a ruling suspend the execution of such act. However, this shall not apply in case there is apprehension that the execution of the act may essentially affect the public interest or in case the Prime Minister raises an objection.

The Kyoto District Court decided in favor of the students in declaring their expulsion from school illegal. The defendant has appealed from this judgment to the High Court. Pending a decision on the appeal, the ousted students requested the Court to order a stay of their expulsion from the Medical School. It is against this injunction that the Prime Minister used his veto power on the basis of Article 10 Paragraph 2 of the Administrative Litigation Law.

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With the Tokyo Bar Associations

At recent meeting of the Tokyo Bar Association held in the Second Tokyo Bar Association Building the Chief, Court Affairs Branch, Legislation and Justice Division, Legal Section delivered an address on a Comparison of the Responsibility of the Trial Court, Prosecutors and Lawyers. The meeting was well attended by members of the Bar Associations in Tokyo. The following are excerpts from his address:

To one accustomed to Anglo-American trial court procedure this subject appears to be so well-established as to present no problem. However, an analysis of it placed alongside that of the Japanese procedure brings out a startling disparity based not only on custom but on attitude.

While there has been some criticism by the American bar that many judges are functioning as mere referees, and that they should assume more of the common-law responsibility and authority of a trial judge, the basic function of a judge still obtains, and that is "to hear and determine." When a case is tried without a jury the judge exercises plenary authority over both fact and law. When, however, a jury is present the functions of the judge and jury are distinctly defined. The jury is the sole trier of the facts, while the judge is the sole authority on the law. Neither can invade the province of the other.

The functions of prosecuting attorneys in criminal cases, and lawyers, in all cases, can be very simply summarized into that of "preparation and presentation." Actually, that responsibility is tremendous in practice and is grounded on the old axiom that "he who asserts must prove."

Preparation begins the moment an offense is committed or a cause of action arises. Whether it is the State or Government, plaintiff or defendant, the attendant responsibility of preparation involves the same critical inspection and examination: drafting and filing the charges on pleadings; gathering and sifting the evidence; interviewing witnesses and obtaining statements; preserving testimony by taking depositions; analyzing the order and method of proof or defense; arranging for the prompt appearance and availability of witnesses; and absolute readiness to proceed when the case is called for trial.

It should be noted at this point that, until the moment an indictment or the pleadings are handed to the court, the judge has had no official contact with, or interest in, the case. When the court is convened to try a case, here for the first time is felt the authority of the judge as the gove nor at all times of the trial in the sense of actively, and firmly when necessary, requiring that the proceedings be conducted with dignity, decorum and the avoidance of waste of time. A correlative of this authority is the duty of the judge to exercise the power of contempt for any obstruction of justice or act derogatory to the authority or dignity of the court.

Since "he who asserts must prove," it is self-evident that the responsibility of "going forward" with the presentation of evidence falls upon the one who has the burden of proof. In a criminal case, this burden is on the State or Government; in a civil case, it is on the plaintiff. In any case, the examination and cross-examination of witnesses, and the introduction of records, documents and exhibits, are all governed by definite rules of evidence. While he is not precluded from doing so, the judge generally does not participate directly in the examination except to rule on objections to the competency, relevancy and admissibility of evidence.

Here, an important point for subsequent comparison must be emphasized. At no time is the judge charged with the responsibility of maintaining a "record" or transcript of the testimony. That obligation falls solely on the litigants or their counsel. In general practice, however, every conscientious judge does frequently make notes on important points, not

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for the purpose of their becoming an official part of the proceedings, but merely to better follow the development of testimony and to support his subsequent charge to the jury or, in the absence of a jury, to guide him in arriving at his decision. The responsibility of making and preserving a "record" falls on the parties, particularly when the one who loses desires to appeal. To state it simply, if counsel for one side, or both, may eventually wish to rely on a record of the trial for purposes of appeal, it is his duty to arrange for a qualified court reporter to be present during the entire trial and make a verbatim record of all testimony, objections and rulings, and all other developments during the trial. Some jurisdictions provide by law for official court reporters.

At the conclusion of all the testimony, when both sides have rested their case, it is then "submitted" to the court. In a jury case the judge now performs the very important and delicate function of "charging" the jury on the law that shall be applied by them in their finding of fact. In many state jurisdictions in the United States the judge sums up the evidence and instructs the jury that they are to determine for themselves the weight of the evidence and the credit to be given to witnesses. However, the federal court system has preserved the common law practice of giving the trial judge the power to comment on the evidence and the credibility of the witnesses, even to expressing an opinion. While seldom used it is a power reserved for that rare occasion when flagrant stratagem or trickery requires an immediate corrective in order to prevent a miscarriage or travesty on justice. In the exercise of this function the discretion of the judge is not arbitrary and uncontrolled, but judicial, and in conformity with the standards governing judicial office.

After retiring to their chambers for deliberation, the jury, if they arrive at one, return the "verdict" which is read in open court. In a criminal case it can be "guilty" or "not guilty;" in a civil case it can be a finding for so many dollars or other relief "for the plaintiff" or a finding "for the defendant." The verdict is entered on the court journal, and in a criminal case a date is set for the pronouncement of sentence.

At the conclusion of a case tried to the court, without a jury, the case is submitted to the court for decision. This may be rendered immediately but in complicated civil cases, or where the evidence may be conflicting, the judge generally studies and reviews the case before arriving at a decision. Until entered on the court journal a decision is not a valid judgment for the reason that "a court can only speak through its journal." In some jurisdictions this responsibility is carried out by the proper court official. In many jurisdictions, however, this procedure is the responsibility of counsel particularly for the prevailing side. The lawyer draws up a "journal entry" which recites that the cause duly came on for trial upon the pleadings of the parties and the testimony of witnesses and other evidence, and that the finding of the court. This journal entry is then agreed upon by counsel for both sides, acknowledged, and presented to the trial judge for his signature. It is then filed and becomes a legal judgment of record.

Particular attention should be directed here to the fact that in all criminal cases and almost all civil cases the trial judge does not set forth his decision, or the reasons therefor, in a written opinion. In certain cases, where specifically requested by counsel, the judge makes a separate finding of fact and conclusion of law.

This concludes the function of the trial judge and, so far as he is concerned, the case is closed. After pronouncing sentence in a criminal case, the execution thereof is the responsibility of the proper government agency, not the court. In a civil case, the execution of a judgment by way of satisfaction, settlement or other relief, becomes a matter of diligent pursuit by the attorney for the successful litigant, generally through the legally established procedure of attachment or garnishment.

In short, it is the lawyer who "carries the ball" in the Anglo-

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American administration of justice and his success in advancing the cause or defence of his client rests and falls upon his preparation for, and presentation of, his case.

While the American judge is charged with the grave responsibility of his judicial office and bound by the highest principles of ethical conduct, the discharge of that responsibility is unfettered by administrative or procedural details and duties which, through long custom, have fallen on the shoulde s of the Japanese judge. To understand this it is necessary, for the purpose of comparison, to keep in mind the historical background of the Japanese legal and judicial system, the fundamental feature of which was the principle of conciliation.

This principle, also prominent in Chinese justice and a result of the Confucian philosophy, has been deep-rooted in the Japanese people and still exists even under the new Constitution of Japan. Furthermore, the principle of family unity, in a society so tight and interknit as the Japanese, abhors seeking outside relief in private disagreements and favors the settlement of disputes. Use of the judicial and legal process is a last resort. It is one explanation why, in a nation of over eighty million people, there are not over two thousand judges and six thousand lawyers:

While the modern administration of justice in Japan, developed in the Meiji era, drew heavily from the Continental practice, the Japanese judges did not enby the independence of their French or German counterparts. By virtue of their education and sociological background they were primarily legal technicians - servants of the state rather than guardians of justice. Instead of exercising judicial independence and responsibility they tended to answer to their jurisdictional superior, the Ministry of Justice. In the administration of criminal law the judges were under the continuous observation and control of the public procurators who, though attached to the courts, reported to and followed the directives and nods of the Ministry of Justice.

The judges held the status of civil servants and were classified and remunerated on the same level as administrative officials. This was reflected in their pitifully inadequate salaries and the official indifference accorded them in the past. This is contrary to the Anglo-American concept where judges are never made comparable to ordinary government officials and their salaries are purposely put at a high level to insure that in the administration of justice the possibility of corruption, or physical and economic discomfort, is reduced to the minimum in the human equation.

When the new Constitution of Japan came into effect in May 1947 the Ministry of Justice was abolished and for the first time the judiciary in Japan was established as the third branch of government, together with the legislative and executive. Now the whole judicial pow r is vested in a Supreme Court and such inferior courts as are established by law which shall decide all legal disputes. Furthermore, the Constitution specifically provides that judges shall receive adequate compensation. Numerous implementing laws have been established in order to provide the machinery of justice with the necessary working parts. But customs and traditions cannot be changed overnight by the stroke of the pen or the vision of the constitutional architect. Continuous education and patient enlightenment will provide the most effective lubrication for this new machine.

With this passing historical comment, it will be readily seen that the Japanese concept of justice differs widely from the Anglo-American. In the American courts we have seen that the province of a judge is to hear testimony and determine from all the evidence. In Japan, however, the judges consider it their duty to assume responsibilities which in Anglo-American courts are those of the litigant and his lawyer. The Japanese judge has by custom and practice become a combination lawyer-prosecutor-investigator-clerk-reporter-recorder-assignment commissioner-conciliator-father counsellor - - and judge.

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When a civil complaint is filed, the court clerk presents it to the judge in the appropriate division, sending a copy to the opposite party for written answer if necessary. The judge then sets the date for the first public trial (which may be two, three or more months later, depending on the circumstances.) The court clerk summons the parties on that date and, in the event one of the parties or counsel fails to appear, the judge (or collegiate body of judges depending on the gravity of the matter) receives the suggestion of the other party which is tantamount to a postponement (in Tokyo, from two to three months, or more.) This procedure goes on and on until witnesses finally appear, protocol is made and reviewed, and final decision arrived at.

Similar procedure occurs in a criminal case with the written indictment filed by the public procurator with the appropriate criminal division and assigned to a particular judge or collegiate body. Before the new Code of Criminal Procedure came into effect in January 1949, the charge was appropriate accompanied by all the papers, statements, report of investigation - and usually the most important document, the confession of the accused.

It will be seen, therefore, that the Japanese judge is "in" the case from its very inception and becomes responsible for the entire order of procedure. In this connection it becomes incumbent on him, if he deems it necessary for the purpose of justice, to view the premises or scene of the crime, conduct independent investigations, determine what testimony will be received, what witnesses will be heard and set the order of proof. His sense of rendering justice will even compel him to seek out, exofficio, an important missing witness. Trials are delayed over long periods of time, continuations and postponements are granted as a matter of course or upon the court's own motion, and the day of judgment is somewhere in the dim future.

A pertinent but reasonable question poses itself, and that is the function of the Japanese lawyer. And therein lies a strange paradox of attitude. The American lawyer owes his primary duty to his client and, as has been pointed out, is responsible for the proper and diligent preparation of his case or defense. This can only be done by preliminary investigation, interviewing witnesses, and searching out every detail essential to the support of his case. In this activity he is, of course, bound by the high ethics of his profession, and by the criminal laws which govern perjury, subornation of perjury, tampering with witnesses, and other acts obstructing justice. On the other hand, the Japanese lawyer labors under the apprehension that if he interviews witnesses, especially in a criminal case, he will be deemed to be aiding perjury and subject to criminal prosecution by the public procurator. As a result the lawyer appears to be unprepared to proceed with his defense until the actual appearance of the witness in the court room. This naturally results in further postponement and delays in proceedings.

The technique of trial in the Japanese courtroom follows the Chinese and Continental inquisitorial method - that is, the active participation by the trial judge in the examination of witnesses. While the new Code of Criminal Procedure established certain procedure in this regard the practice is still prevalent. For instance, the court may at the outset entertain the statement of the accused - often his confession in court. The result is that the public procurator and defense counsel, by custom and practice, lean and rely on the judge to elicit testimony.

Attention should be called to the fact that, in spite of its comprehensive declaration of civil rights, the new Constitution has no specific provision for right of trial by jury. Japan adopted the jury system in criminal cases in 1923. While the application of the law was suspended during the war, it was in itself so inadequate and left so many loopholes that it never enjoyed popularity and actually fell into disuse.

The record of testimony and proceedings or "protocol" - no matter how insignificant or important the case - presents a serious problem to the Japanese judges. The recording is done by court clerks and does not purport

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to be a verbatim report of the testimony but merely the clerk's impression of that testimony. Since the judge is responsible for the "protocol" he must give it constant attention which means further postponements of proceedings in order for him to review the protocol and keep it uptodate.

This responsibility becomes most important at the conclusion of the case. If the decision of the court is repugnant to, or inconsistent with, the protocol, the decision will be quashed by the reviewing court. The beneficiaries of this strange responsibility are the parties availing themselves of the protocol on appeal:

But an even more burdensome duty, established by custom and practice and relied on by the parties, requires the trial judge to make a written statement of his decision, with full reasons therefore, in every case. This laborious task, coming on the heels of all other time-consuming responsibilities, is alone enough to break the back of any administration of justice: While it is true the in modern reporting the decisions of high appellate tribunals are published for the purpose of establishing the law, seldom if any are the decisions of trial courts either written or reported.

The exercise of the power of contempt of court by the trial judges has already been referred to and recent cases in the American courts illustrate the great restraint and caution that is used in employing that powerful deterrent on persons flaunting the dignity and respect of the court and its proceedings. While most jurisdictions have laws giving the courts specific power in this respect, the Anglo-American concept is that this power to punish is "inherent" in the courts. The Japanese do not have that concept and entertain a reluctance to take a step (which they might often wish they could) that might put the court itself in disfavor. While the Japanese courts are given power to maintain order and met out punishment for interference with trials, such action requires the filing of charges by the public procurator. It is submitted that such delay is inconsistent with the effectiveness of an immediate corrective, convincing and complete - and on the spot:

This comparison of the Japanese with Anglo-American trial technique is offered with no purpose of reproof but as a critical observation that will enable the practitioners of either system to understand the other. In so doing, no claim to discovery is made for, as with the physician and the clergyman, originality is a doubtful virtue. One truth, however, is self-evident. The administration of justice in Japan is in a crucial state caused by an overload of work and serious backlog of cases. The need for modernization and improvement of court practice and procedure might well be the challenge to the bar associations and the individual responsibility of each Japanese lawyer to demonstrate to the legal world their capacity for leadership.

EXPEDITING TRIALS

> The following text of recent joint press conference of Legal Section and Civil Information and Education Section, prepared by Chief, Criminal Affairs Branch, Legislation and Justice Division, Legal Section emphasizes the importance of streamlining court procedures so as to cope with the growing backlog of pending cases:

Since the war, there has been a startling increase in the number of civil and criminal cases to be disposed of by the Japanese courts, an increase completely disproportionate to the increase in the number of judges since pre-war days. This is especially true with regard to criminal cases. While the number of judges increased only 1.5 times,

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the number of criminal cases, not including cases disposed of by summary procedure without trial, has increased five times or more since pre-war days. At present an average of more than 200 cases come to each judge during a year, while it was quite rare before the war for a judge to have 100 cases a year. Although the courts are disposing of about twice as many cases as they did before the war, they have not been able to keep pace with the growing volume of business. This has resulted in accumulation of a huge backlog of pending cases and a drop in the percentage of cases disposed of. Judges in charge of criminal cases are disposing of only 71% of the cases received each year whereas before the war they disposed of 82%. A similar situation exists with respect to civil cases, and the backlog is growing particularly fast in the Family Courts.

The Supreme Court has been conscious of the need to streamline court procedures to counteract the growing backlog of pending cases, and after prolonged study of the situation, it issued preliminary instructions to all Inferior Courts on 30 October of this year to expedite trials of both civil and criminal cases. The Supreme Court will soon issue new rules of procedure to supplement and reinforce these instructions, and has requested the Attorney General's Office and the Diet to enact legislation to expedite trials. Three bills were introduced in the Special Diet Session and were enacted into law by the Diet on 8 December 1950. Legislation covering seven other points is now being considered for introduction into the regular session of the Diet.

The importance of the above-mentioned instructions and rules of the Supreme Court and the legislation for expediting trials cannot be overemphasized. Not only does the Japanese Constitution guarantee to the accused in all criminal cases the right to a speedy trial, but this is a fundamental right of all litigants in a democratic nation. Even in civil cases which do not affect the public interest directly, delays which stretch over many months and sometimes many years are inexcusable in any judicial system. The reason for the constitutional guarantee of a speedy trial in criminal cases is obvious. Prompt and certain trials are the most effective deterrent to the commission of crime. Wrong-doers will not be deterred if their punishment will be long postponed and there is a chance their cases will never be tried. On the other hand, innocent persons who are wrongfully accused should be cleared promptly.

Because of the great importance of this subject to the people of Japan, Legal Section believes that as much publicity as possible should be given to the action of the Japanese Government to expedite trials of civil and criminal cases. With this in mind, I wish to briefly summarize the main points of the instructions issued by the Supreme Court on 30 October of this year, the three bills already enacted into law by the Diet and the seven other bills for expediting trials now being considered by the Japanese Government.

Summary of Instructions for Expediting Trials Issued by the Supreme Court on 30 October 1950 to all Inferior Courts in Japan

A. As to both civil and criminal cases:

1. As far as possible cases to be handled by a single judge rather than by a Collegiate Court.

2. More frequent use of preparatory procedures (pretrial conferences) to simplify issues and expedite trials.

3. Continuous trials.

4. Postponements in trial dates only where unavoidable.

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5. Both sides to be responsible for preparing the case before trial, by questioning witnesses, examining evidence, etc., and to take the initiative in presenting the case without relying on the court to act ex officio.

6. Prompt attendance of witnesses and others.

7. Temporary transfer of judges and redistribution of work of judges.

8. Special divisions within courts to concentrate on certain types of cases (such as old Code Criminal cases -- i.e., cases in which public action was instituted before enforcement of new Code of Criminal Procedure on 1 January 1949).

9. Court to limit the time of argument where appropriate and to stop irrelevant or unnecessarily repetitive questions or statements during the trial.

B. "Old Code" Criminal Cases:

1. The new Code of Criminal Procedure went into effect on 1 January 1949 but approximately 17,000 cases are still pending in which public action was instituted before enforcement of the New Code. The Court sets 30 June 1951 as the goal for completing second instance trials of these so-called "Old Code" criminal cases.

2. The first instance trial of these "Old Code" cases is to be concentrated as far as possible on issues contested by the accused, and protocols and judgments are to be simplified.

3. On koso appeal the appellant will be asked to state orally or in writing the matters of which he complains in the first instance judgment and the hearing is to be concentrated on those matters instead of trying the whole case over again.

C. Reports:

1. Wherever a particular court is discovered to be especially far behind, a special report is required to be made to the Supreme Court showing the number of continuances, intervals between trial dates, and intervals between final hearing and pronouncement of judgment.

2. Judges who fail to write their opinions within thirty days after the close of the trial are instructed to report their reasons for their failure to the Supreme Court.

Summary of Laws for Expediting Trials Enacted During the Special Diet Session

A. Law for Amendment of Court Organization Law.

1. The law increases the jurisdiction of Summary Courts in civil cases from 5,000 yen to 30,000 yen.

2. It increases the jurisdiction of Summary Courts in criminal cases to include the following additional offenses or attempts: gambling, fraudulent appropriation, crimes relating to stolen goods, crime of trespass, and certain offenses mentioned in the Second Hand Business Law and Pawnbrokers' Business Law.

3. The obvious purpose of the first two points is to transfer some of the burden of first instance trials from the District Courts which are increasingly over-loaded to the Summary Courts which have the least case-load of any court in Japan at present. In general, the District Courts now have a case-load seven to eight times that in pre-war days, whereas the Summary Courts have just about the same case-loads

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as the similar local courts in pre-war days.

4. Another point in this law is the authorization for temporary transfers or "substitution" of judges to courts excessively behind in their work, with greater latitude than under the present law. At present, such transfers can only be made within certain areas and between courts of certain levels. This law will modify these restrictions.

B. Law for Amendment to Code of Civil Procedure.

1. The main point of this law is to permit preliminary proceedings (pre-trial conferences) in any civil case. At present such conferences are only permitted in cases tried by Collegiate Courts.

2. The second point is to prohibit postponements in trial dates after preliminary hearings have been held except for unavoidable cause.

C. Law for Partial Amendment to the Law for Enforcement of the Code of Criminal Procedure.

1. This law requires all Jokoku appeals to the Supreme Court to be governed by the new Code of Criminal Procedure. As a result, most appeals to the Supreme Court will henceforth be limited to cases involving constitutional issues or cases where the judgment below is alleged to conflict with judicial precedents. In addition, the Supreme Court will have the power in its discretion to review many cases which it deems involve an important problem of construction of law.

2. This law should greatly reduce the number of appeals to the Supreme Court in these old code criminal cases, and considerably relieve the burden of the court. It will avoid a needless clog on the proper business of the Supreme Court under the new Constitution which would be caused if it tried Jokoku appeals in cases which have already been through two or three lower courts and are not of a nature calling for the judgment of the Supreme Court.

Summary of Legislation Being Considered

Other legislation is now being considered for introduction into the regular session of the Diet covering the following points:

1. To encourage recruitment of additional judicial personnel.

2. For an arraignment system.

3. For adult probation.

4. Contempt of court.

5. Default judgments in civil cases, where the party fails to appear.

6. Limiting use of conciliation in civil cases after initial stages of the trial are over.

7. Clarifying Administrative Litigation Law.

Purpose of the Supreme Court Rules for Expediting Trials Now Being Drafted

It is premature to attempt to summarize the contents of the Supreme Court rules which are now being drafted for the expediting of civil and criminal trials. However, it may be stated that these rules will be

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issued in the near future and that their purpose will be to reinforce and supplement the instructions already issued. The most radical changes will be the requirement of continuous trials and the emphasis on greater responsibility for preparation of the case before trial by the parties themselves and through pre-trial conferences so that the trial itself will be simplified and more efficiently conducted. Special rules will be enacted to expedite koso and jokoku appeals of old Code criminal cases -- that is, cases in which public action was instituted before the enforcement of the new Code of Criminal Procedure on 1 January 1949. The most important change in the appeal procedure will be a requirement that the appellant state the reasons for his appeal so that the trial can be concentrated on contested issues. The appeal will be primarily a review of the first instance trial to determine whether any errors were committed in respect to matters concerning which the appellant complains. It will not be a complete re-trial of the case. The necessity for this streamlining of the appellate procedure will be apparent if the situations of the High Courts and the Supreme Courts are considered.

High Courts today are receiving 20 to 30 times the number of criminal cases received by the Courts of Appeal in pre-war days. Since the number of High Court judges has only doubled, the case-load of each High Court judge has increased 10 times or more compared with pre-war days. High Courts are disposing of many more cases than the old Courts of Appeal in actual numbers, but the rate of disposition has fallen from 70 to 80% before the war to about 45% since the war. Obviously, the only hope is either a tremendous increase in the number of High Court judges, which is manifestly impossible under existing budgets, or a sincere attempt to make the new abbreviated procedure work. As far as the Supreme Court is concerned, the number of judges was reduced to 15 under the new Constitution because the Court was considered primarily a court for determining constitutional questions and other important questions of law and for maintaining uniformity between the various High Courts on matters of law. It was not intended to permit every question of law to be reviewed in the Supreme Court. Unfortunately, over a thousand appeals are now pending in the Supreme Court in old Code criminal cases, many of which do not fall within the proper business of the Supreme Court under the new Constitution. As a result, in 1949 the case-load of each Supreme Court judge was two to three times the case-load of Supreme Court judges before the war. However, this is a temporary situation. When the Law for Partial Amendment of the Enforcement Law of the Code of Criminal Procedure becomes effective on 28 December, no more appeals will be permitted under the old Code. As a result, the number of appeals to the Supreme Court in old Code cases now pending in the Inferior Courts will probably be only one-quarter the number which might otherwise have been expected. Instead of facing the prospect of about 3,000 more appeals in old Code cases, the Supreme Court will expect only about 750 such appeals to be filed. It should be able to dispose of these cases almost as fast as they are received and to rapidly reduce the present backlog of 1,000 such cases now pending. Unless new criminal or civil appeals to the Supreme Court increase at a faster rate than now seems likely, the long-range situation of the Supreme Court docket looks rather favorable.

In conclusion, let me add a note of caution. Opposition may be expected from some circles to the reforms described above for expediting trials, particularly from lawyers who mistakenly believe that delays in trials enable them to earn greater fees. The reforms will also require cooperation from Japanese citizens to insure that they are administered in the spirit with which they have been planned. Citizens who are asked to appear in court as witnesses or are summoned to appear as the accused in a criminal case or the party in a civil case must realize the importance of their duty to appear promptly. Parties and witnesses must cooperate with defense counsel, public procurators and the courts in preparing the cases before trial and in expediting the conduct of the trial itself, otherwise, the new instructions, rules and laws will be dead-letters or mere scraps of paper without any life or meaning.

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

LEGAL COMMENTS

September, 1950

At a meeting sponsored by the Legal Affairs Bureau, Sapporo, the Civil Liberties Bureau of the Attorney General's Office and the Information Section of the Attorney General's Office, the Chief of Civil Affairs and Civil Liberties Branch, Legislation and Justice Division, Legal Section gave a lecture on "Civil Liberties and the Building of a Peaceful Society" at Sapporo Citizens Public Hall, September 30, 1950 which points up the importance of civil rights in the structure of democratic society. The following are excerpts from this lecture:

The speaker first discussed the antidemocratic propaganda of Japan's recent past according to which democracy and all notions connected with it - such as civil rights, rule of law, etc. - were cold, mechanistic ideas, to be reasoned out, but not to be felt, whereas the oriental idea of a state based upon morality - loyalty, filial piety, obedience and benevelence - was filled with the warmth of human feeling. In this connection the importance of the humanistic emotion for true democrats was stressed. A common denominator of both the Western and Eastern dream of a better society was seen in the fact that in both cases the ideal society is one "in which anarchy does not rule and in which the application of force and violence are unnecessary."

The speaker continued: "From this we may see that mankind, as a whole, is longing for this type of society. Throughout the ages, man's history to a great degree has been the history of suffering through violence, and throughout history he has dreamed of abolishing this curse. We, too, still dream of the golden age which does not know violence, for war in the last analysis is nothing but violence on a huge scale. When we pray for peace -- as all men of good will do - we actually pray for an organization of human society in which violence is forever banned.

"A person who takes recourse to violence in order to settle disputes with his neighbor would generally be looked down upon as a somewhat backward, uncivilized human being. I believe that similarly a society is the more civilized and the more advanced, the better a system for the abolition of violence it has devised. The primitive approach to social problems is, of course, that of force; this force consists of oppression on the one side and in revolution on the other. The police state of all colors is essentially built upon brute force. Democracy, on the other hand, is primarily a system to eliminate force from society. This is to be achieved mainly by the adherence to the human rights concept."

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On an example from Japan's history -- the Osaka riots of 1834, led by Oshio Heihachiro -- it was then shown that, under an undemocratic system, flaws in the social structure can be amended and wicked and incompetent officials can be removed only by violence. "It was this type of a situation which has given rise to the fight for civil liberties in many lands. Thus, the original thirteen American Colonies were not represented in the Parliament of England and could achieve an amelioration of their grievances only by a war of revolution. The subjects of the French King before the French Revolution had no way of obtaining redress for their grievances except by the arbitrary will of the ruler, who as often as not, decided to overlook these grievances. In such a situation a strong feeling of injustice arises in a great part of the population. For this pent-up feeling no legitimate outlet exists since open expression of dissatisfaction may be punishable. We all know that a vessel filled with steam will explode if the pressure of the steam rises and no valve or outlet is provided. Similarly the aggrieved part of the population, unless given an outlet for its grievances will accumulate hatred against those in power and this hatred will explode whenever the pressure becomes too strong. The late Justice Brandeis of the United States Supreme Court wrote in one of his famous opinions: 'Order cannot be secured merely through fear of punishment. It is dangerous to discourage thought, hope and imagination. Fear breeds repression; repression breeds hatred; hate menaces stable government.' And President Wilson stated this truth as follows: 'The only way to keep men from agitating against grievances is to remove the grievances. An unwillingness even to discuss these matters produces only dissatisfaction and gives comfort to the extreme elements in our country which endeavor to stir up disturbances in order to provoke Governments to embark upon a course of retaliation and repression. The seed of revolution is repression.'"

This situation was then contrasted with a similar situation in an ideal democratic state. In this connection, Judge Brandeis was quoted as follows: "The path of safety lies in the opportunity to discuss freely supposed grievances and proposed remedies." After stating that in a democratic state the elected officers are naturally sensitive to public opinion and interested in alleviating grievances, which may cost them votes, the importance of free expression of grievances was stressed: "Such public expression of conflicting views, in itself, serves a wholesome purpose. Once the pros and cons of an issue are openly discussed the desire to obtain a solution by force and the disruptive emotion of hate recede into the background. The question is no longer how the discontented may be suppressed or how those in power may be overthrown but how a satisfactory solution to the problem may be found. The problem will then be discussed with calmness befitting the discussion of matters affecting a part of the nation. However, if no solution is found there is no need for the discontented to secretly accumulate arms nor any need for the government to fill the jails with those who disagree with it. Other processes are open such as recall of local officials and the entire system of elections. The vote of the majority of the electorate or the legislature is the best way to decide what beliefs shall be translated into action. It is true, the government must resist if its opponents begin to carry on the conflict of opinions by breaking heads instead of counting them. But it is equally inadvisable for the government to seek to end a mere conflict of ideas by imprisoning its intellectual adversaries.

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"An aggrieved part of the population may rid the country of those policies it believes mistaken or harmful by elections based upon free discussion of important issues and elect new men who will approach the problem with new methods."

It was pointed out that, once the democratic processes are instituted and working, the use of violence for political aims is unjustifiable and a crime against a democratic society. Under such circumstances a democracy is justified to defend itself against those who, unable to obtain their ends by persuasion of their fellow citizens, resort to violence in order to establish themselves in power and to abolish the democratic processes and civil liberties in order to maintain themselves in power.

The speaker then continued: "There are times when new social forces arise and ask to be heard. Authoritarian governments are apt to make vain attempts to suppress them. In this case another cycle of disruptive violence begins. The disruption of the social and economic fabric by revolution or even the continual recurrence of local outrages is so disastrous that it ought to be prevented in the wisest and most effective manner. However, the problems created by new social forces can neither be solved by brute force nor merely by reference to time honored moral teachings. Democracy allows a peaceful evolutionary solution of these problems.

"I may again quote Justice Brandeis who said of the framers of the American Bill of Rights: 'Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty.' Such peaceful change is made possible only thru the exercise of human rights.

"Most of those who hold freedom dear believe that it adds to individual happiness because it allows the development of human potentialities. Yet, the individualistic aspect of freedom can easily be over-stressed. When this is done, cynical observers, as those Japanese observers of the past which I have mentioned in the beginning, may consider the exercise of human rights as a sign of selfishness.

"Actually this desire for the elevation of the individual is considered also from the viewpoint of the good of the community. This idea was stated in John Stewart Mills' essay on Liberty as follows:

> 'The worth of a State in the long run is the worth of the individuals composing it. A state which shall postpone the interest of their mental expansion and elevation to a little more of administrative skill; a State which dwarfs its men in order that they may be more docile instruments in its hands, even for beneficial purposes, will find that with small men no great things can really be accomplished.'

"Let me touch on one more aspect of civil liberties: All democratic constitutions contain provisions protecting the citizen against unwarranted searches, seizures, and arrests, and against compelled confessions. This, too, is as important for the community as it is for the individual, for, it is essential that the community as such rest safely in the knowledge that it does not have to fear the unbridled authority of the state. Only where there is no fear can there be real peace in the society."

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After a reference to the importance of a judiciary independent of the executive and to the necessity of defending civil liberties against violations by individuals such as "bosses", the speaker summed up his talk as follows:

"I hope that I have shown that democracy is a practical device to build a good society. That is, a society without anarchy and violence. In the edifice of democratic thought civil liberties are the very keystone.

"It may well be that a perfect democracy is still a Utopia. Some countries have advanced closer to it while others are still clearly addicted to the philosophy of brute force.

"Throughout the last centuries men have fought and died against this brute force and for civil liberties. This fight has been carried out in many lands of American and Europe, at Valley Forge and on the barricades of the French Revolution and of the 1848 uprisings. The result of the fight is embodied in such documents as the Declaration of Independence, the Bill of Rights of the American Constitution and the French Declaration of the Rights of Man. At the time when the fight for liberty was gaining momentum about a hundred years ago, a Frenchman by the name of Alexis de Tocqueville put the following thoughts down in his book "Democracy in America" which he wrote after visiting the young republic: 'It is evident to all alike that a great democratic revolution is going on amongst us; but there are two opinions as to its nature and consequences. To some it appears to be a novel accident, which as such may still be checked, to others it seems irresistible because it is the one uniform, the one ancient, and the one permanent tendency which is to be found in history.' This building of the democratic edifice continues in our times. Here in Japan the concept of civil liberties is comparatively new. The task of making it a reality has just begun. Many difficulties may lie ahead, but those who believe in it and work for it are joining people of like intent in many lands who are confident that the future does not belong to tyranny but to freedom."

WITH THE COURTS

Tokyo District Court Awards First Damages Under State Redress Law

A recent decision of the Tokyo District Court in the Man KAMATA case is of wide interest, inasmuch as it establishes a precedent as being the first decision awarding damages under the State Redress Law (Law 125 of 1947). The action grew out of the unprovoked shooting of a young farmer by a Tokyo policeman in violation of Regulations governing the use of weapons (Inst. 9, Home Ministry, 1925) and in violation of Article 7 of the Law Concerning the Execution of Duties of Police Officials (Law 136 of 1948). The court held that there was no justification for use of a weapon and that the wanton use of his revolver by the policeman also violated a MEMORANDUM of GHQ SCAP dated January 16, 1946 concerning the use of firearms.

On October 12, 1950 the Tokyo District Court in the case of Masako KAMATA, et al vs. Tokyo Metropolis judged that the Metropolitan Government of Tokyo should pay 879,051 yen compensation to the widow, three small children of the victim and to his parents for the death of this youth who was shot by the policeman. The judgment, the first of its kind in Japan was passed on an action filed by KAMATA'S family for monetary

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compensation against the Governor of the Tokyo Metropolis in 1948. The shooting occurred at Ueno Station on May 21st, 1948, when the young farmer, taking a rice ration to his sister Fumio OGURA was shot as result of his refusal to accompany the policeman to a police box.

The action was started through attorneys of the Japan Civil Liberties Union, and the amount of compensation worked out by the Hoffman method, calculating the approximate income the youth would have earned had he lived 30 years longer.

The facts as stated in the decision are as follows: Man HAMATA, born September 19, 1920 lived in Miyagi Prefecture near the city of Sendai with his wife, Masako, his small children and his aged parents. He was engaged in agriculture and was the only male member of his household able to perform arduous duties such as are required on a farm, since, except for him, the family consisted of very old people and very young ones, mostly female. He had been asked by his sister, Fumio OGURA to bring to her the rice which had been rationed to her in Miyagi Prefecture during her evacuation due to war, and retained unconsumed. His sister, Fumio lived in the household of her husband, Miyoshi OGURA at No. 86 Shibuecho, Honden, Katsushika Ward, Tokyo. HAMATA took with him seven or eight sho of the rationed rice in a ruck sack and a Boston bag and departed from his home for Tokyo by train, leaving Sendai about 10:00 am May 20. It was the season for rice planting. HAMATA cultivated approximately 2:45 acres of rice paddies, and it was his expressed intention to deliver the rice to his sister that evening and return to his planting the following morning.

On his trip to Tokyo he was caught in a police raid at Koriyama Station, and five or six sho of the rice he was carrying seized by the police there; however, he managed to arrive at Ueno station at about 10:00 pm the same day, the police raid having made his train very late in arriving. Upon leaving the train he searched for his sister's house, but in the darkness did not recognize any familiar landmarks. He had visited his sister only one time, and in the night as completely lost in the unfamiliar surroundings and strange neighborhood, but continued his quest until about midnight. Realizing his efforts to find the place were futile he began to look for an inn in Asakusa where he could spend the night. At that hour practically all of the places were closed, but remembering his mother had requested him to bring some nails home he stopped in at a shop at Kotobukicho, purchased the nails, and while there explained his circumstances to the proprietor, Ito HIGUCHI and was accorded a night's lodging. At 4:30 the following morning he arose and started for the station, intending to return home by the train leaving Ueno station about 5:10 am.

Passing a crossing at Kotobukicho in the neighborhood of No. 5, 3-chome, he was accosted by a Metropolitan Police officer, Massao ASAUI, who was attached to the Asakusa Police Station and on patrol duty in that area.

PLAINTIFFS' CLAIM

Plaintiffs claim that HAMATA answered each question put to him by the police officer, opened his Boston bag as demanded, and allowed the police officer to search his person; however, the officer was not satisfied and demanded HAMATA come to the police box with him. This he refused to do, giving as his reason that he was on his way to catch the 5:10 train, and the time was fast approaching when the train would leave, also that it was urgent for him to reach his home that day as he was

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busily engaged in planting rice and requested the police officer to question him there, since he had done nothing wrong and he would miss the train if he accompanied the officer. When KAMATA refused to go, the officer drew his revolver with his right hand and seized KAMATA with the other asking "Do you see this?" and at the same moment discharged the weapon into KAMATA'S abdomen, rupturing his intestines. The youth was unarmed as the officer had discovered when he searched him.

KAMATA was sent to the Shitaya Hospital where he underwent treatment but died after six days, on May 27th, having developed peritonitis, due to the rupture.

Plaintiffs aver that the youth was mild mannered and his appearance was by no means suspicious, that he was neither armed with any weapon nor liable to any suspicion, and there was no ground whatsoever on his part for being shot. Hence the incident was caused by an illegal act due to intention or negligence on the part of the police officer; that the act was committed by the officer in connection with his official duties as exercise of authority of the Municipal Police in an area where the special quarter as provided for by the Police Law existed.

DEFENDANT'S PLEA

Defendant requests a decision to dismiss claim of the plaintiffs and pleads as follows: Defendant recognizes the fact that at about 4:30 on the morning of May 21st, 1948 Man KAMATA was passing a crossing in Kotobukicho in the neighborhood of No. 5, 3-chome and was stopped for questioning on suspicion by police officer ASAUMI, who was on patrol in the service of Asakusa Police Station; that on that occasion the police officer demanded that he accompany him to a police box, and this was refused; that KAMATA was wounded in the abdomen by a shot fired by the police officer; that after KAMATA was shot he was taken to Shitaya Hospital where he was treated but died at 5:55 pm on 27th day of same month; that the youth was not armed with any weapon; that the act of the police officer was one committed by him in connection with his official duties as exercise of authority of the Municipal Police in an area where the special quarter as provided for by the Police Law exists, and that the defendant is a public body which maintains and bears the expenses of the Municipal Police; as to all other facts insisted upon by the plaintiffs, the defendant contends.

Defendant claims that the locality in which the shooting occurred, and over which the Asakusa Police Station has jurisdiction, is one centering around Asakusa Park with many stores, stalls and facilities for public amusement, that this section is closely connected with criminal acts, and due to its proximity to Ueno Park and the subway at Ueno station, at the time question, served as a sort of den for criminals and was haunted by a multitude of depraved persons; that in this particular neighborhood where the shooting occurred crimes have been so frequently committed that police officers in the service of that police box have been required to be strenuous in their endeavor to arrest criminals and rigorously carried out patrols on their beat and the questioning of suspicious characters; that in the early morning the light was very faint, and on the date in question road lamps were not installed and that hence the police officer did not observe KAMATA closely or clearly, that this hour was the favorite time for suspicious persons to hang about, and having the nature of the locality

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in mind the police officer approached KAMATA from behind on the roadway near the sidewalk and accosted him at a distance of some nine feet. According to the defendant's plea, KAMATA immediately stopped and the officer asked "Where do you go?" and he replied that he was going to Sendai; to the next question put by the officer "Where did you put up last night?" he is quoted as replying "Somewhere about here," that to the officer this answer seemed vague and observing the youth was very thin, wore poor clothing and carried a Boston bag he considered him a suspicious person. The police officer, called as a witness for the Tokyo Metropolitan Police claims that he requested KAMATA to open the Boston bag and he refused, saying he had only shirts and clothes in the bag, whereupon he demanded that the youth accompany him to the police box, that KAMATA leaned against the board fence and refused to go with him; the officer also claims he did not search KAMATA, and fearing that he carried a weapon took the revolver from his pocket, released the safety device, and when the youth saw the revolver he threw away his bag and grappled with the officer and in the struggle the revolver was discharged. The defendant further pleads that such being the circumstances, KAMATA'S death was due neither to negligence nor intention on the part of the police officer, consequently defendant is not liable for damages on account of his death; but assuming that the police officer was responsible for negligence and the defendant liable to damages, the latter insists on putting its negligence against one for which KAMATA, the victim was also to blame. An additional circimstance mentioned here by the defendant is the payment of twenty-one thousand yen by the Asakusa Police Station for doctor's fee and other expenses before the death of the youth and five thousand yen sent to the bereaved family in lieu of an offering on the occasion of the first All Soul's Day after his death.

DECISION OF THE COURT

The Tokyo High Court in its decision held that the evidence establishes the fact that KAMATA was not armed with any weapon at the time he was shot, that he refused to comply with police officer's demand to accompany him to the police box, that since no evidence was available through which KAMATA could have been clearly identified with a person who had just committed a crime or which justified the suspicion that he had committed a crime at all, he could not have been arrested as a criminal in the act of committing crime, or as a criminal suspect who was subject to emergency arrest. There are no circumstances in the present case, which, from the point of view of the judicial police or administrative police warranted the compulsion used in demanding the youth to follow the police officer to the police box. Upon his refusal to come along the police officer produced his revolver, hence it is appropriate to recognize that the revolver was used for the purpose of threatening KAMATA and compelling him to accompany the officer. The use of a weapon carried by a police officer or other police personnel is authorized in case of emergency and when inevitable in arresting a criminal to prevent him from escaping, to defend the police officer or other persons to suppress resistance to the execution of official duties. (Art. 7 of the Law for Execution of Authorities of Police Officers). The court also held that although this law was promulgated subsequent to the occurrence of the incident in question, its spirit should be considered to have existed at the time the incident occurred and that the Regulations for the use of Weapons by Police Officers, (Inst. 9, Home Ministry, 1925) were violated. The decision of the court continues

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"As has already been stated KAMATA was not a criminal or a person who should have been compulsorily taken to the police box. As to his alleged attempts to harm police officer ASAUMI, this court finds the testimony of the witness ASAUMI on this point incredible, and no other evidence by virtue of which this fact can be authenticated is available. Hence the use of the revolver by the said police officer does not correspond to any of the cases in which it is authorized, and it should be considered as illegal. Again, as has already been authenticated, police officer ASAUMI took out his revolver. KAMATA saw it and began to struggle with him, attempting to take the revolver away from the officer. In this grapple, under pressure of jostling, the revolver in the hands of the police officer was suddenly discharged, the bullet hit KAMATA on left side of his abdomen and KAMATA died on account of the wound. Hence, if the moment of the discharge of the revolver alone be taken up, it may a pear that police officer ASAUMI was free from negligence. However, the said officer took out the revolver when he should not have, and used it illegally, thus driving KAMATA to resist inevitably (this is described as (inevitably) since his was an instinctive act of a man who was scared by the sight of a revolver, although offering resistance to revolver with bare hands may have to be called sheer lack of common sense). Police Officer ASAUMI, therefore cannot escape responsibility for negligence for discharging the revolver, and hence KAMATA's death....."

The court also held that it can be recognized that the district under the jurisdiction of the Asakasa Police Station in the particular neighborhood of the place where the incident occurred is a locality infested with crime. However, by this fact alone the negligence on the part of the olice officer cannot be denied. Defendant on its part has recognized that the act in uestion b the police officer was com itted in connection with official duties in the exercise of the authority of the Municipal Police in an area where the special quarter provided for by the Police Law exists and that the defendant is a public body which maintains and bears the expense of the Municipal Police, and that this is considered to be the case according to the construction of Article 42, and Articles 51, 52 and 53 of the Police Law. Hence defendant, in accordance with the State Redress Law, shall take the responsibility for damages due to the said illegal act of police officer ASAUMI. The decision then proceeds with adjudging the matter concerning damages according to the Hoffman method for each of the six plaintiffs, KAMATA's parents, his wife and their three small children.

The Tokyo Matropolis has filed an appeal with the Tokyo High Court from this decision.

For the convenience of legal and government officers the provisions of Article 7 of the Law for Execution of Authorities of Police Officers and provisions of State Redress Law and Regulations governing the use of weapons are quoted below.

The State Redress Law (Law 125, October 27, 1947), provides, in part, that "if a public official entrusted with the exercise of the public power of the state or of a public entity has, in the conduct of its official duties, inflicted intentionally or through negligence any damages on another person through an illegal act, the State or the public entity concerned shall be under obligation to make compensation therefor.

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If in the case referred to in the preceding paragraph, the public official has perpetrated the act intentionally or through gross negligence, the State or the public entity concerned shall have the right to obtain reimbursement from the said public official....."

Article 7 of the Law Concerning the Execution of Duties of Police Officials, Law No. 136, July 12, 1948 provides:

"USE OF WEAPON. - A police official may use a weapon in case where he has reasonable ground to consider it necessary for the apprehension of a criminal, guarding against escape, defence of him or another person or oppression of a serious resistance to the limit considered as reasonably required in accordance with its circumstances; provided that he shall not injure any person except the case fallingunder Article 36 (Legal Defence) of the Criminal Law (Law No. 45 of 1907) or of Article 37 (Emergent Refuge) of the same Law or the case falling under any of the following items;

1. In case a person who is actually in process of committing or who, a police official has sufficient ground to suspect, has committed one of those violent and dangerous crimes that are to be condemned to death penalty, life imprisonment, penal servitude or confinement for not less than three (3) years makes resistance to the performance of duties of the police official against him, is about to escape, or a third person makes resistance to let him escape and then the official has reasonable ground sufficient to believe that there exists no other means to prevent or to effect the apprehension;

2. In case the subject person, on the occasion of apprehension under a warrant of arrest or of execution of a warrant of arrest or of detention, makes resistance to the performance o duties of a police official against him, is about to escape or a third person makes resistance against a police official to let the subject person escape, and then the official has reasonable ground sufficient to believe that there exists no other means to prevent or to effect the arrest....."

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LEGAL COMMENTS

June, 1950

Treatment Under Domestic Laws of those Finally Convicted by a Military Court or Tribunal of the Allied Powers

On July 8, 1950, Takeo Ohashi, the Attorney General of Japan, in a formal communication in writing addressed jointly to the Prime Minister, the President of National Personnel Authority, all Ministers and administrative agencies of the Japanese Government, stated that with respect to the matter concerning the treatment under domestic laws of those finally convicted by a military court or tribunal of the Allied Forces, consultation between the SCAP authorities and the Attorney General has resulted in the conclusion that the following interpretation shall be adopted:

"In regard to the application of the Provisions in laws and ordinances concerning personnel qualifications (including conditions relating to appointment or assuming duties, or dismissal or loss of employment, etc., or conditions relating to permission, authorization, registration, or its cancellation, or suspension of business, etc.), those finally convicted by a military court or tribunal shall be treated in the same way as those finally sentenced to equivalent penalty at a Japanese court."

Mr. Ohashi notified the Secretary General of the Supreme Court of Japan and the Chairman of the Japan Federation of Bar Associations that the above interpretation of provisions of existing laws and ordinances had been sent to the agencies and Ministers concerned.

As clarified by an explanatory note of the Attorney General, his statment while not explicitly mentioning them is meant to cover those convicted as war criminals.

It is understood that this authentic interpretation does not bind the courts; however, it serves the purpose of an instruction to the administrative authorities which will follow it for all practical purposes of law enforcement.

With the Courts

The regular monthly meeting of the Supreme Court of Japan was held in the Supreme Court Building in Tokyo Friday, June 30th. This meeting was exclusively devoted to a discussion of the present slow procedure and long delays in the trial of criminal cases and civil suits. Associate Justice Kuriyama emphasized that the speeding up of trials also depends upon greater cooperation by lawyers who still to a large extent lack the sense of responsibility which he observed among lawyers in the United States during his recent visit. He also referred to the public procurators in Japan who likewise leave the burden of the procedure to the trial judge. In addition, civil and criminal judges are burdened with the actual writing out of judgments and sentences, and some system

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should be devised to relieve the judges from this detail and lighten their work.

Mr. Naito of the Secretariat corroborated this statement in summarizing the difference between the Japanese and American judicial system as follows:

(1) In Japan the lawyers look to the courts primarily to handle the trial instead of preparing their cases and handling the trials as the lawyers do in the United States,

(2) In civil suits in the United States the trial court decides on the facts, whereas here in Japan the facts are also heard on appeal, and

(3) In Japan there are no stenographic records of the trial such as are kept in the United States.

The Chief, Legislation and Justice Division, Legal Section, who with other members of Legal Section participated in this meeting stated that defense attorneys throughout the world have a tendency to use various methods to delay trials and civil suits and in the last analysis it is the responsibility of the court to effect speedy trials. He dwelled at length on the serious criticism of the slowness of the judicial procedure, as continuously made by other SCAP sections and Civil Affairs officers as well as among the Japanese public and in the press. He suggested the immediate establishment of a Committee composed of judges, procurators and lawyers, to study all ramifications of the problem and to arrive at practical solutions as a basis for rules of the Supreme Court, to remedy the deficiencies in the court procedure. Chief Justice Tanaka, in the name of the Supreme Court, enthusiastically accepted this suggestion, and recommended that a Committee be appointed to study the question and make such recommendations as will improve the present court procedure.

Subsequently the Judicial Assembly of the Supreme Court approved the following persons as members of the Committee: Associate Judges of the Supreme Court Shigeru Kuriyama, Tsuyoshi Mano, Tamotsu Shima and Saburo Iwamatsu; Secretary General of the Supreme Court, Gomijo; President Kobayashi and Judge Nishikubi of the Tokyo District Court. Two public procurators to be named by the Procurator General and two lawyers to be nominated by the Chairman of the Japan Federation of Bar Associations will also serve on this Committee.

An experiment in the continuous trial method, which permits few postponements or continuances once action is begun, is being conducted in the Osaka District Court under the supervision of the President of the Osaka High Court. Various types of cases are being referred to the court including charges of attempted murder, burglary, fraud, forcible entry, violence against public service personnel, illegal possession of firearms, embezzelment and bribery.

A study of this experiment will be made by the Committee.

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Former Korean League in Japan

The Supreme Court of Japan recently dismissed an appeal filed by members of the former Korean League in Japan against the Attorney General, Takeo Ohashi in connection with confiscation of the former League's properties and dissolution of the organization, upon the grounds that the Japanese Courts are without jurisdiction over the present case.

The appeal grew out of action by the Attorney General, which was challenged as an allegedly improper designation of properties of dissolved organizations for seizure as result of abuse of the Organizations Control Order. The League was defeated in two lower courts on the basis of lack of jurisdiction.

The Supreme Court held that the Japanese Courts are without jurisdiction over the present case, inasmuch as it challenges the validity of the disposition effected by the Attorney General by virtue of the provisions of the Organizations Control Order and the Cabinet Order concerning the Custody and Disposition, etc. of the Properties of Dissolved Organizations. and cites decision rendered by the Supreme Court June 13, 1949 in case No. 1,862, 1948 (See 974 p.p., No. 7, Vol. III, Supreme Court Reports)

It was also held that the presiding judge of court should at once dismiss a suit by mean of an order, whenever a suit of this nature is instituted; again with the case of Kokoku complaint against such order, the presiding judge of the court of Kokoku instance must dismiss such application immediately by means of an order. Further, in case where appeal is filed with a superior court from an inferior court's judgment of different purport from the above, the said appealed court is requested to revoke at once the original judgment and dismiss the petition concerned, upon the grounds that the Japanese courts are without jurisdiction.

It may be noted that the Tokyo District Court for the same reason dismissed the action of the Communist leaders who challenged their recent purge. Since both the dissolution of certain organizations and the purge are matters directed by the Occupation and implemented into Japanese law by Orders under the Potsdam Declaration, acts to carry out Occupation directed law connot be challenged in Japanese Courts.

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LEGAL COMMENTS

May, 1950

The Diet in its last session amended the important Nationality Law, the text of which is included herein. In the following article, the Chief, Legislative and Justice Division, Legal Section has given a summary of the salient points of the new Japanese Nationality Law:

Subject law was designed to replace the old Nationality Law, several provisions of which were in conflict with the new Constitution of Japan and with reform legislation implementing the principles of this Constitution. Such revision was, indeed, overdue, but had been held up by some reluctance to amend the Nationality Law before the Peace Treaty had been concluded. Due to the unforseen delay in the Peace negotiations, the Japanese Government felt, however that the unconstitutional provisions of the old law should be formally eliminated from the statute book since they had become invalid and inapplicable, and the actually existing gap should be filled. Subject law is strictly limited to this purpose and does not attempt to touch on problems the final solution of which will be affected by the coming Peace Treaty; thus it includes no provisions on the nationality status of Koreans, Formosans and Ryukyuans.

The main features of subject law may be summarized as follows:

a. The principle of the old law that a child shall be regarded as a Japanese if the father is a Japanese at the time of its birth has been maintained. This so-called jus sanjuinis is distinguished from the jus soli prevailing in the United States, according to which birth in the country is the decisive factor. This law has also in common with the old law the tendency to prevent double nationality and statelessness.

b. The most important change is connected with the new constitutional principle of essential equality of sexes. The former law made the nationality status of the wife dependent upon that of the husband. Marriage with a Japanese national automatically resulted in the acquisition of Japanese nationality by the wife, and loss of, or change in his nationality affected her status. Subject law eliminates all provisions of such nature and recognizes the independent status of the wife with regard to acquisition, change and renunciation of nationality. Art 6 (1) provides, however, for a "simplified" naturalization of the wife of a Japanese national. In her case the Attorney General may dispense with certain conditions otherwise required for naturalization, particularly that of a fixed period of residence in Japan.

c. The former rule that the nationality of a child follows its parents' nationality was considered contrary to the constitutional emphasis upon dignity of the individual. Therefore, automatic acquisition of the Japanese nationality for a child by virtue of recognition or adoption as well as the effect of acquisition or loss of nationality by father or mother upon minor children has been abolished and the child's nationality status has become independent.

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d. All provisions connected with the old semi-feudal house system were omitted as a consequence of the abolition of this system in the revised civil code.

e. The former Nationality Law authorized the Attorney General to permit privileged naturalization of an alien who had rendered specially meritorious services to Japan, "subject to the Imperial sanction." Art 7 of the new law retains this authorization, but because of the constitutional limitations of the Emperor's position, replaces "Imperial sanction" by Diet approval.

f. The former law discriminated against naturalized citizens who were not admitted to certain high positions in the government, such as Ministers of State, members of the Diet or President of the Supreme Court. The new law has no such provision which violates the principle of equality before the law.

g. The requirements for renunciation of nationality have been relaxed. In no case is the approval of the Attorney General a prerequisite for renunciation. It goes without saying that the restriction on renunciation of nationality in connection with military service was omitted as contrary to the abolition of the Armed Forces in the Constitution.

Subject law is, on the whole, an exceptionally good piece of legislation. It reveals the conscientious effort of the drafters to eradicate unconstitutional and obsolete elements of the former Nationality Law.

According to Art. 4 (1) one of the general requirements for naturalization is residence in Japan for at least five consecutive years. In the case of a husband of a Japanese national the Attorney General may reduce this period to three years (Art. 5 (1)), while a wife of a Japanese national may be naturalized even without her having resided in Japan (Art 6 (1)).

It may be noted that an interesting constitutional problem arises in connection with Art. 10, Par. 1, which reads that a Japanese national having a foreign nationality may renounce his or her nationality. According to Art. 22, Par. 2 of the Constitution, freedom of all persons to move to a foreign country and to divest themselves of their nationality shall be inviolate. The language of this provision does not imply that the right to renounce one's nationality is dependent upon acquiring a foreign nationality. Therefore, the condition of such acquisition in Art 10 of subject law could be considered contrary to Art. 22 of the Constitution. There is no doubt that a person who would want to renounce his Japanese nationality without acquiring a foreign nationality could not achieve such purpose under this law. The Japanese government, on the other hand, refers to Art. 98, Par. 2 of the Constitution which demands the faithful observation of the treaties concluded by Japan and of "established laws of nations." The Hague Convention of April 12, 1930, which the United States declined to sign contained certain agreements on questions relating to the conflict of nationality laws. One of the main objectives of the Convention was to discourage both double nationality and statelessness. Thus Art. 7 of the Convention provides that insofar as the law of a State provides for the issue of an expatriation permit, such a permit shall not entail the loss of the nationality of the State which issues it, unless the person to whom it is issued posesses another nationality or unless and until be acquired another nationality. Furthermore, the Conference adopted a unanimous recommendation to the effect that it is desirable that in regulating

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questions of nationality, States should make every effort to reduce, so far as possible cases of statelessness. Still, it should be noted that the unusual case of a person renouncing his nationality with the intention to remain stateless has not been considered in the Convention, as far as can be seen, and that the above mentioned Art. 7 does not exactly cover it. Such a case recently occurred with an American citizen.

In the United States where the right to expatriation is most strongly advocated, it has been recognized and is now provided in the Nationality Act of 1940 that citizens could not expatriate themselves and remain permanently in the country. The right is conditioned upon actual removal abroad. Obviously the assumption here too, is that such removal will eventually result in the acquisition of a foreign nationality. Japan signed the Convention, but did not ratify it. While undeniably the tendency toward avoiding statelessness has almost become a principle of international law, there remains a doubt whether such principle extends to instances in which a person is not being forced into statelessness, but chooses it on his own volition. The possible conflict between a principle of international law and a provision of the Constitution of Japan may have to be solved by a future decision of the Japanese Supreme Court.

THE NATIONALITY LAW
(Public Law 147, enacted May 4, 1950)
Effective July 1, 1950

Article 1. The conditions necessary for being a Japanese national shall be determined by the provisions of this Law.

(Acquisition of nationality by birth)

Article 2. A child shall, in any of the following cases, be a Japanese National
(1) When, at the time of its birth, the father is a Japanese national;
(2) When the father who died prior to the birth of the child was a Japanese national at the time of his death;
(3) When the mother is a Japanese national in case the father is unknown or has no nationality;
(4) When both parents are unknown or have no nationality in a case where the child is born in Japan.

(Naturalization)
Article 3. One who is not Japanese national (hereinafter referred to as "an alien") may acquire Japanese nationality by naturalization.
2. The permission of the Attorney-General shall be obtained for naturalization.

Article 4. The Attorney-General shall not permit the naturalization of an alien unless he or she fulfills all of the following conditions:
(1) The one has had a domicile in Japan for five or more years consecutively;
(2) That one is twenty years of age or more and a person of full capacity according to the law of his or her native country;
(3) That one is a man or woman of upright conduct;
(4) That one has property or ability enough to lead independent living;

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(5) That one has no nationality, or one's acquisition of Japanese nationality will cause one to lose one's nationality;
(6) A person who, since the enforcement of the Constitution of Japan has never plotted or advocated, or formed or belonged to a political party or other organization which has plotted or advocated, the overthrow of the Constitution of Japan or the Government existing thereunder.

Article 5. With respect to an alien who falls under any one of the following items, and has presently a domicile in Japan, the Attorney-General may permit the naturalization of the alien even when the said alien does not fulfil the condition mentioned in item (1) of the preceding Article.
(1) One who is the husband of a Japanese national and has a domicile or residence in Japan consecutively for three years or more;
(2) One who is the child of one who was a Japanese national (excluding child by adoption) and has a domicile or residence in Japan consecutively for three years or more;
(3) One who was born in Japan and who either has a domicile or residence in Japan consecutively for three years or more or has father or mother (excluding father and mother by adoption) born in Japan;
(4) One who has had a residence in Japan consecutively for ten years or more.

Article 6. With respect to an alien who falls under any one of the following items, the Attorney-General may permit the naturalization of the alien even when the said alien does not fulfill the conditions mentioned in items (1), (2) and (4) of Article 4;
(1) The wife of a Japanese national;
(2) One who is a child (excluding child by adoption) of a Japanese national and has a domicile in Japan;
(3) One who is a child by adoption of a Japanese national and has had a domicile in Japan for one year or more consecutively and was a minor according to the law of its native country at the time of the adoption;
(4) One who has lost Japanese nationality (excluding one who has lost the Japanese nationality after one's naturalization in Japan) and has a domicile in Japan.

Article 7. With respect to an alien who has especially rendered meritorious service to Japan, the Attorney-General may, notwithstanding the provision of Article 4, permit the naturalization of the alien with the approval of the Diet.

(Loss of nationality)

Article 8. A Japanese national shall lose his or her Japanese nationality when he or she acquires a foreign nationality at his or her own wish.

Article 9. A Japanese national who has acquired a foreign nationality by reason of his or her birth in the foreign country shall lose Japanese nationality retroactively as from the time of birth, unless the Japanese national manifests his or her volition to reserve his or her Japanese nationality according to the provisions of the Family Registration Law (Law No. 224 of 1947):

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Article 10. A Japanese national having a foreign nationality may renounce his or her Japanese nationality.

2. The renunciation of nationality shall be made by notifying to the Attorney-General.

3. One who has renounced his or her nationality shall lose Japanese nationality.

(Procedure for renunciation of nationality)

Article 11. The application for permission of naturalization, or the notification of renunciation of nationality, shall be made by the legal representative in his or her behalf, in case the person who intends to become naturalized or renounce nationality is under fifteen years of age.

Article 12. The Attorney-General shall, when he has permitted naturalization or accepted notification of renunciation of nationality, announce to that effect by public notice in the Official Gazette.

2. The naturalization or renunciation of nationality shall come into effect as from the day of the public notice under the preceding paragraph.

Article 13. Other than those provided for in the preceding two Articles, the procedures concerning naturalization and renunciation of nationality shall be prescribed by the Attorney-General.

Supplementary Provisions:

1. This Law shall come into force as from July 1, 1950.
2. The Nationality Law (Law No. 66 of 1899) shall be abolished.
3. The applications for permission of naturalization or the applications for permission of restoration of nationality made under the provisions of the old Nationality Law before the enforcement of this Law, shall be regarded as applications for permission of naturalization made under the provisions of this Law.
4. The applications for permission of renunciation of nationality made before the enforcement of this Law under the provisions of the old Nationality Law shall be regarded as the notifications of renunciation of nationality made under the provisions of this Law.
5. A child whose parent was naturalized in Japan prior to the enforcement of this Law and who has acquired Japanese nationality under the provision of Article 15 paragraph 1 of the old Nationality Law shall be regarded as having naturalized in Japan with respect to the application of the provisions of Article 6 item (4). The same shall apply to one who, prior to the enforcement of this Law, was adopted by a Japanese national or became the incoming husband (nyufu) of a Japanese national.

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

LEGAL COMMENTS

April 1950

The recent Supreme Court decision in the case of Akio T.N.K., convicted in the Supporo District Court of robbery is of particular interest, inasmuch as it involves the same rule of the Supreme Court which was overlooked in the Mitsuharu K.T.GIRI case last year. It will be remembered that this mistake of four judges of a Potty Bench of the Supreme Court caused a great deal of adverse publicity and severe criticism which led to an unsuccessful impeachment procedure against the Supreme Court Judges involved. It will be noted from Akio T.N.K. decision reproduced herein, that Judge Takejiro S.W.D. dissented.

Colonel Alva C. Carpenter, Chief of Legal Section, delivered the following address at the inauguration of the Judges Practicing Law Institute held in the Supreme Court Building in Tokyo which emphasizes the importance of the Japanese judiciary to the nation as a whole in carrying out the recent legal reforms. Attention is invited to his remarks relative to the judges' key position and responsibility in bringing about a more efficient and workable administration of court procedure, with the objective to expedite criminal trials and civil suits and generally improve the present slow and outmoded practices, which are based on customary attitudes of the Japanese judges rather than on legislation. The newly established Practicing Law Institutes for Judges and Public Procurators are designed to bring about a fundamental change in these practices and attitudes. The continuing Interchange of Persons Program is another means to promote such change. Rules of the Supreme Court containing instructions for expediting civil and criminal trials and suits are in consideration.

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"Re" No. 2,000, 1949

J U D G M E N T

T.N.K. Akio
Permanent and present addresses:
Kita-No. 1 No. 9-sen, Iburi-mura,
Ishikari-machi, Ishikari-gun,
Hokkaido.
Occupation: Fisherman
Age: 21

As regards the case of robbery against the above-mentioned defendant, he filed a Jōkoku appeal from the judgment rendered on June 2, 1949 by the Sapporo High Court, so this Court has in accordance with Art. 2 of the Law for Enforcement of the Code of Criminal Procedure come to decide as thus:

Formal Adjudication of Judgment

The present Jōkoku appeal is dismissed.

Reasons

On the statement of reasons for Jōkoku appeal held by Defense Counsel KOBAYASHI Moriji:

According to the record of the present case, the court of origin at its first date for trial on facts on Mar. 15, 1949, designated the next date on which the examination of witness was to be conducted in compliance with the request of the defense counsel as Apr. 16, the same year, however, the court, upon ruling on Apr. 4, the session-off, to change the above-designated date to May 26 of the year, held the second session on the newly-fixed date, thereby concluding the oral proceedings concerning the case. Hence it is clear that fifteen consecutive days or more had been elapsed after the first session before holding the second one. And it is as maintained herein that since the court action was originally brought to the Sapporo District Court on Apr. 16, 1948, the old Criminal Code and the Law for Temporary Measures of the Code of Criminal Procedure should have been applied in the hearings in general of the present case in accordance with Art. 2 of the Law for Enforcement of the Code of Criminal Procedure. However, Art. 13 of the said Enforcement Law provides, "Besides the matters prescribed in this Law, necessary matters concerning the disposal of those cases which are pending in court at the time of enforcement of the New Code shall be provided by the Rules of Court", and in pursuance of the above, the Supreme Court Rule of Enforcement of the Rule of Criminal Procedure stipulates in its Art. 3, Item 3, reading," Even where after the commencement of trial the session has not been held for fifteen (15) or more consecutive days, it suffices to renew the proceedings of public trial only if deemed necessary". Therefore, the court is not always required to recommence its proceedings of public trial even where the session has not been opened for fifteen or more consecutive days after the first prorogued except a case where the court deems it must. Thus being the case, it cannot be admitted illegal in any regard that the court of origin failed to take steps to recommence its proceedings despite that it had stayed its proceedings of public trial for fifteen days or more after opening the first session. Hence the Defense Counsel's purport of assertion is groundless.

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For such reason as stated heretofore, the judgment is rendered as mentioned in Formal Adjudication of Judgment.

The above is unanimous among all judges concerned, except Judge SAWADA Takejiro who is of minority opinion that follows:

The provision of Art. 353 of the old Code of Criminal Procedure was one of the embodiments of the spirit of the old Code to be consistent in "Principle of Public Trial First" and "Principle of Direct Examination," being one of the leading provisions in which the characteristics of the old Code of Criminal Procedure had been realized. Therefore aside from how that provision was being applied to actual cases, it was believed in general that the criminal procedure was being practised under the Principle of Public Trial First and the Principle of Direct Examination only on the ground of the existence of the said provision. While the criminal procedure has come to be practised according to the newly-determined Code of Procedure on and after Jan. 1, 1949, yet the Law for Enforcement of the Code of Procedure prescribes in its Art. 2, reading, "Those cases against which public action has been instituted before the enforcement of the New Code shall be governed by the old Code and Temporary Measures Law even after the enforcement of the new Code", thereby clarifying that the cases against which public action had been instituted prior to the enforcement of the new Code should be disposed of under the old Code. Judging from such provision as quoted above, the Enforcement Law orders, it must be said, that the court should, in its conduct of examination of those cases against which public action had been instituted prior to the enforcement of the new Code should be disposed of under the old Code. Judging from such provision as quoted above, the Enforcement Law orders, it must be said, that the court should, in its conduct of examination of those cases against which public action had been instituted before the enforcement of the new Code, respect what the old Code adopted as its reasonable idea. In other words, the Enforcement Law does not expect in any way that a case against which public action had been brought prior to the enforcement of the new Code should, far from the provision of the old Code, be examined in such a way as causes disadvantage to defendant, it must be concluded.

Whereas, the provision of Art. 3, Item 3 of the Rule of Enforcement of the Rule of Criminal Procedure excludes that of Art. 353 of the old Code, thus utterly setting what the old Code adopted as its reasonable idea at naught. Albeit the majority opinion maintains that the above provision of the Rule is of lawfulness determined by the authorization of the rule-making power under Art. 13 of the Enforcement Law, such view, in my opinion, is a fallacy originated in misinterpreting Art. 13 in question. It is true that the said Article stipulates necessary matters concerning the disposal of cases pending in court at the time of the enforcement of the new Code by determined by court by means of its rules, however, we must give serious consideration to the fact that the above provision of Art. 13 is nothing but one of those provisions of the Enforcement Law of Code of Criminal Procedure, among which such a one as that of the above-quoted Art. 2 is contained. If we read the provision of Art. 13 separately from and independently of other provisions of the Enforcement Law, among others that of the before-quoted Art. 2, we are absolutely unable to catch the true significance implicated therein. Altho the said provision authorizes the court to determine by means of its rules the necessary matters relating to the disposal of such cases as pending therein at the time of the enforcement of the new Code, the scope of matters to be established by the court under its rules should, methinks, be taken as confined within those matters which had not been as yet provided for in the old Code as well as in the Temporary Measures Law and not so far extensible as to such matters as are beyond those already stipulated in the above Laws, if we construe the said provision of Art. 13 of the Enforcement Law in reference to the before-quoted Art. 2 as well as other provisions of the same Law. Therefore it must be

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said that it is the going-too-far beyond the scope of authorization of the rule-making under Art. 13 in question for the court to determine a rule of such substance as may modify, or may naturally lead to alter and repeal, the provisions of the old Code as well as of the Temporary Measures Law. It is so still more, and must be said, in my opinion, deviating far from the scope of authorization for the court to have acted in such a way as determine a rule of which substance might naturally lead to deny the provision of Art. 353 of the old Code to which (the provision of Art. 353) entrusted a special mission to embody the reasonable idea of the said Code relative to the conduct of hearing. The utterly same thing as the above can be said from the nature of the authorization by virtue of law. Thus being the case, no reasoning from any point of view may be made a ground for the lawfulness and the validity of Art. 3, Item 3 of the Rule of Enforcement of the Rule of Criminal Procedure. If such be the case, there is nothing for it but to be concluded the violation of Art. 353 of the old Code for the court of origin to have failed in recommencing its proceedings of trial on the basis of such an invalid provision as found so in the above, and so the judgment of the said court must be said to be unable to excuse itself from illegality falling under Art. 410, Item 16 of the said Code. Therefore, the present Jōkoku appeal being well-grounded, the original judgment should be quashed and the case sent back to the court of origin.

Public Procurator OSABE Kingo participated in the Present trial.

The Grand Bench of the Supreme Court

Presiding Judge Judge TSUKAZAKI Naoyoshi
Ditto HASEGAWA Taichirō
Ditto SAWADA Takejirō
Ditto SHIMOYAMA Seiichi
Ditto INOUE Noboru
Ditto MANO Tsuyoshi
Ditto OTANI Katsushige
Ditto SHIMA Tamotsu
Ditto SAITŌ Yūsuke
Ditto JUJITA Hachirō
Ditto IWAMATSU Suburō
Ditto KAWAMURA Matasuke
Ditto HOZUMI Shigetoo

(Judge KURIYAMA Shigeru can not add his signature and seal hereto because of his absence due to an official trip.)

Feb. 15, 1950.

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GENERAL HEADQUARTERS

SUPREME COMMANDER FOR THE ALLIED POWERS

LEGAL SECTION

LEGAL COMMENTS

March, 1950

At a meeting of the Public Procurators of Japan held in Akasaka Palace March 28, 1950, sponsored by the Public Procurators Practicing Law Institute, the Chief of Civil Affairs and Civil Liberties Branch, Legislative and Justice Division, Legal Section, delivered the following address which brings out the importance of relationship between Public Procurators and civil liberties.

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Text of speech delivered at the
Public Procurators Practicing
Law Institute, 28 March 1950

In addressing this assembly of procurators on the vital subject of civil rights I am well aware of the importance and the difficulty of the task. Other lectures in this institute aim at adding to your knowledge or opening a new field for your experience, making you more efficient procurators in special cases, handling the New Code of Criminal Procedure to better advantage for the side of the prosecution. This lecture however, invites you to reflect on your job as a whole and aims at giving you a new outlook on it and offers an opportunity to glimpse a new type of professional satisfaction.

We agree, I believe, that a procurator's position is not to be taken as a chance to exert power over others, nor do I believe it is sufficient to picture the procurator as the revenger of the State, intent only on punishment of those who run afoul of the law, without consideration of social conditions and circumstances. Questions of social justice are important to procurators who wish to approach their job with sincerity. This leads to an appreciation of the problems of civil liberties. It is against this background of professional sincerity with yourselves that I wish to speak about procurators and civil liberties.

Let me start out with a few historical remarks about the position of government in general in the question of civil liberties:

Until rather recently the government was only the villain in the drama of civil liberties. This is easy to understand, since the reconciliation of liberty and authority is a delicate and never ending task. In the past the danger that the government would extend its authority to the detriment of freedom of the individual was only too obvious. Those who prize fundamental freedoms such as freedom of speech and of the press, the right of assembly, the right of an accused to fair and just trial, etc., looking at the experience of the past and reflecting upon the evils of preceding ages of tyranny, concluded that the threat of arbitrary tyrannical government was the most serious threat to civil liberties. Thus, bills of rights were born in the U.S., in France, in the Germany of 1848, and in many other countries. Since government and government alone was considered the enemy of freedom, these bills of rights were directed against the government. They circumscribed a certain sphere into which the government was prohibited from intruding by laws or other governmental action. A bill of rights of this type could have real meaning only if it actually limited the power of government in the interest of safeguarding individual liberty. A bill of rights which -- as was the case in the former Constitution -- gave such liberties only within the limit of the law, was therefore a distortion of the original idea which aimed at putting these liberties above the general law-making power of the State.

No doubt government can be an enemy of civil liberties.

However, more recently those interested in civil liberties have come to the conclusion that the use of defensive weapons against the State is not enough to insure freedom. A shield is insufficient. Civil liberties have to be protected also aggressively against individual members of the society. To cite an example: there are in all societies people who would exploit differences of sex, race, social status, or family origin, or who are so intolerant of differences of opinion or creed, that they oppress others. There have always been those who believe that they were above the law, that they constitute an authority by virtue of their social power, even if lacking legitimate authority by free election or appointment,

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that their will has to be followed in a certain area without taking recourse to legally established courts and procedures which they disdain. They work by threat, intimidation and violence. Anyone who would, for instance, resist their requests for money for causes they sponsor or who otherwise incurs their disfavor is endangered. In this country this type of person is frequently encountered as boss in various fields.

I cite this example to show, that extensive and frequent losses of liberty may be due to the failure of the forces of government to protect individual citizens from encroachment of their liberty by other citizens who have some power over them.

Considering these cases we must admit that the government which heretofore was considered only as the potential enemy of civil liberties can and should also be the protector of civil liberties; that what is necessary is not only protection of civil liberties against the government but also protection of civil liberties by the government; and that to use a shield in protection of civil liberties being insufficient, a sword is needed which has to be wielded by the government. In a democracy an important function of the law enforcement branch of the government lies in the aggressive protection of the fundamental rights of a free people.

And now let us turn to the practical application of these conclusions. For, civil liberties are not theories or intangibles reserved for academic discussions of constitutional law. They are in the sum and substance of the daily lives of the citizens. To make these rights a reality and to protect them is everybody's business. However, as may already have become apparent, there is a reason why civil liberties are of special, professional interest to procurators. The problem "procurators and civil liberties" does not deal with an utopian dream, but with specific actions procurators must or must not take.

This divides my talk into two parts, one dealing with limitations imposed on procurators; the other with the necessity for certain affirmative actions; on their part.

I shall first talk briefly about the duties. This part of my talk will be mainly concerned with the "shield" approach which I mentioned before: Procurators must scrupulously respect the shield with which the Constitution and the implementing laws protect civil rights.

Since these points are elaborated on in other lectures, let me only mention by way of example provisions such of Article 33 of the Constitution which stipulates that in general arrest can be made only upon issuance of a proper warrant; Article 34 which stipulates that no person can be detained without being at once informed of the charges, or without adequate cause, and his right to assistance by counsel; Article 35 which protects the citizen against search and seizure without proper warrant; Article 37 specifying his right to a speedy, public and fair trial, including his right to produce witnesses and examine all witnesses; and his right to be assigned counsel by the State if he is unable to secure same; Article 38 safeguarding freedom from coercion to self-incrimination and stating that confession made under compulsion, torture or threat, or after prolonged arrest or detention shall not be admitted as evidence, and that no person shall be convicted or punished in cases where the only proof against him is his own confession; and Article 39 containing the principle "nullum crimen sine lege previa" and the prevention of double jeopardy.

Let me point out that all these provisions are addressed in part to the procurators, prohibiting certain actions on their part.

Turning to the Code of Criminal Procedure, we must never forget that one of its aims declared in Article 1 is the realization of Criminal Laws with fairness and under thorough accomplishment of the security of the fundamental human rights of individuals. Here, I believe, is an outline of your fundamental duties which is not always properly understood. As procu-

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rators you realize that a peaceful society must be protected from those who harm it by criminal violation of the law. But, you must also realize that a peaceful democratic society must rest safely in the knowledge that the police power which is given to the State is not being abused. The citizen must know that he need not be worried because he is safeguarded in his human rights by the law and by the adherence of all public officials to it. The law balances these two needs of society. It is your sacred duty to society to maintain that balance.

The great importance of provisions such as those regarding search and seizure, as well as of those regarding warrant for arrest and detention becomes apparent when we conceive of a society where they do not exist or exist only on paper. When persons can be arrested without reason at will and houses are searched without restrictions, what sense of freedom can there exist in the Community? Only the certain knowledge of the citizen that he is safe from an unbridled power of government because of a wise legislation and because of the understanding of the procurators of their task, will give him freedom from fear, and only where there is no fear can there be real peace in a society.

Democracy cannot exist in the shadow of such fear. A procurator who disregards any of those rules because he does not understand their reason and considers them only as wanton obstacles to efficiency is not only guilty of a minor procedural mistake. He hampers the progress of this nation towards an orderly democracy.

Let us therefore not be induced by a misunderstood notion of efficiency to destroy the right of the citizen to be free from unwarranted interference in his life. A procurator who could safeguard the right of the Community to protect itself against criminals only by destroying this very precious good of the community--the sense of such freedom--could hardly lay claim to any efficiency. To try to obtain convictions at this price to society would be a betrayal of the trust of the community.

I have already referred to protection of civil liberties against violations by individuals. In these cases the State may throw off the old stigma of an enemy of civil liberty and become the true protector of human rights. To give an example: if the government by law or ordinances would deny the right to vote to citizens of a certain social origin, or would allow only voting but no real choice of candidates of various opinions, this would constitute a violation of civil rights. But it is just as possible that private persons abusing their social standing intimidate their fellow citizens into staying away from the polls or into voting in favor of certain persons or groups. As always in these cases, the social position of those who execute this threat may be considerably higher than that of their victims. You must not allow this fact to sway you in their favor. A threat of this type is not directed only at the members of a certain community, it is a threat to the entire system of an orderly functioning democracy. In such cases you must act, being aware of your duty towards the society.

Let me take another example. Freedom of the press is generally understood as the right of the press to publish news or opinions without government interference, so that the people by reading all views on the matter may find the truth. But is there any true freedom of the press when the publisher or editor is intimidated by a boss, when he wants to point out the abuse under which the community suffers?

I have already referred to bosses and their henchmen who terrorize certain neighborhoods extorting money from small business people who are striving hard enough to make a living for themselves and their families. But the story does not end with such cases of intimidation by a single boss and his gang. Often it is a great part, possibly even the majority of a community which, aroused by some narrow-minded spreaders of intolerance, commits violations of civil liberties against a member of the community who has incurred its disfavor. Who of you is not familiar

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with the human tragedies which the word "murahachibu" brings before our mind? This lecture invites you to critically examine these cases and to realize that they involve human tragedies of people who are rendered helpless unless you come to their aid. It is one of the very corner stones of an orderly government that punishments are given only for violations of laws and by due process stipulated by law. An orderly government cannot allow that persons having no recognized qualifications are able to punish others who are socially weak, without reference to any recognized standard but a pooling of mutual prejudices. Where are the limits of such anarchy? Where is there any freedom from fear if such cases go unheeded by those who are supposed to be the guardians of the law? It appears that the provisions of the Criminal Code are sufficient to allow prosecution of such cases and the Supreme Court in a number of enlightened decisions has deemed the provisions of Article 222, for instance, applicable to the cases of "murahachibu". Cases of this sort are a blot on the shield of any society. It may be that the average citizen can only deplore this state of affairs, but you as procurators are not free to mutter a few regretful remarks about the unfortunate fact that so much of the population is still thinking in feudalistic patterns. It is up to you to show that the State disapproves of such illegal mob action.

An important field of prosecution lies in the penal provisions of the Labor Standards Law, many of which have to do with Civil Liberties. Particularly I want to refer you to the provisions aiming at the exclusion of labor bosses and to various forms of slavery existing in this country-slavery in mines, in the textile industry etc. You may for instance consider the position of children and especially young girls sold by their financially needy parents for a paltry low sum int actual slavery. They are forced to stay in any place appointed by their master, and if they wish to free themselves of their bondage they are tracked down sometimes even with the assistance of law enforcement officers. There are now enough laws on the books, I believe, to prosecute such cases. There is also proof that any prosecution has a salutory effort for at least a certain area and period. We must not be blinded by the fact that these conditions are very old in Japan. Slavery in any form is abhorred in a democratic society. Legislators cannot fight it without your help. As procurators you have the power to make your conscience and your feeling of human compassion an active force, and as human beings you should use this power.

Another field of importance are the cases of police brutality which, according to the reports of the Civil Liberties Bureau and according to occasional newspaper items are not infrequent. It is true that the character of the police has changed from an instrument of ruthless oppression to a friend of the people, but old habits are often retained by sloppy thinking individuals. A police force consists of thousands of human beings and as in any other big organization, these human beings are of all types: kind or brutal, swayed by anger or level headed, broad minded or prejudiced. The minority of those who do not recognize their true mission is apt to mar the picture of the entire force. It is therefore necessary to deal with them when they stoop so low as to commit crimes -- and torturing a human being in your power certainly is a crime -- as vigorously as we would with any other criminal. In addition, prosecution of third degree methods is important in order to achieve justice, free of distortion by such force against the suspect. We all are astonished by reports of certain trials in other countries in which defendant after defendant confesses, and if such confessions are the result of torture, justice becomes a travesty. You must show your disapproval of such methods in your own country by prosecution of police officials who abuse their power.

You will have recognized that I have only touched upon some of the civil liberties violations occurring in Japan. I am sure you could have added examples from many a field.

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Generally speaking, I believe that there are enough statutory tools to take action. While in some cases difficulties of proof may exist, I am convinced that they are by no means unsurmountable. In preparation for trials I would, for instance, mention the possibility of assistance through Civil Liberties Commissioners and private Civil Liberties organizations. Considering the fact that complaints are filed frequently enough and sometimes with attendant considerable publicity, I am convinced that a substantial percentage may be successfully prosecuted after careful preparation.

What is needed first of all is sincerity of purpose of the procurators who are aware of their duty to safeguard civil liberties without fear or favor. Successful prosecution will in itself bring about a marked improvement. As a matter of fact many of the difficulties of proof which stem from the atmosphere of intimidation will progressively disappear if the procurators show that they are on the side of the aggrieved people. I cannot stress enough the fact that the very essence of civil liberties consists in the right of every individual to claim the protection of the laws whenever his human freedoms are infringed upon. To afford that protection is one of your first duties.

Let me add one more thought in conclusion. Where there is social unrest we ought to be more anxious and vigorous in protecting civil liberties. Emotions run higher when the clash of interests is frequent and heated. In the battle for public favor extremists urge tolerance for their ideas, intolerance for their opponents. In this welter of confusing factors, civil liberties are often the loser. When you show your sincere interests in these cases, you will be acting as a defender of a new front against those radicals who would otherwise utilize your neglect by all means of skillful propaganda and who thereby might sway others to believe that civil liberties are best served by backing them -- while in actuality the propagandistic use of civil liberties slogans is only a means to an end to them, the end being their ascendance to power, which would mean the end of all civil liberties.

For all these reasons, I urge you to give due consideration in your work to the importance of civil liberties.

It is greatly up to you whether the State will continue in the mind of the people as the enemy of civillibertios or will come into its proper position as a friend of civil liberties and whether the public procurator will become a protector of those long suffering under oppression and denial of civil rights.

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GENERAL HEADQUARTERS

SUPREME COMMANDER FOR THE ALLIED POWERS

LEGAL SECTION

LEGAL COMMENTS

FEBRUARY, 1950

In the following speech the Chief, Criminal Affairs Branch, Legislation and Justice Division, Legal Section, attempted to summarize the Japanese Criminal Law of Libel, Blackmail, Threat, Intimidation and Violence.

While the speech was delivered to a conference on the Law and the Press which was primarily concerned with so-called "Gorotsuki", or "Gangster Newspapers", the summary might be useful to Civil Affairs Officers and others who desire quick information on the essence of the Japanese Criminal Law in these fields.

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Text of Speech
Delivered at the Saitama University
Conference on the Law and the Press
23 February 1950

JAPANESE CRIMINAL LAW OF LIBEL, BLACKMAIL, THREAT, INTIMIDATION, and VIOLENCE

Background of the Problem

In spite of continuous efforts during the Occupation by the Japanese police and other law enforcement agencies to systematically "shake down" the nation's underworld with the aim of ferreting out thousands of gangster "bosses" who were continuing to hold out in defiance of the law, the problem still seems far from final solution. Although hundreds of "big-shots", such as the leaders of the Otsu, Yasuda, and Sekine "Gumi" (feudalistic racketeer organizations) have been arrested, and many similar organizations have voluntarily dissolved, there has been no lessening in gangsterism. On the contrary, many such outlawed bosses were reported simply to have dropped out of the major underworld activities but still to be continuing their unlawful practices on a less prominent scale. Some have merely switched their names; others have set themselves up as heads of questionable business concerns; still others have radically altered their field of activities but retained their past feudalistic system and personnel. Many still have their underworld power in new roles. The Asahi reported some time ago that during one police drive which lasted for a period of about 7 months, the police successfully rounded up over 10,000 underworld criminals, including "big shots", "gorotsuki" newspapers, minor intimidation gangs, and others. Nevertheless there are undoubtedly some hundreds of "big timers" and thousands of subordinate bosses and lesser henchmen still in operation.

The Oyabun-Kobun System

How many of these various types of Oyabun and Kobun are directly connected with the "gorotsuki" newspaper racket and exactly how such newspaper gangsters operate in detail I do not know. However, the "gorotsuki" newspapers are only one manifestation of the Oyabun-Kobun system which dates back as far as the Tokugawa era in Japan and is essentially an extension of the traditional Japanese family system. It expanded from its origin as a number of gambling groups into the field of politics, economics, the police system, and the army and navy. The system is not just one of

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corrupt illegal activities but its essential characteristic lies in a hierarchial relationship, between a group of individuals with roots in the feudal attitudes and ideals of a historical past which is very close to the immediate present. Basically the pattern is this: A boss (Oyabun) whose ancestors have been Oyabuns for generations has a number of henchmen bound to him by close ties of personnel loyalty. In return for supplying his Kobuns with money, goods, advice, paternalistic direction and status, the boss receives an absolute loyalty which is accompanied by a feudalistic sense of honor and highly exaggerated regard for a "face". These Kobuns, in turn, have other Kobuns, though they are in the relationship of "Oji-san" (uncle) to these other Kobuns, rather than in the position of Oyabun. In turn, this second group of Kobuns have their own Kobuns, and so the relationship extends on the basis of immediate and close quasi-family ties, until the Oyabun controls a large number of henchmen.

The "Gorotsuki" Newspapers

It is obvious that a system with such deep-rooted history can only be eliminated in the long run by a transformation of Japanese society through education. However, this does not obviate the necessity for continuing efforts to enforce the criminal law as far as it is possible to do so. Regardless of details of the exact methods of operation of the so-called "gorotsuki" newspapers, the general picture is clear. I understand that their organization is similar to the other gangster groups and that they operate by means of libel, blackmail, intimidation and violence. In particular, I understand it is a common practice for such newspapers to prepare libelous articles attacking candidates for public offices and to threaten publication or violence unless they were paid off. Of course, the new Constitution and laws of Japan are designed to ensure freedom of the press, but this does not mean that criminal libel, blackmail, intimidation and violence should be condoned.

Crimes against Reputation

Former Press and Publication laws which were undoubtedly restrictive of freedom of the press have been repealed, but the Penal Code still contains a chapter entitled "Crimes Against Reputation" (Meiyo ni tai-suru Tsumi). Article 230 of this chapter states that every person who has injured the reputation of another person by publicly alleging facts, regardless of whether such facts are true or false, shall be punished with penal servitude or imprisonment not exceeding 3 years or a fine of not more than ¥50,000. However, in order to protect the right of the press to publish facts related to the public interest and primarily for the public benefit, a new Article 230 has recently been added to the Penal Code. This Article provides that publication of facts having relation to the public interest and primarily for the public benefit is not punishable, even though it may injure the reputation of another person, provided that the truth of the facts published is established after inquiry. The article specifically provides that "facts concerning a criminal act committed by a person who has not yet been prosecuted in relation thereto, shall be deemed facts related to the public interest". Similarly, true facts concerning a public official or a candidate for elective public office may be published without punishment even if they injure his reputation.

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These new provisions were essential in order to protect the interest of the public in being properly informed about crimes, public officials, and candidates for elective public offices. They also protect the right of the press to freely publish such facts provided that they are true. The qualifications do not make it legal for any person or newspaper to circulate or publish a falsehood which injures the reputation of any suspect, public official or candidate. Article 231 of the same chapter of the Penal Code provides for punishment by detention (imprisonment not exceeding 30 days) or a minor fine of every person who has publicly insulted another person even without alleging facts. The article covers unfavorable comments published concerning a person's character, conduct, antecedents, etc., by the use of insulting language.

Crimes against Credit and Business

Another chapter of the Penal Code which has remained unchanged during the Occupation and which is closely related to the chapter already discussed is the chapter entitled "Crimes Against Credit and Business" (Shinyo oyobi Gyomu ni Tai-suru Tsumi). Article 233 of this chapter provides that every person who has injured the credit of another person or impeded his business by circulating false reports or by fraudulent means shall be punished with penal servitude not more than 3 years or fined not more than ¥50,000. Article 234 provides that every person who has forcefully interfered with the business of another person shall be dealt with in accordance with the preceding article.

Application of the Law

The provisions of the foregoing two chapters of the criminal code may be somewhat clarified by discussing a few of the Supreme Court cases which have interpreted them. The following remarks are based upon such Supreme Court decisions.

Even a person who has committed a crime or another illegal act also has a reputation to keep up. Consequently when falsehoods which injure his reputation have been publicly alleged, the crime of libel under Article 230 is constituted. When a person adversely criticizes another person by an article in which the latter is accused of evil deeds in language interspersed with insulting expression and publishes such article to the injury of his reputation, the insulting language and the allegation of facts form the method of the crime of libel, and the act is therefore punishable.

Even though a defamatory article published in a newspaper, magazine, or another publication contains no direct reference to the name, facial features, nickname, or pen-name of the injured party, if the person to whom the article refers can be inferred from the wording and other circumstances, it may be dealt with as libelous.

The act of printing an article which injures the reputation of a candidate for membership of a prefectural assembly and circulating the same among the electors by special post amounts to the notification of facts which intend generally to injure the reputation of another person. It, therefore, constitutes the crime of libel within the meaning of Article 230 of the Criminal Code. However, under Article 230a, if, upon inquiry into the facts, the truth thereof be established, the said act is not punishable.

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Each person is protected by law from having his social position and estoem violated. When violated by another person, therefore, it is an impairment of his reputation.

The crime of injuring a reputation is constituted by violating the social position or estoem of a person by publicly declaring facts whether true or otherwise; the crime of injuring credit however, is formed by imperiling the confidence of another in a person's solvency or willingness to pay by circulating false rumors or by means of a fraudulent stratogem.

An act of circulating a falsehood, may according to circumstances, constitute the two crimes of injuring credit and reputation, or simply the crime of injuring credit or reputation.

Even though the contents of a paragraph inserted in a newspaper and reading in effect that A owes ¥50,000 to B is already well-known to C and others, the crime of injury to reputation is not constituted unless the paragraph goes so far as to imply that A is on the verge of bankruptcy.

The word "credit" within the meaning of Article 233 of the Criminal Code is not included in Article 230, par 1, of the said Code, but is independent and outside the scope of the latter article.

When a newspaper paragraph of an insulting nature forms an essential element of the crime of injury to reputation, the act is not dealt with for the crime of insult in addition to the act of impairment of reputation. If no punishment is imposed for the crime of injury to reputation because the truth of the allegation has been proved in accordance with Article 230a, and the facts alleged were related to the public interest and primarily for the public benefit, than the accused is to be entirely acquitted and cannot be punished for the crime of insult under Article 231.

The published fact involved in the injury to reputation need not necessarily be one not publicly known. The crime is formed even when a publicly known fact is published.

The words "publicly alleging facts" within the meaning of Article 230, par 1, of the Criminal Code denote the intimation of facts under conditions in which an indefinite number of people could have seen and heard the same. Even if no person actually saw or heard the intimation, there may still be a public intimation of facts.

The persons who are to be held criminally liable when the crime of injury to reputation has been committed by means of a newspaper are determined in accordance with the Criminal Code. It is immaterial whether they are the editor and publisher or any of the following persons:

(1) a person other than the editor who actually had charge of the editing;
(2) a person who has signed the article inserted;
(3) in the case of particulars of a correction or refutation, the person who has demanded the inserted article.

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If a person has delivered a speech which in view of its whole tenor, the rumors current at the time, and other circumstances, enables the general audience to infer who is reported to have misconducted himself and in what manner, he may be found guilty of defamation. Similarly, a person who has published an article in a newspaper under the same circumstances may be found guilty of criminal libel.

The victim of criminal libel or insult is either a specific person or a specific organization possessing personal capacity.

A reporter who has supplied data with an intention of having an article which is injurious to the reputation of a person inserted in a newspaper causes, in conjunction with the acts of editing and publishing, injury to reputation. When a paper containing such articles has been published, the reporter concerned cannot evade liability as one of the principal offenders of the crime of libel. A newspaper correspondent cannot evade liability for his correspondence which tends to injure the reputation of another person and which has been inserted and published in the paper merely because it is within the exclusive power of the editor to select "copy". Furthermore, by supplying the editor with material for the given article the correspondent has thereby actually perpetrated the crime of libel jointly with the editor and has not merely assisted in preparing for the said crime.

When copies of a paper containing allegations injurious to the reputation of a person are distributed by post to a large number of persons, it amounts to publicity within the meaning of Article 230, even though the number of recipients of the copies may be specifically limited.

When the report of a juridical person has injured the reputation of another person in the name of the juridical person, punishment is thereby imposed on the actual author of the act.

When a letter of complaint containing allegations bearing on the private conduct of a person and tending to injure his reputation is fully published in a newspaper, it constitutes the crime of libel.

When a reporter is informed of facts which tend to injure the reputation of a person with the object of having such facts published in newspaper, and they are published as a result of tacit persuasion, an instigation of libel is committed.

In the crime of injury to the reputation of a person, it is sufficient if an allegation of facts is made to such an extent that it can be deemed to be injurious to the reputation of a specific person. It is not necessary that the facts be therefore minutely specified in regard to time, place, or other details.

The crime of insult is complete when the offender's opinion holding the social position of another person in contempt, is publicly made known without mention of facts; on the other hand the crime of injury to reputation is complete when concrete facts tending to injure the social position of another person are publicly declared.

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Even critisism of the public capacity of a person may constitute a case of criminal insult if the offender publicly makes unfavorable comments concerning such person's character, conduct, antecedents, etc., by the use of insulting language.

"Circulating false reports" as provided in Article 233 of the criminal code means to publish false reports; for the completion of the crime therefore, it is not necessary to cause people further to circulate false reports.

"Injuring the credit of another person" within the meaning of Article 233 denotes injury to the financial credit of a person; consequently, the false report circulated for the purpose need not necessarily imply a conception of evil deeds or misconduct.

The act of injuring the credit of a person does not necessarily produce the result of violating his property right.

When discussing injury to credit under Article 233 of the Criminal Code or compensation for damages under Article 709 of the Civil Code, a distinction should always be made between credit and property rights. Article 709 of the Civil Code provides " A person who violates intentionally or negligently the right of another is bound to make compensation for damage arising therefrom." This is the basic provision for a civil action for libel or defamation as opposed to the Articles of the criminal code already referred to which provide for criminal punishment rather than civil damages. It should be noted in this connection that Article 710 of the Civil Code provides " A person who is liable in damages in accordance with the provisions of the preceding article must make compensation therefor even in respect of a non-pecuniary damage, irrespective of whether such injury was to the person, liberty, or reputation of another or to his property rights."

All that is required for the formation of the crime of Article 233 is injury to the credit of another person by circulating a false report or by fraudulent means. It is not absolutely necessary that reference be made to concrete injurious acts.

"Circulating false reports in the sense of Article 233 denotes spreading rumors which are false, it is not essential that the rumor be an invention of the accused in order that it may be found to be false."

When a false article tending to impede the business of another person is inserted in a newspaper and an attitude taken to the effect that similar paragraphs will be continuously published unless a sum of money is paid, and money is thus exacted, the act of impeding business forms the concrete evidence of the crime of intimidation. It is, however, the means used to obtain the money. In other words, it is an act which is the means of a crime and which comes under another criminal category within the meaning of Article 54, par 1, of the Criminal Code. Article 54, par 1, of the Criminal Code provides "When a single act results in several crimes or when the means or result of committing a crime constitutes another crime, sentence of the gravest punishment shall be given". The crime of intimidation is punishable under other chapters of the penal code which will be subsequently discussed.

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To circulate false rumors in the sense of Article 233 denotes the spreading of false rumors among an indefinitely large number of people. It is not absolutely necessary that the offender should personally and directly inform a large number of persons of such false rumors.

The word "business" in Article 233 applies in general to all professions, occupations, or other affairs or undertakings requiring continuous attention or employment, whether moral or economic but does not include official affairs.

The word "forcefully" in the sense of Article 234 (referring to a person who has forcefully interfered with the business of another) refers to force or strength to dominate or awe the will be another person. It applies not only when the offender has resorted to violence or intimidation but also when he has terrorized the other party by bluff or by reason of his position or power.

Force within the meaning of Article 234 includes violence.

"The business of a person" in the sense of Article 234 denotes the business of any person other than the offender, and it may be the business of a natural person, juridical person, or other group or organization.

In a judgement which finds the accused guilty of the crime of interfering with business under Article 234, it suffices to find that the accused has by force interfered with the conduct of the business of another person. It is not necessary to state exactly how much loss has been caused thereby.

Crimes of Intimidation

Crimes against reputation, or against credit and business, are frequently connected with Crimes of Intimidation (Kyohaku no Tsumi), which are defined by another chapter of the Penal Code. The word "Kyohaku" may also be translated as "threat", "coercion", "menace", or "compulsion". It has already been mentioned in this connection that a single act amy result in several crimes, or the means or result of committing a crime may constitute another crime, in which case Article 54 par 1, of the Criminal Code provides that sentence of the gravest punishment shall be given. In the chapter concerning crimes of intimidation, Article 222 provides that every person who has threatened another person with injury to his life, person, liberty, reputation, or property shall be punished with penal servitude not exceeding 2 years or fined not more than ¥25,000. The same punishment applies to every person who has threatened injury to the life, person, liberty, reputation, or property of a relative. Article 223 of the same chapter provides that every person who has threatened another person with injury to his life, person, liberty, reputation, or property, or has used violence against another person and thereby caused such person to perform an act which he is not bound to perform or prevent him from exercising a right to which he is entitled, shall be punished by penal servitude not exceeding 3 years. The same punishment applies where the threat of injury was to the life, person, liberty, reputation, or property of a relative. Attempts of these crimes are also punishable.

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Application of the Law

The provisions of this chapter may be further clarified by a few comments based upon Supreme Court opinions.

The crimes of intimidation specified in Articles 222-223 of the Criminal Code are constituted if a person is notified that facts which will impair his reputation may be disclosed. It is not necessary to give concrete notice of the facts of which disclosure is threatened.

If an illegal intimation has been made to the effect that harm will be done to the life and property of a person, the fact that such intimation was made in the name of a non-existent person is no bar to the formation of the crime of intimidation.

If an act of intimidation has been perpetrated with the knowledge that it may cause a person to suffer fear, it constitutes the crime of intimidation, despite the fact that it has been perpetrated with an intention ulterior to that of inspiring the person to whom the notice of intimidation has been addressed with fear.

The act of sending a letter intimating that a person whole family will be killed by bombs unless he does a certain act, constitutes the crime of intimidation, irrespective of whether the receiver of the letter believes that the threat will be carried out against him or his family, or whether he is thereby actually inspired with fear.

It suffices for the formation of the crime of intimidation if the offender has adopted means of informing the other party with intention to intimidate that the harm specified in Article 222 of the Criminal Code will be caused to him, and if the other party thereby understands that a harmful act is threatened. It is not necessary that the offender should have communicated directly with the other party by speech or other means.

Article 223, par 1, of the Criminal Code provides for punishment of any person who by threats or violence has caused another person to do or refrain from doing or suffer to be done an act for which he has no right or power and is therefore under no obligation to do.

If a person was caused by threats or violence to perform an act which he was already bound to perform the crime of intimidation under Article 223 is nevertheless constituted.

When a newspaper man intimates to the manager of a restaurant that he will publish something unfavorable to the manager or the restaurant unless the manager performs certain services, it constitutes a threat against the reputation and property of the manager.

Crimes of Violence

There are certain other Articles of the Penal Code which are closely related to Article 222 concerning threats. These articles are Articles 208, concerning the crime of violence, and Article 261, concerning the crime of damage or destruction of animate or inanimate objects. Article 208 provides that every person who has used violence against another person without wounding (injuring) such person shall be punished with penal servitude not

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exceeding 2 years, a fine not exceeding ¥25,000, detention or minor fine. This Article, which punishes the crime of assault, is of course also related to crimes of assault and battery which result in actual injury, known in Japanese criminal law as Crimes of Wounding (Shogai no Tsumi), for which severer punishments are provided. Under Article 204, the punishment for the crime of wounding is penal servitude not exceeding 10 years or a fine not exceeding ¥25,000 or a minor fine. Under Article 205, if death is caused by wounding, the punishment is limited penal servitude for not less than 2 years. Limited penal servitude varies from one month to 15 years and includes both confinement in prison and performance of prescribed labor. Article 261 punishes with penal servitude not exceeding 3 years or with a fine not exceeding ¥25,000 or a minor fine the crime of damaging (destroying) or injuring an animate or inanimate thing, (other than public documents, private documents relating to rights or liabilities, or building or ship -- for which more severe punishments are provided in Articles 258-260, inclusive).

Of course people running "goretsuki" newspapers undoubtedly combine threats, intimidation, and violence and also act jointly and through the backing of the force of their gangster organizations. In such cases they are also punishable under the Law Relating to the Punishment of Acts of Violence, etc. (Boryoku-koi to Shobatsu ni Kan-suru Horitus), Law No. 60 of 1926. Article 1 of this Law provides that every person who has committed a crime of Article 208, par 1, (violence) Article 222, (threats) or Article 261, (destruction) of the Criminal Code by displaying the force of an organization or multitude (mob), by displaying force under the guise of an organization or multitude (mob), or displaying a weapon or as a joint act of several persons, shall be liable to penal servitude not exceeding 3 years or fine not more than ¥25,000. This Article also provides that every person who has habitually committed any of the crimes of the Articles referred to above (namely, violence threats, or destruction) shall be punished with the same punishment.

Article 2 of this same law provides that every person who with intent to obtain or cause to be obtained illegal pecuniary advantage (profit) has pressed for an interview or committed an act of forcible demand or intimidation by any of the methods of par 1 of the preceding Article shall be liable to penal servitude of not more than 1 year or fined not more than ¥5,000. This Article also provides that every person who has habitually and without justification pressed for an interview or committed an act of forcible demand or intimidation shall be punished in accordance with the preceding paragraph.

Article 3 of the same Law provides that every person who has supplied, offered or promised to supply money, goods, or other pecuniary advantage or service with an intent to have committed by any of the methods mentioned in Article 1, par. 1, a crime of Article 199 of the Criminal Code (homcide), Article 204 (wounding), Article 208, par 1, (violence without wounding) Article 222-223 (threats), Article 234 (forceful interference with the business of another), Article 260 (damage or destruction to building or ship), or Article 261 (damage, destruction or injury to an animate or inanimate thing), and every person who has knowingly received, demanded, or promised to receive such supply shall be punished with penal servitude not exceeding 6 months or fined not more than ¥2,500. Article 3 also provides that any person who has done any of the acts mentioned in the article with intent to cause the crime of Article 95 of the Criminal Code to be committed by any of the methods of Article 1, par 1, of this Law shall be punished with penal

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servitude or imprisonment not exceeding 6 months or fined not more than ¥2,500. (Article 95 of the Criminal Code provides punishment of penal servitude or imprisonment not exceeding 3 years for crimes obstructing official business (Komu no Shikko wo Bogai-suru Tsumi), thus supplementing the chapter providing for the punishment of crimes against non-official business already discussed.) This Law for Punishment of Acts of Violence would seem to furnish an adequate legal basis for prosecution and punishment of "gorotsuki" newspapers and the gangster organizations which they serve.

Application of the Law

The following comments are based upon Japanese Court decisions applying the Law for Punishment of Acts of Violence, etc.

When several persons have jointly committed violence, it constitutes the crime of Article 1, par 1, of Law No. 60 of 1926, even though the backing of the force of an organization or multitude has not been used.

If a number of persons have parleyed with an adversary by displaying the force of an organization, but, upon seeing the refusal of the other party to comply with their demands, and his attempt to run away, have brought him back by force in order to continue the parley, they have committed the crime of violence by displaying the force of an organization.

If it is found that several persons have jointly perpetrated acts of violence and the case falls under Article 1, par 1, of the Law Relating to the Punishment of Acts of Violence, etc., Article 60 of the Criminal Code is not to be applied. (Article 60 of the Criminal Code provides that two or more persons who have cooperated in committing a crime are "joint" principals.)

Even though an organization exists for a legitimate purpose, if members thereof have used violence or threats by making use of the power of the organization, their act comes within the purview of Article 1 of the Law Relating to the Punishment of Acts of Violence, etc.

When several persons have jointly perpetrated the crimes of Articles 222 (threats) and 261 (destruction) of the Criminal Code, they are dealt with as for one crime, an infringement of Article 1, par 1, of the Law Relating to the Punishment of Acts of Violence, etc.

Crimes of Blackmail

There is one other chapter of the Penal Code which is closely related to crimes of intimidation. This is the chapter titled "Crimes of Fraud and Blackmail" (Sagi oyobi Kyokatsu no Tsumi). The word "Kyokatsu" may also be translated as "threat" or "intimidation". Article 249 of this chapter provides that every person who has intimidated and caused another person to deliver property shall be punished with penal servitude not exceeding 10 years. The Article also provides that the same punishment applies to a person who by the same method has gained an unlawful pecuniary advantage or enabled a third party to do so. Attempts of this crime of blackmail are also punished under Article 250 of the chapter.

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Application of the Law

The following comments are based upon Japanese Court decisions.

The act of terrorizing another person by an intimation of an allegedly impending evil to be brought about by the act of a third person, thereby obtaining a delivery of property, constitutes blackmail. So a "gorotsuki" newspaper which received payments by means of threats of publishing libelous articles would be punishable for the crime of blackmail under Article 249 of the Criminal Code.

If by means of threats the offender has acquired a formal title for the delivery of property either by the injured party or by a third person and has then taken or attempted to take delivery of the property by such title, the crime of Article 249, par 2, is constituted when the formal title was acquired and regardless whether the delivery of the property had actually been taken or not.

The act of threatening a person and thereby causing him to deliver title deeds constitutes the crime of Article 249, par 1, irrespective of whether such act is perpetrated for the offender or for some other reason.

When a person has been intimidated to deliver material property, such as money, to the intimidator or to a third person, Article 249, par 1, of the Criminal Code should be applied.

The injured party in the crime of blackmail is always the owner of the property right affected by the crime. The person who is threatened need not necessarily be such owner but may be a person having relations of some kind with the said injured party.

A, for the purpose of illegally obtaining property, made B convey threats but failed to obtain his objective. There was no error in dealing with A for attempted blackmail and with B merely for the crime of intimidation.

When a person is notified that something disadvantageous to him will be published in a newspaper, the notification itself is sufficient to terrorize. In so far as the constitution of the crime is concerned, it is not necessary that the contents of the intended publication be made known to him.

If, for the purpose of blackmail, a person has mailed a letter intending to inspire another person with fear, and the letter has reached the addressee's place, the letter has been used. Therefore, even though the addressee failed to take notice of the letter's contents, the crime is nevertheless perpetrated.

The publisher of a newspaper containing articles injurious to the credit of a joint stock company threatened the director to the effect that the threats would be continued unless a monetary payment was made. The director filled with fear, directed a third person to advance money for the company and to pay it to the publisher, which was accordingly done. The party which has sustained pecuniary loss is the company, and the blackmailer has gained an illegal pecuniary advantage.

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The threatened injury essential for the formation of the crime of blackmail need not necessarily be intended to materialize.

A series of articles relating to a person's misconduct were published in a newspaper for a blackmailing purpose. If a demand has been made for the expenses incurred in collecting data for the articles as a price for discontinuing their publication, and the said demand is complied with, it constitutes a crime of blackmail.

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

LEGAL COMMENTS

SEPTEMBER 1949

In the following report the Chief, Legislation and Justice Division, Legal Section, has attempted to give a very condensed analysis of the Reform of Japan's Judicial and Legal System under Allied Occupation. Such summary, while necessarily sketchy, might be useful to Civil Affairs Officers who desire quick information on the essence of the new laws. The references in the Official Gazette are designed to facilitate a more detailed study of the described legislation.

It should be noted that part 3 of the report, which deals with the new Constitution, closely follows the analysis in SCAP's Summation of Non-Military Activities in Japan, No. 14 of November, 1946, pp 25 - 40.

Attention is furthermore invited to the August issue of the Washington Law Review, the Far Eastern Section of which contains an article of the same author on the same subject.

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THE REFORM OF JAPAN'S JUDICIAL AND LEGAL SYSTEM UNDER ALLIED OCCUPATION

1. Sources of Occupation Policy

Under the Potsdam Declaration the Japanese Government is required to "remove all obstacles to the revival and strengthening of democratic tendencies among the Japanese people. Freedom of speech, of religion and of thought as well as respect for the fundamental human rights shall be established." The occupation was conscious of the truth that customs and traditions of a society cannot be changed at one stroke, and that it takes a long time before new ideas conquer the minds and hearts of the people. What could be done at the outset, apart from continuous education and enlightenment, was to lay the legal foundations for the sweeping changes necessitated by the broad Potsdam objectives. Far reaching reforms in the legal and judicial system were already visualized by the U. S. Initial Post Surrender Policy for Japan which stated "...the judicial, legal and police systems shall be reformed as soon as possible to conform to the policies set forth... and thereafter shall be progressively influenced to protect individual liberties and civil rights."

2. Initial Measures

In the beginning of the occupation SCAP was primarily concerned with the problem of demilitarization rather than with Japan's judicial organization and law. However, the Japanese Government, under the direction of the Occupation authorities,[1] did abolish the most conspicuous legal restrictions on civil liberties and abrogated a number of laws which did not conform to the democratic principles and policies of the Occupation. The repeal covered primarily the vicious legislation which had accompanied mobilization and the conduct of war and which had been used to suppress opposition to the war lords and imperialists. "National Peace Preservation Law," "Thought Offenses", "Special Police Activities," and "Protective Detentions" were products of this period. Pursuant to the abolition of these laws, thousands of political prisoners were released from prison and restored to their civil rights.

3. A New Constitution

a. The Facts.

However the Occupation, in order to carry out the above outlined policies could not be satisfied with initial measures of a predominantly negative nature but was bound to insist on a sweeping and constructive reform of the outdated and in many respects undemocratic legal and judicial system of Japan, which was patterned during the Meiji Restoration on the model of continental Europe, particularly Imperial Germany. What the country experienced under the impact of military defeat and what it continues to experience under the guidance of the Occupation has been fittingly characterized as "induced revolution". This revolution became conspicuous particularly by the actual change in the political role of the Emperor. In the light of such development the adjustment of the legal foundations to the political situation became mandatory. This meant first of all that the old Meiji

1./ The most important SCAP directive was SCAPIN 93 of October 4, 1945, frequently called Civil Liberties Directive.

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Constitution which vested all governmental powers in the Emperor and did not sufficiently respect civil rights of the individual had to be replaced by a modern and humanized basic law. Without a new Constitution a revision of the main Codes which affected the rights of the citizen in his relationship to the state would have been inconceivable and unworkable.

Under the leadership of the Supreme Commander, negotiations were undertaken with Japanese Governmental agencies, which resulted in the preparation and draft of a new Constitution. Both within the Diet, in the press and public forums as well as in innumerable general conversations, the provisions of this document were debated long and earnestly. After extensive nation-wide discussions, certain revisions in the basic draft were accepted, and the Constitution was adopted virtually unanimously in both Houses of the Diet.

The Constitution, promulgated on 3 November 1946, became effective on 3 May 1947.

b. Gist of the New Constitution

The new Constitution, enacted in the forms of the Meiji Constitution and as an amendment to this instrument, transforms Japan into a representative and parliamentary democracy, characterized by the supremacy of the legislative branch over the executive. Sovereignty, which hitherto rested with the Emperor, is now placed in the hands of the people. The Imperial institution survives in the modified form of a constitutional or "limited" monarchy. The prerogatives retained by the Emperor are even more restricted than those usually conferred upon the Head of the State in parliamentary governments. The Constitution does not make the Emperor even a titular chief executive, but characterizes him merely as the symbol of the state and of the unity of the people. While in similar governmental systems, such as England, France, Belgium and Holland, the Head of the State, monarch, or president has, at least constitutionally, the task to supervise and ensure the execution of the laws, here executive power is vested not in the Emperor, but in the Cabinet. In addition "powers related to the government" are explicitly denied him. The new functions "in matters of State" which the Emperor is to perform are predominantly formal and ceremonial, but even for these acts he needs the advice and approval of the Cabinet, which bears the responsibility for them.

Japan continues to have a bi-cameral legislature consisting of the House of Councillors and the House of Representatives, both elected by secret ballot in accordance with the principle of universal adult suffrage, the lower house wielding larger powers than the upper. This at once invites comparison to England, with which it has also in common a strong Prime Minister within the Cabinet and the responsibility of the Cabinet to the Parliament. In case of a vote of non-confidence the Cabinet must either resign en bloc or dissolve the House of Representatives.

The principle of separation of powers, which is the peculiar mark of the form of government in the United States, is followed with regard to the judiciary. The Constitution does away with the existing dependence

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of the courts upon the executive, thus elevating the judiciary to a genuine third branch of the government. Moreover, it establishes what has been termed in the United States "judicial supremacy" in providing that the Supreme Court has the power to determine the constitutionality of legislative and administrative acts, subjecting both the executive and legislative branches of government to check by an independent judiciary.

In the field of local government, the Constitution sets forth the principles of decentralization and local autonomy, leaving the detailed organization and operations of local public entities to implementing legislation. It requires representative democracy, with the members of assemblies, chief executive and other officers elected by direct popular vote within their several communities.

The Japanese Bill of Rights, as the Chapter of the Constitution dealing with the rights and duties of the people may be termed, covers the broad fields of political, social, economic and juridical relations between the individual and the state. The Meiji Constitution also provided for the traditional civil liberties. However, these guarantees did not afford adequate protection of the individual because "Japanese subjects" could exercise their rights only within the "limits of the law." Consequently, they could be and actually were deprived of these freedoms by legislative acts. The new Constitution, similar in this respect to the American, does not contain the same reservation, but solemnly declares that fundamental human rights shall be conferred upon the people of this and future generations as rights eternal and inviolate. Where formerly the individual counted only as a member of the community and social inequality prevailed, the new Constitution not only severely limits the right of the State to interfere, but also guarantees extensive rights to the individual citizen, of which unlimited equality is paramount.

The renunciation of war is a unique feature of the new Constitution. Born out of the bitter experience of war and defeat, this provision bears the impress of the modern conception that mankind constitutes a unity. It renounces the right of belligerency and forbids development of the means to wage war as the only effective curb upon war. Here, for the first time in history, a national state offers specific and absolute guarantees of peaceful intention, not only to its own people, but to the world at large. In this chapter and in the preamble, the position of Japan as a member of an international society, with accepted responsibilities, governed by universal law, is expressly recognized. The moral significance of this renunciation is self-evident.

The permanent abolition of the armed forces is a logical result of the renunciation of war. This, too, is an innovation in the history of constitutions. Switzerland prohibits only a standing army.

On the whole, the new Constitution, which drew freely from the experience of other countries, is an impressive manifestation of democratic principles. On the occasion of its promulgation the Supreme Commander issued the following statement:

> "The adoption of this liberal charter, together with other progressive measures enacted by the Diet, lays a very solid foundation for the new Japan. Like the product of all human endeavor, it has its frailties, but by and large it shows how far we have come since the hostilities ended. It represents a great stride forward toward world peace and good will and normalcy."

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4. Reform of the Basic Codes

a. In general

The new Constitution provided that all laws and provisions thereof contrary to its principles become invalid with the enforcement of the instrument. Since these principles were revolutionary, a comprehensive and, one may even call it, gigantic reform of the whole legal system was required to implement the new Constitution. To control and advise on this implementation has been the difficult but fascinating task of our occupation lawyers. This task has roughly speaking been completed, as far as was humanly possible. In considering the merits and deficiencies of the reform legislation the time element must be taken into account. The work was done by the Japanese as well as by the officials of the occupation under terrific strain and pressure of time. Legislation which under normal conditions might have required ten years or more was enacted within less than two years. Yet such was the situation that delay or inaction pending attainment of perfect solutions were inadmissible.

All this legislation was carried out through the media of the Japanese Government with the Diet as the normal medium in its capacity as the legislative branch. The policy was to give the Diet a free hand to perform its legislative functions, subject only to a veto by SCAP in case a bill or provision thereof was prejudicial to the occupation. This made the situation in Japan, where the national government continued to function, essentially different from direct Military Government as it exists in Germany and existed in Korea. To be sure, direct command, whenever considered necessary or advisable, remains the prerogative of the occupation. However, due to the satisfactory cooperation of the Japanese authorities, such direct command was never needed, as far as the legal and judicial reforms were concerned. Not a single formal directive had to be issued in this respect. Characteristically enough, the only occasion where an authoritative insistence by SCAP became necessary was in connection with the abolition of the lese majesty provisions in the Criminal Code. Here a letter of the SCAP to Prime Minister Yoshida was needed to bring about the required revisions which did away with the privileged legal position of the Emperor and the Imperial family. Apart from this case, the relationship of those officials of SCAP who are responsible for the control of the legislation to the Japanese drafters of the bills has been of an advisory nature, for it was firmly believed that the new legal institutions if imposed by the conqueror would be short-lived. The desired ends were arrived at through conferences featuring suggestions, exchange of ideas, and persuasion. In the continuous contacts between the American and Japanese jurists a mutual understanding of the two different legal systems developed which proved extremely helpful for the final solution of the complicated problems involved. No attempt has been made by the occupation to impose the introduction of legal concepts and institutions patterned on Anglo-Saxon Law into the different Japanese Law. However, the Japanese were eager to know what the American Law provided in certain cases, and frequently expressed the desire to adopt similar devices. Such adoption actually was agreed upon only if their true integration into the Japanese law appeared reasonably probable.

b. Substance of the Reforms

(1) Judiciary

In the past the Japanese judges enjoyed life tenure and were theoretically independent in the performance of their functions. Yet the courts were under the jurisdiction of the executive, the Ministry of Justice. Judges held the status of civil servants and were classified and remunerated like administrative officials. Appointment and promotion were determined by the Ministry. This arrangement did not foster a genuinely independent

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judiciary. Therefore, under the new Constitution the courts are removed from the jurisdiction of the Ministry of Justice and now form a separate organization headed by the Supreme Court. The new Court Organization Law/2. implements these constitutional principles by strengthening the independence of the courts from the executive as well as the prestige and powers of the Supreme Court. The inferior courts consist of eight high courts, six branches of high courts, forty-nine District Courts, 229 branches of District Courts and 565 Summary Courts. The Supreme Court is composed of one Chief Justice and 14 Associate Judges. The President of the Supreme Court is appointed by the Emperor upon designation by the Cabinet, while the other judges of the Supreme Court are appointed by the Cabinet. Popular review of judicial appointments to the Supreme Court at ten year intervals is provided as an interesting innovation. In connection with the first general election of the Members of the House of Representatives following the appointment of an individual judge of the Supreme Court, the voter is given the opportunity to express the desire to have that judge removed from office. When the majority of the voters favors the dismissal, the judge must be dismissed. The same procedure is repeated after the judge has been in office for ten years: the Law for the People's Examination of the Supreme Court Judges/3. a special statute, provides the necessary details for this popular review.

Judges of Inferior Courts are also appointed by the Cabinet but from a list of persons nominated by the Supreme Court. This arrangement entrusts the determination of personnel policy practically to the Supreme Court. Former life tenure is replaced by a 10-year term of office in order to permit the removal of incompetent or otherwise objectionable judges. Supreme Court Judges must retire when they have reached the age of 70 years, while in the case of the other judges this age limit is 65. Apart from this general termination no judge can be removed from office except by public impeachment. A special Judge Impeachment Law/4. implementing this constitutional principle, sets up an Impeachment Committee consisting of twenty members of the House of Representatives which determines on the impeachment, while the Impeachment Court, which renders the decision, consists of fourteen members, seven from each House of the Diet.

At the lowest strata of the court system, the Summary Courts/5. are a new institution. In civil suits they are limited to less significant claims and in criminal affairs they try petty offenses, thus taking over the functions of the former Police Courts, which were abolished as an undesirable feature of the former police state. Recently, a new type of court with special functions has been established, namely the Family Court/** One division of this Court is concerned with arbitration, conciliation and limited determination of controversies within the family, such as questions of maritial relationships and divorce, parental power, custody of children, and guardianship. This division has taken over many functions formerly exercised by the

*Official Gazette (In English) hereinafter abbreviated by the letters "OG"

2./ OG Law No. 59, April 16, 1947; as amended by Law No. 126 and No. 195 of 1947; No. 1, 146 and 260 of 1948; and No. 177 of 1949.

3./ OG Law No. 136, November 20, 1947; as amended by Laws No. 154 and No. 196 of 1947.

4./ OG Law No. 137, November 20, 1947; as amended by Law No. 93 of 1948

5./ OG Law No. 63 of April 17, 1947; as amended by Law No. 89 of 1947; No. 233 of 1948, and No. 86 of 1949.

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family council which was connected with the old semi-feudal house system and has disappeared when the latter was abolished. The second division constitutes the new Juvenile Court which is in charge of decisions formerly made by a quasi-official organization under the control and supervision of the Ministry of Justice. The change which has become effective on 1 January 1949 puts the decision on the socially important cases of juvenile offenders into the hands of an independent judge.

(2) Public Procurators

The Public Procurators' Office Law/6. is essentially a re-enactment of those provisions of the former Court Organization Law which were concerned with procurators. The need for separate treatment of these subjects followed from the complete separation of courts and administrative agencies, required by the Constitution.

The procurators' organization, as before, is nationwide and is made up of separate offices, which correspond to the new types of courts.

Procurators are appointed officials responsible to the National Government alone through the Ministry of Justice, now the Attorney General's Office. The abolition of the Ministry of Justice in February 1948 and the establishment of a new Attorney General's Office/7. was a consequence of the reduced jurisdiction of the executive in the field of judicial administration. It may be noted that the former arrangement according to which both judges and procurators were under the jurisdiction of the Ministry of Justice was disadvantageous to the independence of the courts, since in criminal cases, particularly those of a political nature, the procurators were used by the Ministry as watchdogs and informers on the attitude of the judges.

While the Japanese were strongly opposed to introducing election of procurators, it was felt that additional control over their personnel and functions was needed, inasmuch as in the past they had been the most powerful agency of law enforcement. Therefore, a high level Committee, consisting among others of members of both Houses of the Diet, has been established which is assigned periodic examination of the qualifications of all procurators every three years. This Committee makes proposals and may suggest the removal of public procurators who are unable to discharge their duties because of mental or physical disabilities or because of inefficiency or other reasons. In addition, whenever the Attorney General wants to remove a public procurator from office, he may require such examination, or the Committee may commence it on its own initiative.

While this check was of an organizational and personal nature, the Law concerning the Inquest of Prosecution/8. introduces a new functional control over the public procurators. The Japanese law gives the procurator considerable latitude in the determination of whether or not to prosecute an offense. Critics of the past administration of justice maintained that in Japan the criminal laws were actually applied against the poor and powerless, while the rich and powerful enjoyed almost complete immunity. In Anglo-Saxon countries, the Grand Jury System makes such practices difficult if not impossible. The new Inquest Law may be characterized as an embryonic form of Grand Jury system. The inquest does not render a true bill of indictment but

6./ OG Law No. 61 of April 16, 1947; as amended by Law No. 195 of 1947; and No. 31 and 260 of 1948.

7./ OG Law No. 193 of December 17, 1947; as amended by Laws No. 10, 66 and 260 of 1948; and No. 136 of 1949.

8./ OG Law No. 147 of July 12, 1948.

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is restricted to a finding of purely advisory nature. It examines the propriety of a decision made by a procurator not to prosecute a particular case. Each inquest is composed of eleven members selected by lot from among the votes for the members of the House of Representatives within the territorial jurisdiction of each inquest. There must be not less than 200 inquests, at least one in each District Court area. When a finding has been made as a result of an examination, the detailed finding in writing, with the reasons therefor, is sent to the Chief Procurator of the District Procurator's Office as the superior of the procurator whose actions are in question, and another copy is sent to the Committee for the Examination of Qualifications of Procurators. In addition to posting the gist of the findings on the bulletin board of the Inquest Secretariat for seven days after decision has been made, so that it is available for public view, the inquest must give notice of the gist of the findings of the case to the person who had originally made the formal complaint to the procurator. All this makes it obvious that the decision of the inquest, despite its advisory character, carries tremendous pressure behind it. The experiences made in the short period of six months since the Law has been in effect indicate that contrary to bureaucratic expectation, the people make amazingly courageous and reasonable use of this democratic device.

(3) Lawyers

It was realized early that the change in the position of the Japanese judiciary, if it was to result in a modern administration of justice, should be accompanied by an elevation of the legal profession. In the hierarchical society of the past the lawyers did not enjoy the same prestige as government officials or judges. Their influence on legislation was negligible and their role in public life at large less significant than that of their brethren in western countries. In the transitional phase since the termination of the war the leading Bar Associations of Japan made a concentrated effort to free the lawyers from governmental supervision formerly exercised by the Minister of Justice and continued by the Attorney General. There was general agreement on the need for relaxation of those controls. However, the question of whether the bar associations should be given complete or semi-independence became the subject of lengthy controversies between the three organizations concerned. While the Attorney General favored some limited continuation of the supervisory functions of his office, the Supreme Court held that the lawyers should be subject to its rule-making power and control. The bar associations, on the other hand, rejected both alternatives and strived for full autonomy of the legal profession. Due to this difference of opinions the revision of the Lawyers' Law had to be delayed for a long time, the occupation taking no position with regard to the issue. Gratifyingly enough, it was finally settled among the Japanese on the basis of the view of the bar associations. A new Lawyers' Law, drafted as a member bill of the Lower House, was enacted in the last session of the Diet./9. It has come into effect on September 1, 1949. As a result of this legislation, the affairs connected with the legal profession will be left to autonomous self-rule by the Bar Associations. A Bar Association shall be established in the area under the jurisdiction of each District Court, and the Japan Federation of Bar Associations will be the nationwide top organization with the various Bar Associations as well as the individual lawyers throughout the country as its members.

9./ OG Law No. 205 of 1949.

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All Bar Associations will have broad regulatory powers which cover matters such as codes of professional ethics and standards for fees. The Rules of the local Bar Associations are subject to approval by the Federation.

The Japan Federation of Bar Associations keeps a name-list of lawyers. Registration in this list is the prerequisite for admission to the bar. Application for registration must be made through the local Bar Association which the candidate wants to join. Upon recommendation of a Qualification Examination Committee the local Bar Association may refuse to forward the request to the Federation for specific and legally defined reasons. In this case the applicant may complain to the Federation which, on the recommendation of its own Qualification Examination Committee, either rejects the complaint or directs the local Association to forward the request. Similar procedures are provided in case the local Association wishes to have the registration of a lawyer cancelled. In both instances the person adversely affected by the determination of the Federation may bring action in the Tokyo High Court.

An important exception from the rule that administrative determination is made by the Federation of Bar Associations is provided for with regard to the admission and disbarment of foreign lawyers. They may be admitted to the Japanese bar even though they do not comply with the usual professional and educational requirement, provided they have a "proper knowledge of Japanese law". There is also a mode of admission to a more limited practice of law by persons qualified as lawyers of a foreign country. If they are not familiar with Japanese law, they may give advice to a foreign national and on questions related to foreign law. Here the Supreme Court passes on both forms of admission after having heard the opinion of the Federation. The same procedure applies to disbarment. Similar regulations were contained in the former Lawyers' Law which, however, left the decision to the Minister of Justice (Attorney General). Furthermore, up to now a foreigner could be admitted to the practice of law in Japan only if the same treatment was granted Japanese nationals in his own country. By abandoning this principle of reciprocity the drafters of the bill have established a commendable example of good will toward international understanding.

(4) Civil Law and Related Laws.

The constitutional safeguards emphasizing equality of sexes and the dignity of the individual required a radical revision of that part of the Civil Code/10. which dealt with family relations and inheritance law.

According to the old system, not the family consisting of father, mother and unmarried children, but the "House" -- a kind of clan group -- was the basic family unit. The Head of the House, usually the oldest male of the group, wielded considerable legal and economic powers over the other members of the house regardless of whether he lived with them or not. He owned most of the family property, and succession into property was thus tied up with the succession into the headship of the house. On the other hand he had the duty of supporting the needy members of the family. This centuries old semi-feudal institution has been abolished and the "House" has been replaced by the modern small family unit as it exists in western countries. Furthermore, all restrictions on the legal capacity of women as wives and mothers are abolished. A wife is now free to dispose of her property. With regard to grounds for divorce, husband and wife are treated equally. According to the old Civil Code, adultery was grounds for divorce if committed by the wife; the wife could demand divorce only if the husband was sentenced to a penalty for a sexual crime. While hitherto parental power was primarily in the hands of the father, from now it is exercised jointly by the father and mother.

10./ OG Law No. 222 of 1947; as amended by Law No. 260 of 1948, and No. 115 of 1949.

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As a consequence of the abolition of the house system, succession into property now takes place at equal shares among decendents, regardless of sex, and the surviving spouse, whether husband or wife, is entitled to legal share.

These reforms designed to free Japanese society from the feudalistic ramifications of the patriarchical family rule necessitated a fundamental change in the old family registration/11. or Koseki system, which was based on the house as a family unit. It may be noted that in Japan registration is required as one of the essential elements in order to give legal effect to birth, recognition, adoption, dissolution of adoptive relations, marriage, divorce, parental power and guardianship, death and disappearance, etc. Here again, the registration will in the future follow the new principle of the small modern family unit.

The State Redress Law/12. implements the constitutional guarantee that "every person may sue for redress...from the State or public entity, in case he has suffered damage through illegal acts of any public official." Generally, the law establishes liability in accordance with the Continental European theory, rather than with the United States rule, by placing primary responsibility upon the state or public entity as such. It is provided that should any public official in the conduct of his official duties, inflict intentionally or by negligence any damages on another person through illegal act, the state or public entity concerned is under obligation to make compensation therefor. Should the public official, however, perpetrate the act intentionally or by gross negligence, then he is bound to reimburse the State or public entity which has paid damages.

(5) Criminal Law

In the amendment of the Criminal Code/13. no such fundamental and swooping reforms are involved, as in the case of the Civil Code and its Family Law. However, the Japanese Criminal Code was bound to be essentially affected by the political and sociological revolution in which the nation finds itself at present.

Most important among the amendments because of its eminent political significance, was the abolition of the whole Chapter called "Crimes against the Imperial House". These provisions, known under the term "lese majesty" provided the death penalty for any person who had committed a dangerous or injurious act against the person of the Emperor or any member of the Imperial House. Even the attempt of such acts was subject to death penalty if directed against the Emperor, his close relatives, or the heir apparent, while an attempted assault against other members of the Imperial House was punishable with penal servitude for life. Moreover, heavy penalties up to five years were provided for in case of any "disrespectful act" against the Emperor and other members of the Imperial House. In doing away completely with this privileged protection before the law, the Diet drew the logical conclusion from the changed position of the Emperor and from the principle of equality of all citizens under the new Constitution.

The same principle of equality required a revision of the law in the very different field of sexual morality. The old law provided for punishment of the wife and the other party to the adultery only. Therefore, a husband who committed adultery with an unmarried woman was not subject to punishment. Japan's legislators were, therefore, faced with the alternative, either to make adultery

11./ OG Family Registration Law No. 224 of December 22, 1947.

12./ OG Law No. 125 of October 27, 1947

13./ OG Law No. 124 of 1947; as amended by Law No. 251 of 1948.

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equally punishable for both sexes or to abolish it as a crime. This question was widely discussed among the people, in the press, and in public hearings of the Diet. The opinions were divided, and the Diet finally decided in favor of complete abolition so that in the future criminal courts will no longer be concerned with adultery, which however is now a reason for divorce whether committed by the wife or by the husband.

The renunciation of war, in the Constitution made necessary important changes in the provisions concerning treason in time of war.

The constitutional safeguards of freedom of speech and expression necessitated an important revision of the Code in the field of libel or defamation. The complete exclusion of truth as defense, as existed under the old law, definitely infringed upon a fundamental right. It maximized the honor of an individual and afforded him protection even when by his guilt he had lost his right to such protection and prevented other persons from exposing the true nature of a man's act even where the public welfare demanded that the truth be told. Now a far-reaching admission of truth as a defense has been introduced. According to a newly added article, the allegation of facts injurious to the reputation of another person is not punishable, if it has been made in the public interest and primarily for the public benefit and if the alleged facts are established as true. The amendment specifically provides that a true allegation of facts is not punishable if it refers to a public official or a candidate for elective public office. In this case the new legislation establishes a legal assumption that the allegation has been made in the public interest and for the public benefit. The underlying idea is obvious. Any public official and anybody who wants to be elected to public office must expect to be exposed to public criticism not only with regard to his official career but also to his private life, because the people desire their representatives to be persons of professional ability as well as possessed of personal integrity. Public opinion should, therefore, be encouraged to express itself freely.

Finally the Minor Offenses Law/14. may be mentioned which is basically a compilation of misdemeanors, although the Japanese Criminal Law does not draw any legal or technical line between felony and misdemeanors. In the past, these particular offenses were treated as police offenses and tried by the police courts which have been abolished. The legal source was the old Ordinance for Punishment of Contravention of Police Regulations. Because of this historical tradition, minor offenses were not integrated in the Criminal Code. They were, however, taken out of the sphere of the police adjudication. Care has been taken not to reenact those former provisions which were or could be politically abused for interfering with freedom of speech or assembly.

(6) Procedural Law

The revision of the Code of Civil Procedure/15. although not directly required by the new Constitution was particularly needed to relieve the Appellate Courts from their tremendous burden. The previous procedure which permitted four instances in the petty cases starting in the lowest court has been changed. Now decisions of the Summary Court may be appealed from to the District Court by way of Koso appeal (trial de novo) and against the decision of the District Court the parties may lodge a Jokoku appeal (restricted to questions of law) to the High Court which, as a rule, decides finally. Exceptions are, however, made with regard to constitutional issues, which can always be brought before the Supreme Court. A further reform achieved by the revision was the provision for certain added protections of the rights of

14./ OG Law No. 39 of May 1, 1948.

15./ OG Law No. 125 of 1947; as amended by Law No. 149 of 1948.

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witnesses and judgment debtors. A badly outmoded attachment law was revised to provide exemptions in line with current inflationary conditions. Finally, certain categories of immunities from duty to testify based upon feudalistic concepts of loyalty and obligation were eliminated. The most important of these was the right to refuse to testify against an employer or a relative within the 6th degree of blood.

In the field of administrative procedure, the Administrative Litigation Law/16 establishes the revolutionary principle that any illegal act of an administrative office can be challenged by bringing action in a court. The scope of such action was meant to be unlimited. Provisions are made, however, to prevent the court from stopping the proper functions of the executive branch of the government. Therefore the law admits injunctions only when the court considers them as urgently necessary to prevent an irreparable damage which may result from the execution of an administrative disposition, when an action for the annulment or alteration of an illegal act made by an administrative office has been brought. This shall, however, not apply in case the suspension of execution by court injunction is against the public interest. Furthermore, if the Prime Minister declared that the national interest was affected, an injunction must be rescinded. It is obvious that the Prime Minister can be expected to use this privilege very sparingly in a country where his Cabinet might fal_ on a vote of non-confidence as a result of a wrong political judgment. He would justify such an extraordinary action only on the basis of National interest and only if he were fully prepared to stake his political fate upon it.

No further revision has caused so much sweat, headaches and was so time consuming as that of the Code of Criminal Procedure/17 and no other law so greatly affects the fundamental rights of the citizens. The new Constitution has established elaborate safeguards for the protection of the individual in the field of criminal justice. The right to speedy trial, the right to counsel, to examine witnesses may be mentioned, as well as the rule that no person shall be apprehended except upon warrant issued by a judicial officer which specifies the offense with which the accused is charged. Infliction of torture, customarily used by the police as a means to obtain confessions as well as cruel punishment is absolutely forbidden, and nobody can be convicted if the only evidence against him is his own confession. All these principles are implemented by elaborate and detailed provisions in the Code, which consists of more than 400 articles. The Code has come into force on 1 January 1949.

For the first time in Japan's legal history, certain rules of evidence have been established. In the past, procurators and police records of the examination of suspects, accused or witnesses were submitted to the trial court with the indictment. Thus the court could form a conclusion about the case and was frequently prejudiced before the trial began. Under the new Code, such records may not be referred to or submitted to the court before trial and may not be used during the trial as a substitute for oral testimony or witnesses who are available to testify in court. Witnesses who are available will testify in the court, where their demeanor can be observed and be subject to cross-examination.

The Court must notify the accused of his constitutional rights to defense counsel and to refuse to answer questions during the trial.

16./ OG Law No. 81, July 1, 1948.

17./ OG Law No. 131 of 1948; as amended by Law No. 251 and 260 of 1948; and No. 116 of 1949.

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In the past the presiding judge was the towering figure of the trial. He alone examined the witnesses. Under the new Code both the procurator and the accused or his counsel are given a right to question witnesses. The parties are also given a greater opportunity to challenge the probative value of testimony and to object to rulings and orders of the court.

Finally, a radical change in the system of appeals has been made. Since the new safequards for the defendant will make the trial of first instance more thoroughgoing, the old rule that a complete retrial must take place in the second instance has been abondoned, and admission of appeals to the Supreme Court have been restricted.

(7) Habeas Corpus

The Japanese Constitution 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. To implement this principle, essential to the preservation of civil liberties, some form of relief from arbitrary incarceration, along the line of the Anglo-Saxon writ of habeas corpus, had to be introduced into the Japanese law. The policy of the occupation toward introducing such a novel device was that of waiting for the Japanese to take the first step, since in this field of legislation it would have been expecially harmful to impose the legal concepts of the Occupant. It was gratifying that the Japanese, recognizing the need, took the initiative toward this reform.

A Habeas Corpus Act/18 was introduced on the floor of the Diet as a member bill. The Supreme Commander publicly hailed this legislation by the following statement:

> "With the provision of the privilege of the writ of Habeas Corpus, Japan now assumes a place among those people of the world who live under positive safeguards of the sanctity of individual life, liberty and human dignity."

5. Conclusion

The preceding report could give only the highlights of the reform of the Japanese legal and judicial system. This reform was an undertaking of monumental scope and was carried out under tremendous pressure of time and in a breathtaking tempo. Whether the new laws will be merely blueprints or will be properly applied and penetrate the life of society depends first of all, on the Japanese people themselves. It is up to them to prevent reactionary elements from putting the clock back and depriving them of their newly won rights. The people can accomplish this only if they become thoroughly acquainted with the contents of the new legislation and aware of the rights which this legislation has conferred on them. Nationwide publicity campaigns for this purpose have been and are being conducted in part under the sponsorship of SCAP and in part by the Japanese on their own initiative. All media of information are used: lectures, posters, stage plays, films and radio. The amazing eagerness and receptibility with which the people react to this type of eduction justify an optimistic view with regard to the prospect of the legal reforms.

The awakening of Japanese women, suppressed for centuries, and their increasing awareness of their new legal status can be regarded as promising factor of great importance. The working classes, organized in new social movements, are beginning to grasp the significance of the reforms for the betterment and happiness of the common men. Labor may develop to an effective weapon against suppression of civil liberties provided it avoids extremism.

18/ Habeas Corpus Act - OG Law No. 199 of July 30, 1948.

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It would be erroneous to assume that the reforms will not last merely because of their connection with the occupation. History teaches that lasting effects were brought about on nations by contact with civilization of other countries. The opinion may be ventured that America, the nation primarily responsible for the occupation of Japan, has become the citadel of the democratic forces in their struggle for totalitarianism whether of the left or of the right.

Moreover, Japanese history of law has shown the Japanese as a nation highly capable of adaptation to new legal concepts, particularly where the old ones had resulted in failure. The shock of defeat, never experienced before, has certainly caused most of them to realize that Japan's legal as well as political and social systems must have suffered from serious defects. This recognition again is likely to create a positive attitude toward the basic reforms. Thus the hope might not be illusory that the Allied occupation, insofar as it inspired and influenced the making of new laws, will be finally judged by history as an essential contribution to a freer and better Japanese society.

ALFRED C. OPPLER

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GENERAL HEAD JUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

LEGAL COMMENTS

JULY 1949

THE OFFENDERS PREVENTION AND REHABILITATION LAW (Law No. 142 of 1949)

This law is part of the reform of the juvenile and adult parole system. The law establishes a National Offenders Prevention and Rehabilitation Commission (NOPAR Commission) and local branch offices entitled District Youth Offenders Prevention and Rehabilitation Commissions (DYOPAR Commissions) and District Adult Offenders Prevention and Rehabilitation Commissions (DAOPAR Commissions) whese purpose it is to assist in the rehabilitation of offenders, to establish an effective and standard procedure for granting amnesty, to establish an impartial system of parole, and to encourage crime prevention programs.

Formerly, it was the public procurator who determined whether a person could be paroled or that a parolee should be returned to prison for having violated conditions of parole. It was the procurator, also, who communicated requests for special amnesty, commutation of punishment, reprieve and rehabilitation. Judicial Protection Committees, composed of citizens who volunteered (for good and bad reasons) to aid ex-convicts reestablish themselves in society, assisted the procurator.

Under the new system, the NOPAR Commission is an independent organization of the Attorney General's Office and is composed of five commissioners, chosen from experts in the Medical, Educational and Sociological fields who are appointed and dismissed by the Attorney General with the consent of both houses of the Diet. Until 31 March 1950, there will be only 3 commissioners.

There are eight DYOPAR Commissions and eight DAOPAR Commissions, each Commission being composed of three commissioners appointed by the Attorney General. The DYOPAR Commission has jurisdiction over juveniles from 14 years of age to less than 23 years of age. The DAOPAR Commission has jurisdiction over persons over 23 years of age.

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The NOPAR Commission has the follewin functions:

(1) Administers the supervision system. Formulates general policy and conducts research on the supervision system.

(2) Administers the system of parole. Formulates general policy and conducts research on parole.

(3) Conducts research and study re. general amnesty, special amnesty (pardon), commutation of punishment, reprieve, and restoration of civil rights.

(4) Formulates crime prevention programs.

(5) Directs and controls the operation of the DYOPAR and DAOPAR Commission, reviews their dispositions, establishes rules for their operation.

(6) Carries out scientific research and studies on matters concerning the improvement and rehabilitation of offenders.

The DYOPAR and DAOPAR Commissions carry out policies established by the NOPAR Commission. In addition they are responsible for releasing offenders on parole, for revoking such parole and for supervising persons on parole.

Release on Parole

The head of the prison or reformatory is required to report to the DAOPAR or DYOPAR Commissions whenever a prisoner has served one-third of a limited sentence or 10 years of a life sentence or the term specified in Article 58 of the Juvenile Law (Law 168 of 1948). In addition, the superintendent of reformatories must report when a juvenile has been there for six months.

Where this required report has been submitted, even though an application for parole has not been made, the DYOPAR and DAOPAR Commissions may consider the report to determine whether parole should be granted or not. In this case, the Commission must ask for the opinion of the prison warden or reformatory superintendent in advance.

When the DYOPAR or DAOPAR Commission receives a regular application for release on parole (anyone may make application for parole through the warden of a prison or superintendent of a reformatory), one of the commissioners must hold a hearing (or the chief of a prison or reformatory may hold the hearing and report to the Commissioners).

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If the DYOPAR or DACPAR Commission decides to grant release on parole, it must specify the conditions of supervision and the prison warden or reformatory superintendent must give personal notice to the parolee in writing, of the term of his parole and the conditions with which he must comply.

Supervision

The following persons may be placed under supervision:

(1) A juvenile who has been assigned to the DYOPAR Commission for supervision, under the Juvenile Law. Such supervision cannot extend after the juvenile has reached 20 years of age with one exception, when special ruling by a Family Court on petition by a DYOPAR Commission permits this until the Juvenile is 23.

(2) Persons on parole from reformatories.

(3) Persons on parole from prisons.

(4) Persons for whom execution of a sentence was suspended before they were 18 years old and who were placed on probation.

In no case may supervision extend beyond the term of sentence, date of general amnesty, special amnesty, or reprieve, the term of reduction by commutation, or the maximum term of execution of sentence under the Juvenile Law which provides for indeterminate sentences. Supervision may be stopped or remitted at any time, if the district commissioners deem that it is not necessary.

Persons under supervision must agree to have a fixed residence and engage in an honest occupation, maintain good conduct, avoid keeping company with persons known to have criminal or immoral tendencies and change his residence or take a trip lasting many days only with the permission of his district commission's advisor. Furthermore, the DYOPAR Commission may summon the individual under its supervision at any time for questioning, in addition to conducting an investigation of this person.

The Commissioners are permitted to do only what is deemed to be "reasonably necessary" to accomplish the purpose of supervision. In order to guide and assist those under their supervision, the Commissioners will assist in their education and training, help them to obtain medical treatment and recreation, assist them in obtaining lodging, give vocational

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guidance and job assistance, help to make environmental adjustment, etc. With regard to the latter, any measures which involve the family of a person under supervision may not be taken without the consent of the family.

Emergency aid may be given by the DYOrAR or DAOrAR Commissions in the event a person under supervision is injured or sick, or needs transient lodging, housing or employment. The Commissioners may assist such persons to obtain aid from public health and welfare facilites or other such institutions. When expenses for such emergency help cannot be obtained through public facilities, the DYOrAR or DAOrAR Commissions may pay these expenses and recover them when possible, from the recipient at a later date.

When a DYOrAR Commission finds that a juvenile who has been placed under its supervision by a Family Court is a person about whom there is apprehension that he may commit a crime, then the DYOrAR Commission may refer the juvenile back to the Family Court for disposition even though the juvenile is 20 years of age or more in spite of the fact that a juvenile 20 years of age or more is not ordinarily subject to the jurisdiction of the Family Court.

Violation of Parole

If a parolee from a reformatory who is less than 23 years old has violated or if it is apprehended that he may violate the conditions of parole, the DYOrAR Commission may apply to the Family Court for a ruling of continued detention in a reformatory until the person reaches the age of 23.

If the parolee is 23 years of more, and is seriously mentally defective, the DAOrAR Commission may apply to the Family Court for his detention in a medical reformatory for the period of disability until he is 26 years old.

When a parolee from a prison has violated the conditions of parole, the DAOrAR Commission may revoke his parole only after a hearing.

Suspension of Parole

If there is sufficient reason to believe that conditions of parole have been vilated, the DAOrAR or DYOrAR Commission may suspend the

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parole of a person under their supervision. The parolee may then be apprehended under a judicial warrant of arrest issued upon the request of the Commission. Within ten days after the individual is apprehended, the DYOPAR or DAOPAR Commission must conduct a hearing to decide whether of not to revoke the parole.

Discharge from a Reformatory

The DYOPAR or DAOPAR Commissions may grant discharge from a reformatory to both inmates and parolees of reformatories.

Appeal from Disposition

Appeal may be taken from a disposition of the DAOPAR or DYOPAR Commission to the NOPAR Commission within thirty days. The NOPAR Commission must consider it and make a ruling within sixty days after receipt of the application.

Summons and Testimony

The NOPAR, DYOPAR and DAOPAR Commissions may summon persons and ask for testimony when necessary in investigating matters within the powers of the Commission. Failure to appear is subject to non-penal fine not exceeding 5000 Yen.

Stay of Execution

When execution of a sentence has been stayed because of unsound mind, ill health, old age, pregnancy, etc., the DYOPAR and DAOPAR Commissions may exercise some measure of direction and guidance if requested by the procurator concerned.

Other Powers

When the NOPAR Commission makes recommendation to the Attorney General concerning special amnesty, commutation of punishment, reprieve, and restoration of rights the Commission must investigate the character of the applicant, etc. prior to such recommendation.

The Offenders Prevention and Rehabilitation Law became effective on 1 July 1949.

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

LEGAL COMMENTS

JULY 1949

LAWYERS LAW

The Lawyers Law (No. 205 of 1949) was enacted 30 May 1949, to become effective 1 September 1949, and specifically abolishes the former law (No. 54 of 1934).

Previous attempts since 1946 to revise the law concerning the practise of law had met with no success in the Diet and became the subject of jurisdictional opposition among the bar associations themselves. In the past, lawyers did not enjoy the same prestige as government officials or judges. Their influence in legislation was negligible and their role in public life less significant than that of the members of the legal profession in Western countries. In Japan the control of bar associations and their members came under the jurisdiction of the old Ministry of Justice. When that Ministry was abolished with the advent of the new Constitution of Japan and the establishment of the judicial branch of government, such jurisdiction was temporarily continued, on paper, by the AG's Office. Actually, however, control and discipline of the legal profession came to a virtual standstill and the bar gradually sensed an independence which phychologically developed into the forerunner of an autonomy not possible under the old Minister, the AGO, or even the Supreme Court.

With the benefit of past experience and a new spirit of cooperation and leadership among the bar associations themselves, a joint committee was formed with representatives from the following:

Tokyo Bar Association	Supreme Court
1st Tokyo Bar Association	Attorney-General's Office
2nd Tokyo Bar Association	Legislative Bureau of the H. of R.
All-Japan Bar Association	Legal Affairs Committee of the H. of R.

The working draft of the bill was one prepared by the Legislative Bureau of the House of Representatives after a study of the bar associations' proposals. Meetings were held frequently and in addition to the oral proceedings considerable attention was given the written opinions and suggestions of the various interested agencies. These included not only the

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Supreme Court and the Attorney-General's Office, but also comments of judges of inferior courts, public procurators, and the Japanese United Lawyers Association. Under this procedure over a period of some months, a definite coordination crystallized from the interchange of pros and cons.

As a result, the final draft of the bill found concurrence in the committee and was submitted to the Cabinet which presented it to the House of Representatives on 9 May 1949 without raising any objections. It was passed by that body of 10 May 1949. The House of Councillors proposed some eight amendments which, however, were rejected by the lower house and the bill in its original form was passed by a two-thirds majority on 30 May 1949. One of the rejected amendments was interesting in that it proposed to create automatic qualifications to become a lawyer by reason of membership on the judicial affairs committee of both Houses.

The law, establishing an autonomous entity for the legal profession, corresponds to the "integrated bar" in some of the United States. In other words, a person cannot practice law in Japan unless he is a member of the bar association within whose jurisdictional district he intends to practice. It should be noted that this law has no reference to, or concern with, SCAP licensees representing foreign nationals.

A brief survey of the law, with reference to certain pertinent sections, will assist in comprehending the scope of this legislation which is basically designed to raise and maintain a high standard for the legal profession:

I. The fundamental standard, mission, and function of a Lawyer is defined. In addition, a lawyer may act as patent attorney or taxation affairs agent.

II. In establishing the qualifications for admission, the first drafts required that the person be a Japanese National. This was deleted by the committee and the law provides that anyone who has successfully finished study as a judicial apprentice shall be qualified to become a lawyer. Special exceptions are made for former judges of the Supreme Court, due to the provision of Article 41 of the Court Organization Law, and other substitution qualifications. Specific grounds for disqualifica-

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tion are also set forth.

An interesting feature of the new law is the elimination of any reciprocity requirement as to the admission of foreign lawyers. Article 7 provides that a person qualified to practice law in a foreign country, and who has proper knowledge of Japanese Law, may be approved upon application to, and examination by, the Supreme Court. This same approval is extended to a limited admission of foreign lawyers to perform matters relating to a foreign national or laws of foreign countries.

Provision is made that the Supreme Court cannot give or cancel such approval without giving a hearing to the Japan Federation of Bar Associations. The spirit of these provisions will be supplemented by Rules of the Supreme Court in order that there will be no lowering of the high standards of the profession by an influx of unqualified persons.

III. Registration, change, or cancellation thereof must be made in the name-list of lawyers kept by the Japan Federation of Bar Associations by way of the local bar association which the person desires to join or leave. Reasons for any cancellation must be reported to the Federation by the local bar association to which the person has been attached. Provision is made for definite grounds for cancellation of registration and for demurrer to any refusal request. Any person aggrieved by reason of the action of a Bar Association may institute suit in the Tokyo High Court against the Japan Federation of Bar Associations as the adverse party.

Considerable controversy arose out of the original proposal that the bar association be allowed to cancel the registration of a person who had five consecutive years of non-practice, or refusal to grant registration to a person within two years after resignation as a judge or procurator. The five-year rule was dropped completely. The latter problem posed a serious question

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of the possibility of an unscrupulous person using his position to build up a clientele while in office, with the intent of resigning, or who, after resigning, would capitalize on his former powerful position to unethically attract legal business. Some merit could be found in that contention, especially from reports that came in from the small localities throughout Japan. The proposal was, of course, opposed by judges and procurators but was resolved in favor of a provision under which a bar association may, if it deems any such person derogatory to its good order or reputation, refuse to accept or forward the registration of any one who has occupied a full-time public service post, within one year before such request for registration, especially if it appears inappropriate to allow him to practice within the district where he served as a public official.

IV. The rights and duties of a lawyer, his observation of regulations of the bar, maintaining secrecy, performing matters of trust and prohibition of dual representation of parties are set forth. Specific cases in which a lawyer may not participate are enumerated, and a lawyer is prohibited from using his office in connection with persons who are engaged in legal business without authorization. A Lawyer cannot maintain two or more offices, nor may he concurrently hold a public office for gain except that he may become a member of the Diet or other legislative assemblies.

V. The law provides for the establishment of local bar associations as juridical entities, regulations and rules, meetings and the requirements for registration. Furthermore, a bar association may, as a grievance committee, mediate on disputes as to a lawyer's activities.

VI. The Japan Federation of Bar Associations will be the parent organization and its establishment, object and juridical status are defined in the law. Membership therein will include

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all the local associations throughout Japan and the individual members thereof. The Supreme Court is specifically given the right to request the Federation to report on its business or to investigate and report on matters pertaining to lawyers and bar associations.

VII. The Federation and each local bar association will have a Qualifications Examination Committee, the organization of which will be composed of a chairman and committeemen selected from amon lawyers, judges, public procurators and learned persons. This committee will pass on all requests for registration, or change or cancellation thereof. Any person adversely affected will be accorded an opportunity to state his case or present pertinent data to the Committee.

VIII. Provision is made for a bar association to mete out disciplinary punishment by way of reprimand, suspension for less than two years, discharge or expulsion, for violation of this law, injuring the reputation of the bar association, or conduct inconsistent with the dignity of the legal profession. In addition, any aggrieved person may request the bar association to take disciplinary action against a lawyer. Such action comes within the scope of the activity of a Disciplinary Committee and a Professional Ethics Maintenance Committee established in each bar association. Proper provision is made for demurrer by the lawyer charged, the institution of suits and procedures thereof and, if a bar association fails to take action, recourse to the Japan Federation of Bar Associations. Any lawyer, so affected, has the right of appeal to the Tokyo High Court and a statute of limitations is set at three years from the emergence of reasons for disciplinary action.

IX. Definite provisions are made as to the unauthorized practice of law, advertising, the use of a lawyers name, or publication of false notices thereof.

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X. Penal provisions apply to one not qualified as a lawyer making a false declaration as to registration, the unauthorized practice of law, or being guilty of disgraceful acts as a lawyer. In the case of a juridical entity, punishment may be imposed on it as well as on the actual perpetrator.

XI. The Supplementary Regulations concern the application and affirmation of acts under previous laws and the preparatory procedures for the establishment of the Japan Federation of Bar Associations.

The law, as it now stands, will be an interesting experiment in the regulation of the legal profession. In other countries members of the bar come under the inherent jurisdiction of the highest judicial tribunal in their state or nation. Actually, however, the bar associations have been the moving force in bringing about reforms in the profession, the adoption of ethical codes, and raising the standards of legal education and professional conduct. The Japanese, therefore, have taken a direct approach to a practical problem by establishing an autonomous bar and the future will disclose the manner in which it shoulders the attendant responsibility.

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March 1949

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GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
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LEGAL COMMENTS

MARCH 1949

Court and Public Procurator's Offices Statistics

Occupation units have been plagued by the totally inadequate statistics provided by the offices of the Japanese Government throughout the period of the Occupation. Court and Public Procurator's Offices statistics have been no exception and have been altogether too incomplete and contradictory to provide reliable information concerning the administration of justice in Japan.

It was imperative, if there was to be any real understanding of the condition and needs of the courts and procurators to revise the reporting procedures of both units so as to insure up-to-date and accurate information.

On 1 January 1949, all Courts and Procurator's Offices were required to institute a new system of collecting and compiling case, personnel and other statistics based on instructions issued by both the Supreme Court and Attorney General's Office. Particular emphasis on accuracy and promptness of reporting was stressed and on 25 February 1949 reports from all the Courts and Procurator's Offices in Japan were summarized and submitted to Legal Section for the month of January. Attached hereto is an analysis of these statistics.

Although the system is not yet perfect, the new reports comprise the most complete and accurate statistical record available in Japan. Many irregularities still exist and will be corrected as they come to the attention of the receiving agencies.

Military Government Units are urged to take the opportunity in their discussions with the representatives of the Courts and Procurator's Offices to stress the importance of submitting accurate and prompt reports to the Supreme Court and the Attorney General's Office. It is equally important to emphasize the use of the statistics in determining budgetary, personnel and physical needs of these two agencies.

PREPARED BY:

JEANNE D. CONNERS
LEGISLATION & JUSTICE DIVISION

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STATISTICS REPORT

January

Procurators

(Note: For the purpose of this report only, crimes are defined as Major Crimes - crimes punishable by death, indeterminate or life imprisonment (or penal servitude) or over 15 years imprisonment (or penal servitude); Minor Offenses - offenses punishable by fine, minor fine or detention; Lesser Crimes - all crimes between the other two categories. Do not confuse minor offenses in this report with minor offenses which are defined in the Minor Offense Law as offenses punishable by detention or minor fine.)

I. PERSONS UNDER CRIMINAL INVESTIGATION

A. Number of Persons in Criminal Cases Awaiting Investigation:
(First figure in parentheses indicates number of procurators; second figure, number of assistant procurators actually employed.)

1 Jan. 1948	1 Jan. 1949	31 Jan. 1949	
87,125 (656)	117,959 (674)	166,778 (751)	An increase of 48,819 persons awaiting investigation over the previous month.
(99)	(301)	(419)	
(755)	(975)	(1170)	
116 cases per proc. and asst. proc.	178 cases per proc. and asst. proc.	143 cases per proc. and asst. proc.	

Of the 117,959 persons awaiting investigation on 1 Jan. 1949,

1% -- suspected of Major Crimes -- 1%
61% -- suspected of Lesser Crimes -- 55%
38% -- suspected of Minor Offenses -- 44%

Of the 166,778 persons awaiting investigation on 31 Jan. 1949,

B. Number of Persons in New Cases Received During the Month of January:

113,879

78% brand new; 22% received by transfer from one office to another;

Of the 104,956 persons (78%) involved in the new cases:

8% -- suspected of Major Crimes -- .2%
44% -- suspected of Lesser Crimes -- 28%
55% -- suspected of Minor Offenses -- 71%

Of the 28,923 persons (22%) transferred from one office to another:

C. Persons Were Disposed of During the Month of January in the Following Manner:

Total Disposed of -- 85,060 persons or 34% of the cases received (including those pending from December and those received by transfer). Disposition was as follows:

1. Indicted	-- 14,010 persons	or 16 %
2. Not Indicted	-- 34,717 persons	or 41%
3. Transferred to Other Offices	-- 30,144* persons	or 35 %
4. Suspended	-- 6,189 persons	or 7 %
	85,060 persons	

*The difference in the number of persons received by transfer and disposed by transfer can be explained by the fact that some cases were still in transit on 31 January and will be reported as being received in February.

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1. Indicted -- 14,010 persons or 16 %

Of the 14,010 persons (16 %) indicted:

2.5%	suspected of Major Crimes
34.5%	suspected of Lesser Crimes
63%	suspected of Minor offenses

Procurators demanded:

Public Trial for 39% of persons indicted; Summary Order for 61%

Of the 5,465 persons (39%) indicted:		Of the 8,545 persons (61%) in whose cases Summary Order was used:
7%	suspected of Major Crimes	0
88%	suspected of Lesser Crimes	.2%
5%	suspected of Minor Offenses	99.8%

2. Not Indicted -- 34,717 persons or 41%

1%	suspected of Major Crimes
43%	suspected of Lesser Crimes
56%	suspected of Minor Offenses

3. Transferred to Other Offices -- 30,144 persons or 35 %

.3%	suspected of Major Crimes
42 %	suspected of Lesser Crimes
57 %	suspected of Minor Offenses

4. Suspended -- 6,189 persons or 7 %

1%	suspected of Major Crimes
30%	suspected of Lesser Crimes
69%	suspected of Minor Offenses

II. FINES:

A. Fines Collected During Month of January:

1. The following includes both Fine (1000 yen or more) and Minor Fine (5 yen to 1000 yen):

Violation of Tax Laws	¥ 2,792,225
Violation of Ec. Laws	96,324,163
Others	9,094,765
Confiscation	11,438,830
Non-Penal Fine	324,107
Sequestration	104.830
Grand Total	¥120,078,920

2. The following table is a breakdown of Table 1 into Fines, Minor Fines, Etc.

Total Fines	¥108,172,423
Total Minor Fines	38,730
Total Confiscation	11,438,830
Non-Penal Fine	324,107
Sequestration	104,830
Grand Total	¥120,078,920

B. Fines Fixed by Court Decisions Irrevocably Settled During Month of January:

1. The following includes both Fine (1000 yen or more) and Minor Fine (5 yen to 1000 yen):

Violation of Tax Laws	¥ 3,681,010
Violation of Ec. Laws	147,441,079
Others	11,496,110
Confiscation	11,461,569
Non-Penal Fine	477,433
Grand Total --	¥174,557,201

2. The following is a breakdown of Table 1 into Fines, Minor Fines, Etc.:

Total Fines	¥162,584,278
Total Minor Fines	33,921
Total Confiscation	11,461,569
Total Non-Penal Fine	477,433
Grand Total --	¥174,557,201

III. PERSONNEL:

A. Personnel Situation at End of Month:

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	Fixed Number	Actual Number	VACANCIES All PPO		SPO	HPO	DPO	LPO
Procs	834	751	82	--	0	19	63	0
Asst Procs	504	419	85	--	0	0	0	85
Sec.	4610*	4225*	385	--	16	27	283	59
Others	3951	3166	785	--	8	79	592	106
Total	9899	8562	1337	--	24	125	938	250

*Includes one confidential secretary to Procurator General.

B. Personnel Changes During January:

Procurators
increased by 75 appointments
decreased by 6 resignations (compared to an average of 9 resignations per month in 1946 and more than 4 per month in 1947.)

C. Time Spent on Old and New Codes of Criminal Procedure:

Old Code:

(Procs.)		(Asst.Procs)
28% of their time -		24%
15%	in court	11 %
13%	out of court	12 %

New Code:

(Procs.)		(Asst. Procs)
72 % of their time -		76%
.008%	in court	.009%
72%	out of court	75%
67%	before indictment	73%
5%	after indictment	2%

January

Courts

(Note: Statistics are for period 1-31 January 1949)

1. Case Statistics - All Courts

A. Cases Received, Disposed and Pending

1. There were a total of 306,323 cases on the docket of the courts in January.

187,637 cases were carried over from December
118,686 cases were filed in January
306,323 cases

51% (170,610) were criminal cases
38% (90,191) were civil cases
11% (45,522) were family cases

2. 44% (134,546 cases) of the above cases were disposed of in January:

71% (96,031 cases) were criminal cases
14% (18,656 cases) were civil cases
15% (19,859 cases) were family cases

3. The remainder or 56% (171,777 cases) were pending on 31 Jan. 49:
43% (74,579 cases) are criminal cases
42% (71,535 cases) are civil cases
15% (25,663 cases) are family cases

B. January Case Load Of Judges:

306,323 cases on the docket / 1,650 Total Number of Judge and Assistant Judges = 185.7 cases per each Judge and assistant Judge for month of January.

C. Criminal Cases:

1. On the Docket: 170,610 cases
56.5% (96,464) cases carried over from December
43.5% (74,146) cases filed in January

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Disposed of: 96,031 cases or 56% of those on the docket

Pending: 74,579 cases or 44% of those on the docket

(89% of the pending cases are to be tried under the old Code of Criminal Procedure.)

D. Civil Cases

1. On the Docket in January:

90,191 cases
78% (70,374) cases were carried over from December
22% (19,817) cases were filed in January
82% of the above cases or 73,880 cases were Civil Cases exclusive of civil conciliation.
18% of the above cases or 16,311 cases were Civil-Conciliation, exclusive of domestic conciliation.

Disposed of:

18,656 cases or 21% of those on the docket
Civil Cases - 16,313 cases or 87% of those disposed of
Civil-Conciliation - 2,343 cases or 13% of those disposed of

Pending:

71,535 cases or 79% of those on the docket
Civil Cases - 57,567 cases or 80.5% of those pending
Civil-Conciliation - 13,968 cases or 19.5% of those pending

E. Family Cases

1. On the Docket in January:

45,522 cases
46% (20,723) cases carried over from December

Domestic Matters- 26,697 cases or 59% of those on the docket
Domestic Conciliation - 9,606 cases or 21% of those on the docket
Juvenile Delinquency - 9,219 cases or 20% of those on the docket

2. Disposed of:

19,859 cases or 44% of those on the docket
Domestic Matters - 15,381 cases or 77.5% of those disposed of
Domestic Conciliation - 2,062 cases or 10.5% of those disposed of
Juvenile Delinquency - 2,416 cases or 12.1% of those disposed of

3. Pending:

25,663 cases or 56% of those on the docket
Domestic Matters - 11,316 cases or 44% of those pending
Domestic Conciliation - 7,544 cases or 29% of those pending
Juvenile Delinquency - 6,803 cases or 27% of those pending

II. Criminal Cases - Disposition, Warrants, Bail, Detention and Penalties:

A. Length of Time in Disposition of Criminal Cases

1. Cases Disposed During Month (99,398 cases reported)

(a) Of those cases Disposed of during the Month: (49,789 cases reported)

49.7% had been pending in the court of disposition for 1 Mo.
41.8% " " " " " " " " " 3 Mo.
5.1% " " " " " " " " " 6 Mo.
2.7% " " " " " " " " " 1 Yr.
0.6% " " " " " " " " " 2 Yr.
0.01% " " " " " " " " " more than 2 Yr.

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(b) Of Those Cases Disposed of during the month: (49,469 cases reported)

48.7% had been pending since original filing for 1 month
41.4% " " " " " " " 3 months
5.5% " " " " " " " 6 months
3.2% " " " " " " " 1 year
1.1% " " " " " " " 2 years
0.1% " " " " " " " more than 2 years

2. Cases Pending At The End of the month (94,979 cases reported)

(a) Cases pending in reporting court: (94,979 cases reported)

20.5% have been pending in reporting court 1 month
38% " " " " " " 3 months
18% " " " " " " 6 months
13.7% " " " " " " 1 year
8.4% " " " " " " 2 years
1.1% " " " " " " more than 2 years

(b) Cases Pending since Original Filing: (94,979 cases reported)

14.9% have been pending since original filing 1 month
31.8% " " " " " " 3 months
17.2% " " " " " " 6 months
18.8% " " " " " " 1 year
15% " " " " " " 2 years
2.4% " " " " " " more than 2 years

B. Warrants:

Total Warrants issued during the month of January:	50.369
Issued upon Request:	49,991 (99.2%)
Issued Ex Officio:	378 (.8%)
Refused:	136 (.3%)

1. Types of Courts:

Summary Court issued	33,524 (66.6%)	and refused 88 (64.7%)
District Court issued	16,841 (33.4%)	and refused 48 (35.3%)
High Court issued	4 (.008%)	and refused 0

2. Types of Warrants:

Search, Seizure and Inspection	22,026	(43.7%)
Arrest	14,445	(28.7%)
Detention	8,572	(17.2%)
Others	3,971	(7.9%)
Protection & Exam. of Person	1,355	(2.7%)
Total	50,369	

C. Bail

1. Total Number of Persons Released by all courts during January: 2737 persons

Released before conviction	2011	(73%)
Released pending appeal	726	(27%)

(a) Of Those Released

71 (3%) involved in major crimes: 42(59%) Before Conviction, 29(41%) Pending Appeal
2640 (96%) " " Lesser crimes; 1954(74%) Before Conviction, 686(26%) Pending Appeal
26 (1%) " " minor offenses; 15(58%) Before Conviction, 11(42%) Pending Appeal

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2. Total Number of Persons Out on Bail at the end of January: 29,531 persons

Released before conviction	6,844	(23%)
Released pending appeal	22,687	(77%)

(a) Of Those Released:

1001 (3%) involved in major crimes; 124(12%) Before Conviction, 877(88%) Pending Appeal
28,372 (96%) " " lesser crimes;6679(24%) Before Conviction,21,693(76%) Pending Appeal
158 (1%) " " minor offenses; 41(26%) Before Conviction,117(74%) Pending Appeal

D. Detention

1. Total Number of Persons being detained at the end of Januarv: 15,577 persons:

1608 persons (10.3%) suspected of major crimes
13,635 persons (87.6%) " " lesser crimes
334 persons (2.1%) " " minor offenses

(a) Total Number of Persons being detained: 15,577 persons

Before Indictment	After Indictment Before Trial
3094 persons	4876 persons
107 persons (3.5%) suspected of major crimes	277 persons(5.6%)
2814 persons (91%) " " lesser crimes	4496 persons(92.2%)
173 persons (5.6%) " " minor offenses	103 persons(2.1%)

During Trial	Pending Appeal
3628 persons	3979 persons
539 persons (14.9%) suspected of major crimes	685 persons (17.2%)
3041 persons (83.8%) " " lesser crimes	3284 persons (82.6%)
48 persons (1.3%) " " minor offenses	10 persons (0.3%)

E. Penalties Imposed in First Instance During the month of January:

1. First Instance Cases:

42,290 cases	Involved in:	47,640 persons
127 cases (.3%)	Major Crimes	169 persons (.4%)
8,514 cases (20.1%)	Lesser Crimes	10,521 persons (22%)
33,649 cases (79.6%)	Minor Offenses	36,950 persons (77.6%)

2. Penalties were Imposed on 47,640 persons as follows:

Guilty:	46,920	(98.49%)
Not Guilty:	150	(0.32%)
Remission of Penalty:	13	(0.02%)
Dismissal of Public Action and Others:	557	(1.17%)
	47,640	

3. Penalties Imposed on Guilty Person: 46,920 Persons

Death	2	(0.0043%)
Penal Servitude or Imprisonment	7580	(16%)

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Life	2		
10 years to life	17		
5 - 10 years	178		
1 - 5 years	4232		
6 Mos. to 1 Year	2471		
less than 6 mos	680		
Fine		38,689	(83%)
Detention		17	(0.04%)
Minor Fine		632	(1%)
Total		46,920	

III. Personnel

A. Personnel Situation as of 31 January 1949:

	Authorized No.	Actually Employed	Vacancies
Judges	946	872	74
Asst. Judges	323	255	68
Summary Ct. Judges	678	523	155
	1,947	1,650	297
Court Officials	6,333	5,329	1,004
1.Ct. Reporters		3,146	
2.All Others		2,183	
Judicial Appr.	266	266	0
All Other Employees	9,298	6,702	2,596
TOTAL	17,844	13,947	3,897

B. Personnel Changes During January

Judges, Asst. Judges and Summary Court Judges
increased by a total of 54 appointments (28 judges, 9 asst. judges 17 Summary Court judges)

decreased by 4 by reason of death or retirement.

Court Officials
increased by 776 appointments (376 court reporters, 400 others)
decreased by 61 (56 by death or retirement, 5 by resignation)

All Other Employees
increased by 896 appointments
decreased by 95 (87 by death or retirement, 8 by resignation)

C. Time Spent on Old and New Codes of Criminal Procedure:

Old Code:					New Code:			
(J.)*	(A.J.)*	(S.C.J.)*	(Ct.R.)*		(J.)	(A.J.)	(S.C.J.)	(Ct.R)
93%	90%	77%	88%	of their time	8%	10%	23%	13%
19%	19%	13%	11%	in court	2%	3%	4%	2%
74%	71%	64%	77%	out of court	6%	7%	19%	11%

*J - Judges, A.J. - Assistant Judges, S.C.J. - Summary Court Judges, Ct. R. - Court Reporters.

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RECEIVED 19 AUG 1949

GENERAL HEADQUARTERS
SUPREME COMMANDER FOR THE ALLIED POWERS
LEGAL SECTION

December 1948

LEGAL COMMENTS

I. The following extracts of the more important Supreme Court decisions were prepared by Thomas L. Blakemore from the Japanese Supreme Court Reporter:

Constitutionality:

1. Constitutionality of Death Sentence; S.C. (Re) 119.

Defense contends that death penalty is a cruel punishment, and as such prohibited under Article 36 of Constitution. Also contrary to Constitutional respect for individual rights. Rejected.

Concurring opinion by Shima, Fujita, Iwamatsu and Iwamura, based on argument that "cruel" will be determined by the mores of each age, and that death penalty countenanced by present society. As society develops and is not necessary for law enforcement, this definition may change. Concurring opinion by Inoue, which stresses internal terminology of Constitution, and states in addition that the institution of death penalty must be removed, not by judicial construction, but by Diet.

Grand Bench

Grounds for Jokoku Appeal:

1. Suspension of Sentence; S.C. (Re) 305 of 1947.

Jokoku appeal cannot be taken from the refusal of an inferior court to grant a suspension of sentence since that court has full and exclusive discretionary power in that respect. This does not fall within the scope of Art. 12 of the Code of Criminal Procedure which affords a Jokoku appeal for clear evidence of excessive penalty.

IWAMATSU, MANO, SAITO

2. Admissions; S.C. (Re) 285 of 1947.

If an admission is obtained through pressure, but is not used by the court as a basis for the finding of fact, it does not constitute ground for Jokoku appeal.

MANO, SAITO, IWAMATSU

3. Improper Detention No Ground for Jokoku Appeal; S.C. (Re) 225, 1947.

Various remedies for prolonged or improper detention exist. The impropriety of the detention cannot be pled as a ground for Jokoku appeal.

TSUKAZAKI, SHIMOYAMA, KURIYAMA, FUJITA

Jurisdiction Over Allied Nationals:

1. Nationality and Ordinance No. 311; S.C. (Re) 218 of 1947.

Article 1 of the Criminal Code provides general criminal jurisdiction for acts committed in Japan. Article 1 of Imperial Ordinance No. 311 provides exception in that no jurisdiction to be exercised over allied nationals in connection with crimes against the occupation.

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Defendant on appeal asserts that he is a Chinese, that his parents reside in China, and that nothing in the record of the trial shows a possession of Japanese nationality. Therefore, as a matter of law, his conviction for robbery, by a Japanese Court, is illegal and contrary to Ordinance No. 311.

Court, on examination of record, finds no evidence to the effect that the defendant was not a Japanese. Relying on the presumption of Article 1 of the Criminal Code, in the absence of contrary evidence of possession of Allied nationality, the court sustains conviction.

HASEGAWA, INOUE, SHONO, SHIMA, KAWAMURA

Methol Alcohol Sales:

1. Methol Alcohol; S.C. (Re) 166 of 1947

Court finds a grave duty on the part of vendors of alcohol to check sources of production, in view of dangerous methol content. Therefore the standards of Poisonous Food Products Control Ordinance is constitutional. Appeal from conviction dismissed.

SHIMOYAMA, KURIYAMA, OTANI, FUJITA

2. Methol Alcohol Sales; S.C. (Re) 301 of 1947.

Knowledge of the presence of Methol Alcohol, but negligent lack of appreciation of fact that this was poisonous, held to constitute an intentional sale, under the Poisonous Food and Drink Ordinance. Also, the crime of negligent cause of death was simultaneously established. Conviction upheld with finding that original court did not confuse the crimes and the prerequisites.

TSUKAZAKI, SHIMOYAMA, KURIYAMA, OTANI, FUJITA

Sale of Stolen Goods:

1. Sale of Stolen Goods; S.C. (Re) 238 of 1947

Knowledge that the goods may perhaps be stolen is sufficient to establish the crime of knowing sale of stolen goods. "Absolute knowledge is not necessary, if from the circumstances surrounding the purchase (such as appearance of seller, the nature of the goods, the quantity, attitude, etc.) a suspicion should be aroused of the likelihood of the goods being stolen."

HASEGAWA, SHONO, INOUE, SHIMA, KAWAMURA

Special Statute vs Criminal Code:

1. Duels - Special Statute vs Criminal Code; S.C. (Re) 303 of 1947

Dueling is prohibited by a Statute (#34) of Meiji 22. It provides that the provisions of the Criminal Code shall apply to fatal wounds received in a duel. Dueling, unaccompanied by a fatality, is subject to a two to five year penalty. The record and the finding of fact of the lower court make it clear that sentence might have been imposed either on the basis of dueling or of wounding. However, the dueling possibility was not considered. Case was remanded for a finding of fact on this point.

HASEGAWA, INOUE, SHONO, SHIMA

DECLASSIFIED E.O. 11652 SEC. 3(E) AND 5(D) OR (E) NNDG # 775015

Anticipation of Revision of Law:

1. Stay of Proceedings Unnecessary in Anticipation of Revision of Law: S.C. (re) 23 of 1948.

Following promulgation of Statute No. 124 of 1947 (Revision of part of Criminal Code), but before application, a decision was rendered. New law provided for suspension of execution in cases of sentences less than three years. Held not error to render judgment immediately.

SHIMOYAMA, KURIYAMA, OTANI

Accomplices:

1. Accomplices: Liability; S.C. (Re) 235 of 1947.

A lookout at a robbery who plotted the commission of a theft and robbery is guilty as a principal.

HASEGAWA, INOUE, SHONO, SHIMA, KAWAMURA

2. Accomplices: Liability for Violence; S.C. (Re) 203 of 1947.

One person who has cooperated and plotted the commission of a crime with another, is guilty of robbery even when the acts of violence are committed by others.

TSUKAZAKI, SHIMOYAMA, OTANI, FUJITA

Right to Question Witnesses:

1. Right to Question Witnesses; S.C. (Re) 293 of 1947.

Trial court's use of a police record of interrogation, as evidence in trial, was not error, in that defendant did not request an examination of the witness. Ref.: Emergency Rev. of Code of Criminal Procedure, Article 12.

HASEGAWA, INOUE, SHONO, SHIMA

2. Right to Qeustion Witnesses; S.C. (Re) 204 of 1947.

Failure to advise defendant of right of cross-examination under Article 12 of Emergency Revisions of Code of Criminal Procedure does not constitute error in law. Specifically, the alleged violation was the use of preliminary hearing investigation records.

HASEGAWA, INOUE, SHONO, SHIMA, KAWAMURA

Civil - Injunctions:

1. Injunctions; S.C. (Ma) 3 of 1948.

On appeal from a judgment granting an injunction, the court held that the enforcement of such a judgment will be suspended pending appeal only when the judgment goes beyond the scope of the emergency which requires judicial assistance, or when a final disposition of the subject matter temporarily protected has been rendered.

IWAMATSU, HANO, SAITO

DECLASSIFIED E.O. 11652 SEC. 3(E) AND 5(D) OR (E) NNDG # 775015

II. Local By-laws.

Reports recently have reached Legal Section, SCAP of the enactment of a number of new prefectural and local by-laws about whose constitutionality or legality grave doubts are expressed. Specifically, these have been in the field of restrictions on rights of assembly, and in the imposition of criminal penalties for prostitution. The borderline between Local and National legislative authority is extremely uncertain at the present time, and it would appear that issues of legality or constitutionality must first be determined on an ad hoc basis until such time as generalizations are possible. Although the issue of constitutionality or legality is in every case a matter for the decision of Japanese governmental authorities alone, and is not a proper issue for direct intervention by either SCAP or Military Government on that basis alone, nevertheless the occupational interest in this problem goes very deep. If it should develop that clearly unconstitutional legislation is being enacted in quantity, or that there are many instances when locally enacted legislation is not being properly enforced by National procurators on the basis that it contravenes Diet statutes, the development of additional or more suitable institutions of government may be necessary. For example, the suggestion has been made that it may be desirable to establish prefectural procuratorial organizations which would enforce violations of local laws. Also the question of what limit should be placed on the power of local assemblies to include penal provisions in by-laws is ripe for reconsideration. For the purpose of such inquiries, Legislation and Justice Division, Legal Section, requests from Military Government Teams such information as can be conveniently supplied in regard to acts of dubious legality. If convenient, copies of any local legislation of this category should be forwarded to this Division. Any comment or recommendations of the reporting Local Military Government Team, or any background information as to the circumstances under which the enactment occurred will be welcomed.

III. Code of Criminal Procedure:

Copies of the new Code of Criminal Procedure are enclosed for the use of Military Government Officers. Although the Code has been published in the Official Gazette Extra of July 10, 1948 (Law No. 131, page 81), this pamphlet form will be more convenient for ready reference.